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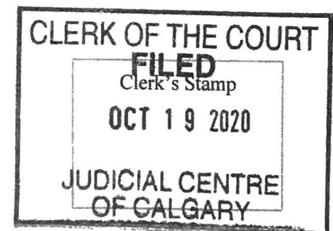

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF BOW RIVER ENERGY LTD.

BRIEF OF LAW AND ARGUMENT OF THE APPLICANT, 2270943 ALBERTA LTD., FOR AN APPLICATION TO BE HEARD ON OCTOBER 29, 2020 AT 10:00 A.M. BEFORE THE HONOURABLE MADAM JUSTICE D. L. SHELLEY
Volume I of II

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I. INTRODUCTION

1. The Applicant, 2270943 Alberta Ltd. ("**227**"), brings the within Application to seek to complete a sale transaction for the purchase of oil and gas assets located in or around Provost, Alberta, which transaction was previously approved by this Honourable Court in this *Companies' Creditors Arrangement Act*[1] proceedings in respect of Bow River Energy Ltd. ("**Bow River**"). In particular, 227 seeks a Sale Approval and Vesting Order ("**SAVO**") for, *inter alia*:

   (a) a declaration that the sale and investment solicitation process ("**SISP**") previously approved by this Court has been complied with;

   (b) declaring that 227's stalking horse bid (the "**Stalking Horse Bid**"), previously approved by this Court, is a successful bid; and

   (c) directing Bow River to specifically perform its obligations under the sale transaction (the "**Transaction**") contemplated by the Asset Purchase Agreement with 227 (as amended, the "**APA**").

2. Bow River, with the supervision of its court-appointed Monitor, BDO Canada Limited (in such capacity, the "**Monitor**") and the assistance of its court-appointed SISP advisor, Sayer Energy Advisors ("**Sayer**"), has conducted a stalking horse SISP in respect of its assets, which consist of oil and gas properties in Alberta and Saskatchewan. The SISP and the Stalking Horse Bid were developed in consultation with Bow River's debentureholders, with the Monitor's approval and oversight. The SISP and the Stalking Horse Bid are intertwined with the interim financing provided by 227, which in turn enabled Bow River to enter into a settlement agreement with Husky Oil Operations Limited ("**Husky**").

3. The SISP, the Stalking Horse Bid, the interim financing and Bow River's settlement with Husky were all approved by this Court. The Alberta Energy Regulator (the "**AER**") was in attendance at that hearing and did not object. On the basis of this Court's approval, and in the absence of any concerns from interested parties, 227 advanced interim financing, and Bow River implemented the SISP. After the conclusion of the SISP, Bow River, in

[1] *Companies Creditors' Arrangement Act*, RSC 1985, c C-36, as amended [***CCAA***] [**TAB 1**].

consultation with the Monitor and Sayer, determined that the Stalking Horse Bid was a successful bid, and that the Transaction was among one of three transactions it would seek to close. Notwithstanding, the AER and the Orphan Wells Association (the "**OWA**") now object to Bow River's transactions, including the Transaction contemplated in the Stalking Horse Bid.

4. The SAVO should be granted. The SISP was complied with, the Stalking Horse Bid was successful. 227 advanced interim financing, under a debtor-in-possession priority charge approved by this Honourable Court (the "**DIP Charge**") that is now being prejudiced by the objections of the AER and OWA to complete the Stalking Horse Bid and other proposed transactions that would see 98% and 95% of Bow River's Alberta and Saskatchewan producing assets, respectively, transferred to bidders under the SISP.

II. FACTS

A. Bow River's Business and Procedural History of the CCAA

5. Bow River is a privately-held junior energy producer based in Calgary, Alberta, with expertise in the exploration, development, and production of oil and natural gas. Bow River has oil and gas assets in Provost, Alberta, West Central Saskatchewan, and Northwest Saskatchewan.[2]

6. Bow River was indebted to the holders of certain secured subordinated debentures (the "**Debentureholders**") issued by the Company on: (a) May 15, 2017, accruing interest at a rate of 16%, (b) May 30, 2018, accruing interest at a rate of 15%, and (c) May 31, 2018 and July 19, 2018, accruing interest at a rate of 15%, respectively.[3] The indebtedness owing to the Debentureholders was conditionally assigned to 227, subject to this Court's approval of the APA. Following the issuance of the SISP Approval Order, the referenced indebtedness is now due and owing to 227.

[2] Affidavit of Daniel G. Belot, sworn on May 29, 2020, filed on June 1, 2020 [**First Belot Affidavit**] at para 5.
[3] First Belot Affidavit at para 48; Order: Approval of SISP Advisor, Stalking Horse Bid, and SISP, granted by the Honourable Madam Justice J. E. Topolniski on July 24, 2020 [**SISP Approval Order**], Schedule "C": Asset Purchase Agreement dated July 17, 2020 between Bow River Energy Ltd. and 2270943 Alberta Ltd., as amended by the Amending Agreement to Asset Purchase Agreement between Bow River Energy Ltd. and 2270943 Alberta Ltd. dated July 23, 2020 [**APA**], s 1.1(x).

7. On June 1, 2020, upon the application of Bow River, this Court granted an initial order under the *CCAA*.[4]

8. On June 10, 2020, upon the application of Bow River, this Court granted an amended and restated initial order for, among other things, the extension of the stay period until July 31, 2020.[5]

9. Following the Court's hearing of June 10, 2020, the Debentureholders, through its appointed committee, and Bow River, in consultation with the Monitor, began discussions to develop a SISP.[6]

10. Ultimately, 227 was incorporated and the Debentureholders have assigned their respective debts to 227.

11. On July 24, 2020, upon the application of Bow River, this Court granted two orders in the CCAA proceedings, as follows:

    (a) an Order granting approval of the retention of Sayer Energy Advisors as the SISP advisor, approval of the SISP, and approval of 227's Stalking Horse Bid, as set out in the APA;[7]

    (b) an Order to extend the stay, approval of interim financing and approval of a settlement agreement with one of its creditors, Husky (the "**Interim Financing Order**").[8]

12. The AER was provided notice with the Court's hearing of July 24, 2020 and counsel for the AER attended same.[9]

13. By granting the SISP Approval Order, this Court, among other things:

[4] Initial Order granted by the Honourable Madam Justice A. D. Grosse on June 1, 2020.
[5] Amended and Restated Initial Order granted by the Honourable Mr. Justice P. R. Jeffrey on June 10, 2020.
[6] Second Report of BDO Canada Limited in its Capacity as Monitor of Bow River Energy Ltd., dated July 20, 2020 [**Second Report**] at para 33.
[7] SISP Approval Order at paras 3, 4 and 8.
[8] Order: Approval of Stay Extension, Interim Financing and Settlement Agreement granted by the Honourable Madam Justice J. E. Topolniski on July 24, 2020 [**Interim Financing Order**] at paras 4, 5, 6 and 8.
[9] Application: Various Relief made on July 24, 2020, Schedule "A": Service List.

(a) approved the implementation of the SISP developed by Bow River, in consultation with the Monitor and Sayer, and which expressly provided for the inclusion of the Stalking Horse Bid from 227, which is the APA; and[10]

(b) approved the APA and authorized and directed Bow River to do all things as are reasonably necessary to conduct and give effect to the APA.[11]

14. By granting the Interim Financing Order, this Court, among other things:

(a) approved a settlement agreement between Bow River and Husky; and[12]

(b) approved Bow River to borrow under a credit facility (the "**Interim Financing**") from 227, as interim lender, to finance Bow River's working capital requirements, including, but not limited to, the payment of the cash portion of the settlement amount pursuant to Bow River's settlement agreement with Husky and the funding of the SISP, as well as the DIP Charge.[13]

15. Following the implementation and completion of the SISP, Bow River scheduled a two-hour hearing before this Court on October 6, 2020 for a contemplated application for sale approval and vesting orders in respect of several transactions, including the transaction contemplated by the APA.[14]

16. On October 6, 2020, upon the application of Bow River, this Court granted a brief extension of the stay period until October 30, 2020, in order to permit Bow River to further engage in discussions with the AER and the OWA respecting the proposed transactions.[15]

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[10] SISP Approval Order at paras 4 and 8, Schedule "A": Sales and Investment Solicitation Process, Schedule "C": APA.
[11] SISP Approval Order at para 4.
[12] Interim Financing Order at para 5.
[13] Interim Financing Order at paras 6-9, Schedule "A": Interim Financing Term Sheet.
[14] Affidavit No. 4 of Daniel G. Belot, sworn on September 28, 2020 [**Fourth Belot Affidavit**] at para 17.
[15] Order: Stay Extension granted by the Honourable Justice D.L. Shelley on October 6, 2020 at para 3.

17. Bow River has advised 227 that, in light of the objections raised by the AER and the OWA to the proposed transactions, it may instead be required to transfer its assets to the OWA, including the Assets (as defined in the APA).[16]

B. The Stalking Horse Bid

18. The definitive terms of the Stalking Horse Bid is set out in the APA.[17] It provided for the purchase by 227 of certain of Bow River's oil and gas assets in the Black Creek and Fleeing Horse areas, including, without limitation, seismic data and licenses related thereto (defined as the "**Assets**" in the APA).[18] The Stalking Horse Bid contemplated 227's assumption of responsibility for related abandonment and reclamation costs associated with the purchased assets, which costs are valued at approximately $9.5 million, constituting approximately $6.3 million worth of liabilities associated with producing assets and $3.2 million of liabilities associated with inactive assets.[19] The Transaction would result in payments being made to various affected stakeholders, including municipalities (for property taxes), royalty-holders, and mineral lessors.[20] Of all bids that were subject to the SISP, the Stalking Horse Bid resulted in the greatest transfer of liabilities possible based on the offers Bow River received.[21]

19. The anticipated LMR of 227, based on the Transaction, is 2.5.[22]

20. In developing the Stalking Horse Bid, 227 engaged in a detailed valuation of Bow River's oil and gas properties, including those subject to the Transaction. The valuation accounted for many factors, including, but not limited to: (a) engineering, geological and technical analysis; (b) optimization and drilling inventory; (c) strategic infrastructure, seismic data and licenses; (d) current cash flow and discounted projected future cash flow; (e) current market value analogues; (f) reserve reports; (g) integration costs and savings; (h)

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[16] Affidavit of Josh Woodlock, sworn on October 14, 2020 [**Woodlock Affidavit**] at para 4; Fourth Belot Affidavit at para 30.
[17] SISP Approval Order Schedule "C": APA.
[18] SISP Approval Order Schedule "C": APA s 11(f).
[19] Affidavit of Robert Dumaine, sworn on October 14, 2020 [**Dumaine Affidavit**] at para 7.
[20] Dumaine Affidavit at paras 7-8.
[21] Fourth Belot Affidavit, Exhibit "B", page 2.
[22] Dumaine Affidavit at para 9.

production and cash flow metrics; (i) the liabilities associated with the properties; and (j) the bidding company's internal price forecast for the commodities.[23]

21. Three other related valuations of certain of Bow River's assets act as comparatives to 227's valuation of the Assets. These are:

(a) an all cash, "white-mapped" offer made by Rifle Shot Oil Corp. ("**Rifle Shot**") for Bow River's Fleeing Horse assets for $5.5 million on February 20, 2020.[24] This offer was made at a time when the monthly average price for the WCS was lower than that of August 2020, when the Stalking Horse Bid was deemed a successful bid under the SISP.[25] Rifle Shot's offer would have involved the assumption of greater liabilities than the Stalking Horse Bid and was for more money than the Stalking Horse Bid;[26] and

(b) third-party reserve evaluations obtained by Bow River in early 2020 of both Bow River's base-producing assets and the drilling development inventory for the Fleeing Horse and Black Creek assets.[27]; and

(c) the licensed seismic data in Bow River's portfolio was acquired by Bow River for the amount of $7 million. The current market value of this data is estimated to be between $7 million and $8 million, and the value of licensing afresh or creating similar seismic data would be in excess of $10 million.[28]

C. The Implementation and Result of the SISP

22. Pursuant to the SISP Approval Order, Bow River worked in consultation with the Monitor and Sayer to conduct the SISP.[29] Sayer undertook significant efforts to market the potential

[23] Dumaine Affidavit at para 10. Summaries of 227's assessments and assumptions are set out in Confidential Exhibit "1" to the Dumaine Affidavit.
[24] Dumaine Affidavit at para 12, Exhibit "A".
[25] Dumaine Affidavit at para 13.
[26] Dumaine Affidavit at para 13.
[27] Dumaine Affidavit at para 16; Confidential Exhibit "2".
[28] Dumaine Affidavit at para 18.
[29] Fourth Belot Affidavit at para 9.

sale and investment respecting Bow River's assets, in accordance with the SISP. In that regard, Sayer did the following:

(a) public marketing of the SISP and the sale of, or an investment in, all of Bow River's property, began on July 24, 2020, with an information brochure summarizing Bow River's assets and the SISP (the "**Teaser**") being mailed to approximately 700 contacts on that date, and with the Teaser also being posted on Sayer's website (the "**Sayer Website**");[30]

(b) the Teaser was downloaded 231 times from the Sayer Website, which Sayer has advised is a high number of downloads for an offering of this nature;[31]

(c) on July 27, 2020, Sayer distributed the Teaser electronically to approximately 2,100 additional contacts;[32]

(d) on July 27, 2020, Sayer caused an advertisement respecting the potential sale and investment opportunity to be placed in the *BOE Report* and this advertisement was viewed 2,782 times;[33]

(e) on August 4, 2020, Sayer caused an advertisement respecting the potential sale and investment opportunity to be placed in the *Daily Oil Bulletin* and this advertisement was viewed 556 times;[34]

(f) Sayer also placed advertisements in *A&D Watch* and *Energy Advisors Group* respecting the potential sale and investment opportunity in order to reach new parties not currently in its mailing or email distribution lists in Canada and the United States; and[35]

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[30] Fourth Belot Affidavit at para 9(a).
[31] Fourth Belot Affidavit at para 9(b).
[32] Fourth Belot Affidavit at para 9(c).
[33] Fourth Belot Affidavit at para 9(d).
[34] Fourth Belot Affidavit at para 9(e).
[35] Fourth Belot Affidavit at para 9(f).

(g) Sayer also advertised the potential sale and investment opportunity in its internal *Canadian Oil and Gas Industry Asset Sale Listing* during the entirety of the marketing period, from July 24, 2020 until August 24, 2020.[36]

23. During the course of the process undertaken by Sayer in accordance with the SISP, 52 parties executed confidentiality agreements and gained access to Bow River's virtual and physical data rooms. Four parties attended at Bow River's office to conduct due diligence.[37] The ratio of executed confidentiality agreements to offers received is 27%, which in Sayer's experience, is comparable to similar undertakings it has managed.[38]

24. Ultimately, a total of 14 companies submitted offers prior to the noon bid deadline on August 24, 2020. One company submitted a late offer in the evening of August 24, 2020, which offer was accepted by Bow River, in consultation with the Monitor and Sayer.[39] Accordingly, Bow River received 15 offers qualified for consideration during the SISP. These offers encompassed 98% and 95% of Bow River's producing properties in Alberta and Saskatchewan, respectively.[40]

25. Bow River did not reject any *en bloc* bids for its Alberta assets. The only bids that Bow River rejected that concerned assets subject to the Stalking Horse Bid concerned specific mineral rights with drilling opportunities,[41] which did not constitute "Superior Offers".

26. None of the offers received by Bow River constituted a "Superior Offer" within the meaning of the SISP.[42] 227 was thus a successful bidder in respect of the Assets (as defined in the APA). As a result, Bow River, in consultation with the Monitor, determined that an auction was not necessary.[43]

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[36] Fourth Belot Affidavit at para 9(g).
[37] Fourth Belot Affidavit at para 10.
[38] Fourth Belot Affidavit at para 12; Third Report of BDO Canada Limited in its Capacity as Monitor of Bow River Energy Ltd., dated September 30, 2020 [**Third Report**] at para 14.
[39] Fourth Belot Affidavit at para 11.
[40] Fourth Belot Affidavit at para 14; Third Report at para 16.
[41] Fourth Belot Affidavit, Exhibit "B", page 2.
[42] Fourth Belot Affidavit at para 13; Third Report at para 17; SISP Approval Order, Schedule "A": Sales and Investment Solicitation Process ss 6, 31, 34, 35; SISP Approval Order, Schedule "B": Time Line.
[43] Third Report at para 17.

27. Following the SISP bid deadline of August 24, 2020, Bow River worked to develop a proposal by which a significant portion of Bow River's Alberta assets would be sold in three separate transactions, including the Stalking Horse Bid (the "**Proposal**").[44] The Proposal contemplated that the proposed purchasers would satisfy a significant portion of Bow River's outstanding surface and mineral lease payments and outstanding royalties, and assume obligations for all post-filing property taxes owing to various municipalities.[45]

28. The SISP was implemented in accordance with the terms of the SISP Approval Order.[46] There is nothing on the record to suggest that either the SISP or the Stalking Horse Bid resulted in any actual or potential prejudice or unfairness to Bow River's stakeholders.

D. Discussions with the AER and the OWA

29. In its efforts to move forward with the Proposal, Bow River, with the Monitor in attendance, met with the AER on September 10, 2020 and September 16, 2020.[47]

30. During the meeting of September 10, 2020, Bow River presented the AER with a summary of the offers received through the SISP, which offers Bow River intended to pursue through the Proposal, and its remaining regulatory liabilities. It further advised the AER that it intended to submit the Proposal for approval by this Court at a hearing scheduled for October 6, 2020.[48] At this meeting, the AER raised several concerns respecting the Proposal and, particularly, the Stalking Horse Bid.[49] Bow River relayed these concerns to 227 and recommended that 227 engage in discussions with the AER respecting same.[50]

31. On September 16, 2020, Bow River and 227, with the Monitor in attendance, met with the AER to discuss its concerns relating to the Stalking Horse Bid.[51]

[44] Fourth Belot Affidavit at para 15.
[45] Fourth Belot Affidavit at para 15.
[46] Fourth Belot Affidavit at paras 9-15, 24 and 27; Third Report at paras 13-17.
[47] Fourth Belot Affidavit at para 16.
[48] Fourth Belot Affidavit at para 17.
[49] Fourth Belot Affidavit at para 18.
[50] Fourth Belot Affidavit at para 18.
[51] Fourth Belot Affidavit at para 19.

32. On September 21, 2020, the AER formally responded to the Proposal by correspondence to Bow River's counsel.[52] The AER advised it would not support the Proposal and would object to a court application for approval of the contemplated sale transactions. The AER cited the Supreme Court of Canada's decision in *Redwater*[53] and asserted that the Stalking Horse Bid sought to eliminate the debt owing to 227 in priority to addressing Bow River's environmental obligations. The AER further stated that the Stalking Horse Bid failed to establish a floor price and was over the market value of the relevant assets. Finally, the AER indicated that the involvement of 227's directors as shareholders and former directors of Bow River would be a relevant consideration to its statutory discretion regarding license transfers.[54]

33. Following receipt of the AER's correspondence of September 21, 2020, Bow River discussed the possibility of conducting a further, abbreviated sales process with the Monitor and 227.[55] Bow River does not have the necessary funds to support a further sales process.[56] Similarly, 227 is unwilling to fund an additional sales process.[57] The only solution would be for the AER or the OWA to fund the process.[58]

34. On September 24, 2020, Bow River's counsel responded to the AER's correspondence of September 21, 2020.[59] Bow River reiterated the SISP and the Stalking Horse Bid were approved by this Court at a hearing at which the AER was present and made submissions. Bow River also objected to the AER's contention that Bow River was seeking to prioritize business considerations over regulatory obligations, noting that its primary objective in the SISP was to transfer as many liabilities as possible to solvent third parties. Bow River further sought confirmation from the AER as to its position on Bow River's intended application for the approval of the transactions set out in the Proposal. Despite Bow River's position that the SISP was conducted fully and fairly, to appease the AER and OWA due

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[52] Fourth Belot Affidavit at paras 20-21, Exhibit "A".
[53] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, [2019] 1 SCR 150 [***Redwater***] [**TAB 2**].
[54] Fourth Belot Affidavit, Exhibit "A", page 2.
[55] Fourth Belot Affidavit at para 28.
[56] Fourth Belot Affidavit at para 29.
[57] Fourth Belot Affidavit at para 29.
[58] Fourth Belot Affidavit at para 29.
[59] Fourth Belot affidavit at para 22, Exhibit "B".

to their objections, Bow River also offered to conduct a further sales process if the AER and the OWA would be willing to fund same,[60] as further particularized below.

35. That further sales process proposed by Bow River in its September 24, 2020 correspondence to the AER[61] would have been abbreviated and conducted by Bow River with the assistance of the SISP Advisor and the Monitor.[62] The sales process would have been an open remarketing of all of Bow River's assets with no stalking horse bid, followed by an auction with respect to qualified bidders.[63] The sales process would have given preference to *en bloc* offers, offers that whitemap a particular geographical area, and offers assuming the most deemed liabilities[64] in order to maximize the transfer of environmental liabilities to solvent third parties.[65]

36. Bow River advised the AER that such further sales process would only be conducted with the agreement of the AER,[66] and would require third party funding of up to $500,000 to ensure that Bow River had sufficient access to funds to complete such further sales process.[67] In addition, Bow River informed the AER that 227 had denied a request for additional funding, and proposed that either the AER or the OWA could provide funding.[68]

37. Finally, Bow River expressed the need for an understanding between Bow River and the AER in relation to such further sales process, and requested that the AER confirm that it would not object to the further sales process should it result in no *en bloc* sales and should Bow River enter into one or several transactions to address environmental liabilities to the best of its abilities.[69]

38. On September 24, 2020, 227's legal counsel advised the AER that, among other things, 227 would be prejudiced by a further sales process sought by the AER as its DIP Charge

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[60] Fourth Belot Affidavit at para 29, Exhibit "B".
[61] Fourth Belot Affidavit at para 29, Exhibit "B".
[62] Fourth Belot Affidavit at para 28(a) and (b), Exhibit "B", page 3.
[63] Fourth Belot Affidavit at para 28(c) and (d), Exhibit "B", page 3.
[64] Fourth Belot Affidavit at para 28(e), Exhibit "B", page 3.
[65] Fourth Belot Affidavit, Exhibit "B", page 3.
[66] Fourth Belot Affidavit, Exhibit "B", page 3.
[67] Fourth Belot Affidavit, Exhibit "B", page 3; Third Report at para 23(b).
[68] Fourth Belot Affidavit, Exhibit "B", page 3.
[69] Fourth Belot Affidavit, Exhibit "B", page 3.

would be jeopardized by further delays.[70] 227's legal counsel also advised the AER that its comments as to the integrity of 227's directors in the September 21, 2020 correspondence to Bow River's counsel were prejudicial to those individuals, but that 227 had changed its directors and would be updating their application for the transfer license to reflect this change.[71]

39. On September 28, 2020, the AER provided its response to Bow River's counsel's correspondence of September 24, 2020.[72] In its correspondence, the AER misquoted 227's legal counsel as having allegedly stated that "[t]he Stalking Horse Bid value is the entirety of the debt owed to the debenture holders of Bow River… [and] not reflective of the value of the assets being purchased, which is much lower than the amount of the bid."[73] The AER also advised, without providing any explanation or addressing any of the terms proposed by Bow River, that it would not fund an additional sales process in these *CCAA* proceedings despite the proposed sales process appeasing the AER's objections.[74]

40. On September 28, 2020, the AER also provided its response to 227's counsel's correspondence of September 24, 2020.[75] Among other things, the AER stated that it is generally supportive of prioritizing DIP financing in a *CCAA* sales process, but that it is concerned about the Proposal in light of *Redwater*. The AER also advised that it did not take issue with the personal integrity of the directors of 227.[76]

41. On September 29, 2020, the OWA advised Bow River's counsel that it would object to the proposed application respecting the Proposal and that, despite its rejection of the offer to run an additional sales process within this proceeding, it would consider funding a receiver if Bow River ceased the within *CCAA* proceedings.[77] The OWA was unwilling to fund a further sales process in the *CCAA*.[78]

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[70] Dumaine Affidavit at para 22, Exhibit "B".
[71] Dumaine Affidavit, Exhibit "B".
[72] Dumaine Affidavit at para 23, Exhibit "C"
[73] Dumaine Affidavit at paras 17, 21.
[74] Supplement to Affidavit No. 4 of Daniel G. Belot, sworn on October 5, 2020 [**Supplemental Belot Affidavit**] at paras 4-5, Exhibit "A".
[75] Dumaine Affidavit at para 24, Exhibit "D".
[76] Dumaine Affidavit, Exhibit "D".
[77] Supplemental Belot Affidavit at para 5, Exhibit "B".
[78] Supplemental Belot Affidavit at para 5, Exhibit "B".

42. As a result of the AER's and the OWA's objections, Bow River was not willing to bring the contemplated application to complete the transactions that were subject to the Proposal, despite being expressly empowered to do so with respect to the Stalking Horse Bid pursuant to the SISP Approval Order. Similarly, the Monitor was not prepared to continue to support such application.

43. On October 6, 2020, just following this Court's granting of an extension of the stay until October 30, 2020, the AER issued a letter to 227 indicating that it was closing 227's application pursuant to Directive 067 for the relevant regulatory licenses and approvals as the application was considered incomplete, and that the AER was "not in a position to evaluate unreasonable risk in [the application] until the insolvency process is exhausted". This letter also stated that "the Applicant Shareholders are currently affiliated with Bow River Energy Ltd.",[79] notwithstanding the AER's earlier statement that it was not questioning the integrity of 227 and its former directors, who remain its shareholders.[80] The AER further invited 227 to reapply under Directive 067.[81]

E. Further Sales Prospects

44. 227, as interim lender, is unwilling to fund an additional sales process in these *CCAA* proceedings.[82] The only alternative sources of such funding would be the AER and the OWA, both of which have similarly expressed that they would not fund a further sales process.[83]

45. Given the protracted deterioration of market conditions and uncertainty related to the COVID-19 pandemic, and in light of the costs and delays associated with any further marketing efforts, it is unlikely that a further sales process would generate any *en bloc* offers.[84] In particular, an *en bloc* offer for the entirety of Bow River's Alberta assets would require a potential purchaser to assume deemed liabilities of approximately $45 million for only 118 active wellbores and 615 inactive wellbores, together with negative annual cash

[79] Dumaine Affidavit, Exhibit "E".
[80] Dumaine Affidavit, Exhibit "D".
[81] Dumaine Affidavit at para 25, Exhibit "E".
[82] Fourth Belot Affidavit at para 29.
[83] Supplemental Belot Affidavit at paras 4-5.
[84] Dumaine Affidavit at para 19.

flow ranging between $1 million and $3 million per year at the current / forward curve WCS price range of $35 to $45 per barrel.[85] The LMR in such circumstances would be below 1.0, requiring a deposit to be made by a licensee. Suspension and abandonment activities would need to start in the first year to remain compliant with current regulations.[86] There is also no evidence that a receivership would result in any further maximization of value to Bow River's creditors. Given the circumstances, a receivership may result in decreased realization value of Bow River for its creditors.

III. ISSUES

46. This Honourable Court is respectfully requested to determine the following issues and sub-issues:

(a) Should this Court direct that the Transaction contemplated in the Stalking Horse Bid, the definitive terms of which are set out in the APA, be completed and the Assets be vested in the name of 227?

(i) Was the SISP implemented in accordance with the SISP Approval Order?

(ii) Is the propriety of the SISP and the Stalking Horse Bid *res judicata*?

(iii) Does the Stalking Horse Bid further the purpose of the *CCAA* and does it comply with the principles set out by the Supreme Court in *Redwater*?

(iv) Does the conduct of the AER constitute good faith, unfairness and undue maneuvering of the creditors' positions?

(b) Should this Court grant an interim injunction enjoining Bow River from transferring the custody and care of its assets to a third-party outside of an approved sales transaction?

[85] Dumaine Affidavit at para 11.
[86] Dumaine Affidavit at para 11.

(c) Should this Court grant a sealing order in respect of the Confidential Exhibits attached to the Dumaine Affidavit?

IV. LAW AND ANALYSIS

A. This Court should Direct that the Transaction be Completed and the Assets be Vested in the Name of 227

i. The SISP was Implemented in Accordance with the SISP Approval Order, and the Stalking Horse Bid is a Successful Bid

47. The evidence makes clear that Bow River implemented the SISP in accordance with the terms thereof, as set out in the SISP Approval Order. Bow River, through Sayer, undertook extensive marketing efforts to solicit interest and offers. Such efforts were effective, given that several parties gained access to the data rooms and a reasonable percentage thereof submitted bids in the SISP. Neither the AER nor the OWA has raised any objections regarding compliance with the SISP Approval Order.

48. The Stalking Horse Bid was a successful bid in the process. Bow River made this determination in consultation with, and with the support of, the Monitor. Bow River did not receive any "Superior Offers" in the SISP, which are defined as follows:

> "Superior Offer" means a credible, reasonably certain and financially viable third party offer, or combination of offers, for: A) the acquisition of all, substantially all, or certain of, the Property or Business contained in the Stalking Horse or APA, or B) an investment, restructuring, recapitalization, refinancing or other form of reorganization of the Company, the terms of which offer are no less favourable and no more burdensome or conditional than the terms contained in the Stalking Horse APA, and which at a minimum, alone, or in combination with other offers, includes:
>
> i) a payment in cash in excess of $250,000 of the aggregate of the total consideration payable pursuant to the Stalking Horse APA, being $4,433,221.00,
>
> ii) a payment in cash in the amount necessary to fully pay the Break Fee, the CCAA Obligations, and the Interim Financing Obligations, as at the closing of such transaction, and

> iii) a payment in cash or an assumption of liabilities to satisfy any and all Cure Costs and Prior Charges, as at the closing of such transaction, which amount with respect to the Stalking Horse APA is estimated to be $298,000.[87]

Neither the AER nor the OWA has raised any objections regarding the fact that the Stalking Horse Bid was a successful bid.

49. As a result, the SISP was undertaken in compliance with the SISP Approval Order and the Stalking Horse Bid is a successful bid. Under the terms of the Stalking Horse Bid, Bow River is obligated to proceed with the Transaction.

ii. The Stalking Horse Bid Furthers the Purpose of the *CCAA* and Satisfies Section 36 of the *CCAA* and the *Soundair* Principles

50. The purpose of the *CCAA* is to enable companies to restructure their financial affairs to avoid the devastating social and economic effects of insolvency.[88] In pursuit of this purpose, *CCAA* proceedings also permit outcomes that do not include the continued existence of the pre-filing debtor company but that instead involve the liquidation of the debtor's assets.[89] Liquidating *CCAA*s may involve, for example, the sale of a company as a going concern, an *en bloc* sale of assets to be operationalized by a buyer, a partial liquidation, or a piecemeal sale of assets.[90] As the Supreme Court of Canada has observed:

> [U]nder the CCAA, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage.[91]

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[87] SISP Approval Order, Schedule "A": Sales and Investment Solicitation Process s 6.
[88] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379 at para 59, citing *Nova Metal Products Inc v Comiskey (Trustee of)*, 1990 CarswellOnt 139, 1 OR (3d) 289 (CA) at para 57 [***Century Services***] [**TAB 3**].
[89] *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10, 444 DLR (4th) 373 at para 42 [***Callidus***] [**TAB 4**].
[90] *Callidus* at para 43 [**TAB 4**].
[91] *Callidus* at para 46 [**TAB 4**].

51. In view of the broad remedial purpose of the *CCAA*, this Court has the jurisdiction under the *CCAA* to approve asset sales.[92] In particular, section 36 of the *CCAA* provides statutory authority for this Court to authorize a sale or disposition of a debtor's assets outside the ordinary course of business.[93] Subsections 36(3) and 36(4) of the *CCAA*, which largely codify the *Soundair* principles, provides as follows:

> **Factors to be considered**
>
> **(3)** In deciding whether to grant the authorization, the court is to consider, among other things,
>
> > **(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> >
> > **(b)** whether the monitor approved the process leading to the proposed sale or disposition;
> >
> > **(c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> >
> > **(d)** the extent to which the creditors were consulted;
> >
> > **(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
> >
> > **(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> **Additional factors — related persons**
>
> **(4)** If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
>
> > **(a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

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[92] *Re Nortel Networks Corp*, 2009 CarswellOnt 4467, 55 CBR (5th) 229 (OntSCJ [Commercial List]) at para 47-48 [**TAB 5**].

[93] *CCAA*, s 36 [**TAB 1**].

> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.[94]

52. The well-accepted *Soundair* principles continue to frame the considerations for a proposed sale of assets in the *CCAA* context.[95] The *Soundair* principles are as follows:

    (a) whether the debtor has made a sufficient effort to get the best price and has not acted improvidently;

    (b) the interests of all parties;

    (c) the efficacy and integrity of the process by which offers are obtained; and

    (d) whether there has been unfairness in the working out of the process.[96]

53. Although the Court's decision to approve a sales process is distinct from its decision to approve a proposed sale, the *Soundair* principles can prospectively inform the adequacy of a proposed sales process.[97] This prospective canvassing of the *Soundair* principles ensures that the sales process has a likelihood of achieving a result that will satisfy the Court on a subsequent application for approval of a sale. While issues may arise after approval of a sales process and prior to the approval of a sale,[98] it is well-established that a court-approved sales process "should be honoured, excepting extraordinary circumstances."[99]

54. Furthermore, the fact that the Transaction has been structured as a stalking horse credit bid does not deter from the broad remedial purpose of the *CCAA*. Canadian courts have routinely recognized that stalking horse credit bids are "a reasonable and useful element of a sales process."[100] The Ontario Supreme Court has observed:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for

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[94] *CCAA*, ss 36(3), 36(4) [**TAB 1**].
[95] *Re Sanjel Corp*, 2016 ABQB 257, 36 CBR (6th) 239 at para 56 [**TAB 6**].
[96] *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205, 83 DLR (4th) 76 (ONCA) at para 16 [**TAB 7**].
[97] *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750, 90 CBR (5th) 74 at para 6 [***Blutip***] [**TAB 8**].
[98] *Re Brainhunter Inc*, 2009 CarswellOnt 8207, 62 CBR (5th) 41 (OntSCJ [Commercial List]) at para 17 [**TAB 9**].
[99] *Re Grant Forest Products Inc*, 2010 ONSC 1846, 67 CBR (5th) 258 at para 29 [**TAB 10**].
[100] *Blutip* at para 7 [**TAB 8**].

> interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity...[101]

55. The AER has supported stalking horse bids in recent insolvency proceedings, including in the receivership of Traverse Energy Ltd.,[102] and in the *CCAA* proceedings of Strategic Oil & Gas Ltd and Strategic Transmission Ltd.[103]

56. This Court has already approved the SISP and the Stalking Horse Bid. In so doing, this Court necessarily recognized that the financial circumstances of Bow River and the limited sources of funding available to it required a quick sales process to optimize recovery for stakeholders. The record makes clear that Bow River was, and remains, in dire financial circumstances requiring immediate cash injection or liquidation of its assets to other parties. The company's cash flow forecast for the period between July 11 to October 16, 2020 provided for a negative cash flow in excess of $2 million notwithstanding the receipt of interim financing from 227.[104]

57. This Court's decision to grant such approvals followed a review of the details of the SISP and the Stalking Horse Bid (as set out in the APA) and a consideration of efficacy and integrity of the proposed sales process. The Bench Brief filed by Bow River in support of

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[101] *Blutip* at para 8 [**TAB 8**].

[102] In the Matter of the Court Appointed Receivership of the Property of Traverse Energy Ltd., Court of Queen's Bench of Alberta Action No. 1901-16844 [**Traverse Energy Receivership Proceedings**], Order (SISP and Stalking Horse APA Approval) Granted by the Honourable Justice P.R. Jeffrey on February 14, 2020 [**TAB 11**]; Traverse Energy Receivership Proceedings, Notice and Statement to Receiver dated December 12, 2019 [**TAB 12**].

[103] In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 as amended, in the Matter of the *Business Corporations Act*, RSA 2000 c B-9, as amended, and In the Matter of the Plan of Compromise or Arrangement of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd., ABQB Action No. 1901-05089 [**CCAA Proceedings of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd.**], Order (Approval of SISP, Stalking Horse and Stay Extension) Granted by the Honourable Madam Justice M.H. Hollins on May 9, 2019. Online: https://home.kpmg/content/dam/kpmg/ca/pdf/creditorlinks/strategic-oil-gas-ltd-and-strategic-transmission/2019-05-09-order-approval-of-sisp-stalking-horse-and-stay-extension-filed.PDF [**TAB 13**]; CCAA Proceedings of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd., Second Supplemental Report of The Monitor dated May 9, 2019, Online:<https://home.kpmg/content/dam/kpmg/ca/pdf/creditorlinks/strategic-oil-gas-ltd-and-strategic-transmission/second-supplemental-report-of-the-monitor-filed-may-9-2019.pdf> [**TAB 14**]; CCAA Proceedings of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd., First Supplemental Report of The Monitor dated May 3, 2019, Online:< https://home.kpmg/content/dam/kpmg/ca/pdf/creditorlinks/strategic-oil-gas-ltd-and-strategic-transmission/first-supplemental-report-of-the-monitor-may-3-2019-filed.pdf> [**TAB 15**].

[104] Second Report of BDO Canada Limited in its Capacity as Monitor of Bow River Energy Ltd. dated July 20, 2020 at paras 23 and 24(a); Affidavit No. 3 of Daniel G. Belot, sworn on July 17, 2020 [**Third Belot Affidavit**] at para 26, Exhibit "B".

its application for approval of the SISP and the Stalking Horse Bid canvassed the law relating to the *Nortel* criteria for approval of a sales process, the guidance set out in the *Soundair* principles and subsections 36(3) and 36(4) of the *CCAA*. The SISP has already been approved by this Court, which should strongly supports approving a sales transaction resulting therefrom.

58. The Stalking Horse Bid has already been subject to scrutiny during its assessment of the SISP; it has been approved by this Court. The Stalking Horse Bid and the contemplated Transaction satisfy the considerations set out in section 36 of the *CCAA* and in *Soundair*. In particular:

(a) The Process Leading to the Transaction is Reasonable in the Circumstances. The SISP has already been approved by this Court. There is no evidence on the record, and there has been no suggestion, that Bow River deviated from the Court-approved SISP in any manner. The SISP involved the marketing and solicitation of offers by a well-respected independent advisor, and resulted in expressions of interest and actual offers in quantities that are comparable to similar undertakings. Bow River took appropriate steps to solicit the best possible offers from the market. As approved by the Court and carried out by Bow River, the SISP was reasonable in the circumstances. There is no evidence that Bow River has acted improvidently in carrying out the SISP or negotiating the Proposal.

(b) The Monitor approved of the process leading to the Transaction. Bow River consulted with the Monitor in developing the terms of the SISP and negotiating the Stalking Horse Bid. The Monitor was in support of the SISP and the Stalking Horse Bid, and viewed it as commercially reasonable in the circumstances.[105]

(c) The Transaction Generates a Greater Benefit for the Stakeholders than Through Liquidation in a Receivership or a Bankruptcy. The SISP and the related Stalking Horse Bid would generate a greater benefit for Bow River's stakeholders than through a liquidation in a receivership or a bankruptcy.[106] As will be discussed

[105] Third Report at para 34.
[106] Third Belot Affidavit at para 42.

further below, there is no evidence that Bow River's stakeholders can generate greater benefit in a further sales process, and there is risk that the benefits will decrease in the current market conditions.

(d) Bow River's Senior Secured Creditors participated in approval of the SISP and the Stalking Horse Bid. All interested stakeholders were provided notice of the application in which Bow River sought the approval of the SISP and the Stalking Horse Bid, including the AER. Furthermore, Husky, which previously asserted claims against 227, participated in discussions relating to the settlement agreement between Husky and Bow River, which played a role in enabling Bow River to develop a SISP that would provide for the transfer of Bow River's seismic assets.

(e) There is a Positive Effect on Bow River's Stakeholders. Bow River did not receive any offers that constituted a "Superior Offer" to the Stalking Horse Bid. The Transaction is a part of the Proposal, which would allow Bow River to sell a significant portion of its Alberta assets. There is no evidence to indicate that Bow River would receive any *en bloc* offers for its assets in a subsequent sales process. To the contrary, the delays and costs related to a further sales process could well result in the transfer of more significant liabilities to the OWA, as liabilities that would otherwise be assumed by prospective purchasers in the Proposal would remain outstanding. The Transaction therefore has a positive effect not only for Bow River's creditors, but also for the regulators and parties who are concerned with outstanding regulatory liabilities.

(f) The Consideration in the Transaction is Reasonable and Fair. 227 undertook a detailed assessment of the Assets, including considerations of a prior offer made by Rifle Shot and reserve valuations from early 2020. 227's purchase price provides for both the payment of cure costs relating to the Assets, as well as the reduction of senior secured debt owed by Bow River. The fact that the Transaction takes the form of a Stalking Horse Bid with a debt reduction component does not affect the reasonableness and fairness of the consideration provided by 227. Stalking horse bids and credit bids are permitted in *CCAA* proceedings. If 227 had bid $1 instead if the debt, there would be no material difference to the underlying assets in the

Stalking Horse Bid and the debt would continue to remain outstanding and unsatisfied.

(g) Good Faith Efforts were Made to Sell the Assets to Persons who are Not Related to Bow River. Although the ownership of 227 involves persons who were related to the Bow River, by implementation of the SISP, Bow River undertook good faith efforts to sell the Assets to persons who are not related to it and was unsuccessful in receiving a Superior Offer.

(h) The Consideration in the Transaction is Superior to the Consideration that would be Received under Another Offer Made in the SISP. Given that there is no Superior Offer to the Stalking Horse Bid within the meaning of the SISP, it is clear that the consideration provided in the Transaction is superior to any other offers made in respect of the Assets.

(i) There is No Evidence of Unfairness in the Implementation of the SISP. There is no evidence on the record to suggest that Bow River's implementation of the SISP did not comply with the terms thereof, as approved by this Court. As will be detailed below, the AER's allegation that the Stalking Horse Bid failed to create a floor price is entirely unfounded. The SISP and the Stalking Horse Bid have been approved by this Court, and the implementation of the SISP, including the selection of the Stalking Horse Bid as a successful bid, complies with the contemplated process.

59. For the foregoing reasons, this Court should direct the parties to complete the Transaction. The SISP and the Stalking Horse Bid have already been approved by this Court. Given compliance with the SISP, the closing of the Transaction and the vesting of the Assets in favour of 227 are the necessary consequence of the SISP Approval Order.

iii. The Propriety of the SISP and the Stalking Horse Bid is *Res Judicata*

60. For reasons further discussed below, the AER's substantive criticisms as to the propriety of the SISP and the Stalking Horse Bid are entirely unfounded. In any event, the propriety of the SISP and the Stalking Horse Bid are *res judicata* and cannot now be challenged by

the AER and the OWA. The issues relating to the fairness and integrity of the SISP and its incorporation of the Stalking Horse Bid were squarely before this Court at the hearing for the SISP Approval Order on July 24, 2020. The AER was provided notice of Bow River's application, participated at the hearing, and did not raise any objections to approval of the SISP and Stalking Horse Bid.[107] The AER did not appeal the SISP Approval Order. Its challenge to the approval of the Transaction undermines this Court's decision in granting the SISP Approval Order and seeks to relitigate issues contrary to the doctrine of *res judicata*. The propriety of the SISP and Stalking Horse Bid are no longer up for debate.

61. The doctrine of *res judicata* brings finality of litigation through cause of action estoppel or issue estoppel.[108] Issue estoppel is applicable here. Issue estoppel bars litigants from raising issues that have already been decided in a previous proceeding.[109] Our Court of Appeal has confirmed three pre-conditions to issue estoppel: (a) the same question or issue has been decided; (b) the judicial decision which is said to create the estoppel is final; and (c) the parties to the judicial decision or their privies must be the same as the parties to the proceedings in which the estoppel is raised, or their privies.[110] The overarching consideration in the Court's exercise of discretion with respect to issue estoppel is whether its application, considered in the entirety of the circumstances, would create an injustice.[111]

62. The issue as to the propriety of the SISP and the Stalking Horse Bid has already been decided by this Court. In granting the SISP Approval Order, the Court approved the SISP and the Stalking Horse Bid as being an appropriate process in the circumstances, having canvassed the legal frameworks set out in *Nortel* and *Soundair*, among others, as earlier described. In particular, the contents of the Stalking Horse Bid, including the nature of the relevant assets and liabilities, were placed before this Court for consideration. The fairness of the sales process and the reasonableness of the consideration set out in the Stalking Horse Bid were integral aspects of the Court's analysis. Furthermore, it is indisputable that

[107] Transcript from Hearing for Application: Various Relief, dated July 24, 2020, submissions of Maria Lavelle on behalf of the AER from page 22 line 17 to page 24 line 17, at page 23 lines 8-11 and 21-29.
[108] *Erschbamer v Wallster*, 2013 BCCA 76, 356 DLR (4th) 634 at para 12 [***Erschbamer***] [**TAB 16**]; *Re Cliffs Over Maple Bay Investments Ltd*, 2011 BCCA 180, 77 CBR (5th) 1 at para 27 [**TAB 17**].
[109] *Erschbamer* at para 12 [**TAB 16**].
[110] *Milner v Sostar*, 2013 ABCA 386, 566 AR 29 at para 17 [**TAB 18**].
[111] *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460 at para 80 [**TAB 19**].

the SISP Approval Order is a final decision, and the parties to the hearing at the application therefor are the same as at the present Application.

63. The application of issue estoppel in the present circumstances would not work an injustice. To the contrary, the failure to apply issue estoppel would result in significant injustice and prejudice to 227 and other prospective purchasers in the Proposal. The AER's challenge of the efficacy and integrity of the SISP and the Stalking Horse Bid undermines this Court's issuance of the SISP Approval Order, and implicitly suggests that the Court failed to appropriately consider the relevant facts or apply the appropriate law. The AER's challenges as to the fairness of the SISP and the reasonableness and competitive effects of the Stalking Horse Bid amount to a relitigation of the issues that have been previously determined by this Court on an application that received the support of the debtor, the Monitor, and the interim lender. To allow the AER to raise these issues again would undermine the purpose of the *CCAA* by creating undue delay and result in a waste of judicial economy, as well as jeopardizing the DIP Charge.

iv. The Stalking Horse Bid Complies with the Principles Set out in *Redwater*

64. The Supreme Court of Canada's seminal decision in *Redwater* highlights the importance of considering a debtor's environmental obligations in insolvency proceedings. *Redwater* was decided in the context of a receivership and bankruptcy under the *Bankruptcy and Insolvency Act*[112] (the "***BIA***").

65. The AER and the OWA's objections misconstrue *Redwater*.

66. Fundamentally, the Supreme Court's decision in *Redwater* can be succinctly summarized as: "Although [a trustee in bankruptcy] remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankruptcy estate by invoking s. 14.06(4) [of the *BIA*]".[113] As the Supreme Court recognized, subsection 14.06(4) is "concerned with the personal liability of trustees and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering".[114]

[112] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
[113] *Redwater* at para 162 [**TAB 2**].
[114] *Redwater* at para 7 [**TAB 2**].

The main issue in *Redwater* was the liability of the trustee vis-à-vis the bankrupt estate with respect to outstanding environmental obligations. *Redwater* should be applied in light of this context.

67. In this matter, the OWA has advised that it would not support any transaction that did not constitute an *en bloc* sale. However, the Supreme Court's reasons in *Redwater* do not limit sales of oil and gas assets to *en bloc* transactions. The *Redwater* decision is accounted for in the Proposal and the Stalking Horse Bid. The AER did not object to the SISP on the basis that only *en bloc* sales could be bid. The AER has previously not objected to less than *en bloc* sales of oil and gas assets. To the contrary, in the *CCAA* proceedings of Strategic Oil & Gas Ltd and Strategic Transmission Ltd., the AER supported a transaction for less than an *en bloc* sale of the debtor's assets.[115] In that instance, the terms of the SISP, which was developed in consultation with the AER, expressly noted that *en bloc* sales were not required.[116] That is because *en bloc* sales are simply not required by *Redwater* or by any other law.

68. *Redwater* addresses the harm that may arise from enabling a bankrupt estate to "walk away" from its environmental liabilities while preserving valuable assets. However, such harm does not arise in this case. The Proposal, and particularly the Stalking Horse Bid, do not disregard Bow River's existing regulatory obligations. To the contrary, the prospective purchasers will assume liabilities relating to the assets subject to the purchase and, in the case of the Stalking Horse Bid, they include liabilities associated with inactive wells. Although Bow River may continue to remain responsible for some liabilities, the alternatives would involve either: (a) the limited likelihood of finding a purchaser to purchase the entirety of the Alberta assets; or (b) Bow River's continued responsibility for all outstanding liabilities, which would all be left to the OWA given Bow River's serious cash constraints. The Proposal in fact removes environmental liabilities that would

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[115] CCAA Proceedings of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd., Order: Approval of SISP, Stalking Horse and Stay Extension, Granted by the Honourable Madam Justice M.H, Hollins on May 9, 2019 [**Strategic SISP Approval Order**] [**TAB 13**]; CCAA Proceedings of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd., Second Supplemental Report of The Monitor dated May 9, 2019 [**TAB 14**]; CCAA Proceedings of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd., First Supplemental Report of The Monitor dated May 3, 2019 [**TAB 15**].

[116] CCAA Proceedings of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd., Strategic SISP Approval Order, Schedule "B", SISP Report, p 6 at para 5.5.4(a) [**TAB 13**].

otherwise be left to the OWA and places responsibility for same upon the prospective purchasers. Leaving 100% of the environmental liabilities to be addressed at a potential future receivership sales process could result in even more liabilities being abandoned even in the long term than presently contemplated.

69. In this case, to require a potential purchaser to undertake an *en bloc* transaction would require a purchaser to assume $45 million of deemed liabilities with a negative cash flow at a reasonable forecast of the WCS prices. This is an uneconomic resolution that is unlikely to materialize. The transfer of 98% and 95% of Bow River's Alberta and Saskatchewan producing assets, respectively, enables many liabilities to be addressed. Furthermore, the Stalking Horse Bid assumes approximately $9.5 million of liabilities, which does not rank secured debt ahead of those liabilities.

v. The Conduct of the AER is Not in Good Faith, Constituting Unfairness and Undue Maneuvering of the Creditors' Positions

70. Good faith and fairness underpin a party's conduct in *CCAA* proceedings. Section 18.6 creates a positive duty for any interested persons in *CCAA* proceedings to act in good faith and empowers the Court to make any order it considers appropriate in the circumstances should such person fail to act in good faith.[117] The assessment of whether a person has acted in good faith necessarily involves a consideration of the fairness of its conduct.

71. The AER's conduct with respect to 227 and the Stalking Horse Bid is unfair. By failing to raise alleged issues concerning the integrity of the SISP and the Stalking Horse Bid during Bow River's initial application for approval thereof, the AER has stood by while 227 funded a sales process that would ultimately be fruitless, in the AER's view, simply because of the incorporation of the Stalking Horse Bid. The AER takes issue only after Bow River, in consultation with the Monitor, determined that the Stalking Horse Bid is a successful bid. The AER did not raise any objections when 227 advanced the Interim Financing to fund the sales process and to settle Husky's claims, both of which benefited all stakeholders. The AER appeared satisfied that another party's funds were being expended to maximize recovery for 227's stakeholders, but now seeks to prevent Bow

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[117] *CCAA*, s 18.6 [**TAB** 1].

River and 227 from seeing the process to its conclusion simply because it deems the outcomes of the sales process unsatisfactory. This Court should not condone the wasting of precious financial resources on fulfilling a SISP that the AER later objects to on baseless grounds.

72. The AER and the OWA refuse to fund an additional, abbreviated sales process in these *CCAA* proceedings, yet they are willing for the matter to proceed to a receivership. The potential receivership process proposed by the AER and the OWA would not likely result in a sales process that differs materially from Bow River's proposed additional sales process. In failing to recognize this similarity of outcome, the AER seems to prioritize its desire to dictate the insolvency process over the need to implement a process that is expeditious and to the benefit of the relevant stakeholders. The AER's conduct amounts to an attempt to use its regulatory power to effect a receivership process under its supervision, which is not necessarily to the benefit of Bow River's stakeholders.

73. Further, the AER's challenges to the SISP and the Stalking Horse Bid are unfounded. For reasons discussed above, the Transaction is not contrary to the principles set out in *Redwater* and the AER's concern with respect thereto is based upon a misunderstanding of that decision.

74. Moreover, the AER appears to raise concerns with respect to whether the Stalking Horse Bid sets an appropriate floor price; it asserts that the consideration therein exceeds the value of the relevant assets. 227 does not dispute that a stalking horse bid's purchase price sets the floor price for subsequent offers under consideration.[118] That is the point of a stalking horse bid, so as to encourage other bidders to bid more for the assets. The AER was aware of the Stalking Horse Bid price, as it was approved as part of the SISP Approval Order. The AER made no inquiries as to the price and did not object to the price. The Stalking Horse Bid was approved by this Court.

75. Nevertheless, there is no evidence on the record to suggest that 227's proposed purchase price is inappropriate. 227's valuation of the assets took into account third-party valuations

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[118] *Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855, 17 CBR (6th) 41 at para 15 [**TAB 20**].

(whether in the form of a prior offer or reserve valuations) and its own financial forecasts. The purchase price was known to the Court and to the AER at the time the approval of the Stalking Horse Bid was sought. Parties which have been involved with these *CCAA* proceedings from the outset, such as Bow River, the Monitor and the Debentureholders (through 227) all supported the approval of the Stalking Horse Bid. The AER has not put forth any evidence to suggest that the purchase price set out in the Stalking Horse Bid is not an appropriate floor price. The AER's unsupported allegation cannot be sufficient to usurp the Court-approved Stalking Horse Bid.

76. The AER's conduct also undermines a fundamental purpose of the *CCAA*, which is to prevent the undue maneuvering for position among creditors.[119] As this Court has confirmed, through the creditor protection provided by the *CCAA*, it seeks to prevent creditors' maneuvers for positioning.[120] The Court should use its supervisory role to minimize the maneuvering for position among creditors in order to preserve the status quo and work towards successful compromise.[121]

77. Given that the Transaction does not undermine the principles set out in *Redwater*, and the sales process and the Stalking Horse Bid giving rise thereto have been approved by this Court, the AER's attempts to prevent these Court-approved mechanisms from being carried to their conclusion constitutes undue maneuvering for the OWA to gain a better position than it otherwise would have. Doing so jeopardizes the DIP Charge, which ranks ahead of all other stakeholders, including the AER. In fact, the AER confirmed that it does not dispute the DIP Charge. However, unless the within application is granted, the DIP Charge will be impossible to repay because the Proposal will not consummate in sales transactions that would provide the funds to repay it. By blocking the sales transactions, the AER has effectively positioned itself ahead of the DIP Charge, improperly placing its interests in priority to 227, as interim financer, despite this Court approving the DIP Charge as ranking

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[119] *Re Concrete Equities Inc*, 2012 ABQB 19, 85 CBR (5th) 156 at para 48; rev'ed on other grounds [**TAB 21**].
[120] *Re Lightstream Resources Ltd*, 2016 ABQB 665, 41 CBR (6th) 204 at para 91, citing *Lehndorff General Partner Ltd (Re)*, [1993] OJ No 14, 17 CBR (3d) 24 [**TAB 22**].
[121] *Re Abitibibowater Inc*, 2009 QCCS 6463, 2009 CarswellQue 14221 at para 24 [**TAB 23**].

ahead of all other stakeholders (subordinated only to an administration charge up to the maximum amount of $300,000.00).[122]

vi. Directive 067 Application

78. As noted above, on October 6, 2020, the AER issued a letter regarding 227's application pursuant to Directive 067 for the regulatory licenses required to own and operate the assets it was acquiring under to the Proposal (the "**Directive 067 Application**"). In its letter, the AER indicated that the Directive 067 Application was "incomplete" because AER was "not in a position to evaluate unreasonable risk in [the application] until the insolvency process is exhausted."[123] The AER also explicitly invited 227 to reapply in the future for the requisite licenses.

79. 227 notes that the AER's letter regarding the Directive 067 Application did not amount to a rejection or refusal of 227's Directive Application, and did not identify any concerns respecting 277 as a potential licensee. Instead, the AER's letter indicates that the AER will only be in a position to evaluate 227's Directive 067 Application after Bow River's "insolvency process is exhausted." Bow River's insolvency process will effectively be exhausted if the within vesting Application is granted, and accordingly, 227 submits that the AER's determination that 227's Directive 067 Application was incomplete in early October presents no obstacle to granting the relief sought in this Application. Although any AER decision respecting the Directive 067 Application is an entirely separate issue from the within Application, there is currently no indication that the AER will reject a Directive 067 Application brought by 227 in the future.

80. Further, 227 submits that the AER's statement that it would not be "in a position to evaluate" 227's Directive 067 Application until the within insolvency process is complete is somewhat baffling. When the AER made its decision that the Directive 067 Application was incomplete, it had before it all of the requisite information regarding 227 and the Proposal. The AER will not learn additional information about 227's suitability as a licensee, or about the potential risks or effects of the Proposal, as a result of the within

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[122] Interim Financing Order at para 10, Schedule "A": Interim Financing Term Sheet ss 9(a) and 16.
[123] Dumaine Affidavit at para 25, Exhibit "E".

Application. If the AER had concerns about 227 as a licensee, or about the Proposal, it could have made a decision to refuse 227's Directive 067's Application, or it could have responded substantively to raise such concerns with 227. Instead, the AER chose to vaguely deem the Directive 067 Application to be "incomplete" without identifying what, if anything, was required of 227 to complete the application.

81. Both as a matter of administrative law[124] and as a matter of fairness and transparency, the AER should have made a decision one way or another regarding the Directive 067 Application, or at least should have responded substantively to identify any specific concerns or additional information required. The AER's conduct amounts to an improper refusal to exercise administrative discretion, which has served only to obfuscate and confuse the within proceedings. 227 submits that if the AER intends to rely on its licensing power to influence or effectively prohibit transactions in the insolvency context, it is crucial that the AER act with decisiveness and transparency. Notably, in *Redwater*[125] and in other cases[126] where the AER has relied on its licensing power to influence or effectively prohibit transactions in the insolvency context, the AER was significantly more decisive and transparent when addressing the use of its licensing power.

82. In its October 6, 2020 letter, the AER expressly invited 227 to reapply for a license in the future. Given that the AER did not reject 227's Directive 067 Application, did not raise any specific concerns respecting the Proposal or 227 as a licensee, and will not learn anything new as a result of this Application, 227 submits that it would be unfair for the AER to refuse to grant a future Directive 067 Application solely on the basis that the SAVO has now been granted. While 227 recognizes that this Court is not the proper forum for considering the propriety of the AER's licensing decisions, 227 submits that the AER's previous conduct in this matter, including that the AER confirmed it is not questioning the integrity of 227's shareholders, makes it unlikely that the AER can properly refuse to grant a Directive 067 Application if one is applied for by 227 in the future.

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[124] Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Tomson Reuters Canada), at 5B.5 (a) [**TAB 24**].
[125] *Redwater SCC* at para 49 [**TAB 2**].
[126] *Re Sydco Energy Inc*, 2018 ABQB 75, 57 CBR (6th) 73 at paras 6 and 11-24 [**TAB 25**].

B. An Interim Injunction should be Granted to Enjoin Bow River from Transferring the Custody and Care of its Assets to a Third-Party Outside of an Approved Sales Transaction

83. If an injunction is not granted and Bow River transfers the assets that are subject to the Transaction to the custody and care of another party, such as the OWA, 227 will suffer irreparable harm.[127] Among other things:

(a) Bow River will cease operations in the absence of immediate cash injection as its forecast cash balance for the end of November 2020 is insufficient to support further business operations. The transfer of Bow River's assets to the OWA, instead of to the successful bidders, will jeopardize Bow River's ability to transfer the assets to those successful bidders and to maintain the operations of those assets to maximize or maintain their value;[128]

(b) in the absence of sales approval and vesting orders, 227's interim lender's charge is in jeopardy given Bow River's present cash flow constraints, as funds are not available from the sales proceeds to repay the interim financing to 227. 227 advanced the interim funds to Bow River based on the fact that the SISP was approved and would not have done so otherwise; and[129]

(c) even if the Transaction is complete, it does not in itself provide sufficient cash to enable Bow River to repay the Interim Financing advanced by 227.[130]

84. An injunction will be granted where it is just and equitable to do so.[131] The test for an injunction, including one of a prohibitive nature, requires satisfaction of the following elements: (a) is there a serious issue to be tried; (b) would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and (c) is the balance of convenience in favour of granting the interlocutory injunction or denying it?[132] The

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[127] Affidavit of Josh Woodlock sworn on October 14, 2020 [**Woodlock Affidavit**] at para 4.
[128] Woodlock Affidavit at para 4(a).
[129] Woodlock Affidavit at para 4(b).
[130] Woodlock Affidavit at para 4(c).
[131] *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, [2017] 1 SCR 824 at para 23 [***Google***] [**TAB 26**].
[132] *Google* at para 25, citing *RJR-Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [**TAB 26**].

standard to be met at the first stage of the test will be raised to "strong *prima facie* case" when the injunction sought is of a mandatory nature.[133] A strong *prima facie* case is one that is likely to succeed at trial.[134]

85. In the present circumstances, the applicable test at the first stage is whether there exists a serious issue to be tried. The injunction sought in this Application is prohibitive and interlocutory in nature, and seeks only to preserve the *status quo* to provide an opportunity for a determination of the approval of remaining transactions in the Proposal on their merits. The injunction sought in this instance does not amount to a final determination of the issues. In any event, the approval of the Transaction satisfies the threshold of a serious issue to be tried, as well as a strong *prima facie* case. There is nothing on the record to suggest that there are any deficiencies relating to the Transaction, other than its completion. To the contrary, both Bow River and the Monitor were satisfied that the Transaction resulted from successful bids in the SISP and supported the closing thereof. The record suggests that there is a serious issue to be tried with respect to the sale and vesting of assets under the Transaction, and 227 would have a strong *prima facie* case for success at trial.

86. 227 would suffer significant irreparable harm if the injunction is not granted. If the assets are transferred to the custody and care of a third-party outside of a court-approved sales transaction, it would likely be to the OWA, in which the transfer would not be made as a sale for consideration and there would be no recovery under the DIP Charge. Such transfer would not result in a cash injection to Bow River. Without the completion of the transactions set out in the Proposal, 227's DIP Charge is in jeopardy as it is clear that Bow River does not have sufficient funds to repay the Interim Financing. An interim injunction is necessary in the present circumstances to preserve the *status quo* and provide additional time for the Transaction to close.

C. A Sealing Order in respect of the Confidential Exhibits Should be Granted

87. The Confidential Exhibits to Robert Dumaine's Affidavit sworn on October 14, 2020 (the "**Dumaine Affidavit**") provide certain commercially sensitive information relating to 227

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[133] *R v Canadian Broadcasting Corp,* 2018 SCC 5, [2018] 1 SCR 196 at para 15 [**TAB 27**].
[134] *Modry v Alberta Health Services*, 2015 ABCA 265, 388 DLR (4th) 352 at para 37 [**TAB 28**].

or the assets that are subject to the Stalking Horse Bid.[135] The dissemination of the information set out in the Confidential Exhibits could adversely affect the SISP and any subsequent sales process that may be undertaken respecting Bow River's assets, and result in prejudice against the stakeholders' ability to recover value therefrom, as well as 227's ability to further participate in any such sales process.[136]

88. The test for granting a sealing order was set out by Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*.[137] A sealing order should be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[138]

89. The Confidential Exhibits contain commercially sensitive information of the Fleeing Horse and Black Creek assets and 227's own financial forecasts. If this information is disseminated, and should the Transaction fail to close, 227's ability to participate in any future further sales process as well as the integrity of any such further process would be put at risk. The information set out in the Confidential Exhibits is commercially sensitive during the pendency of an insolvency proceeding relating to Bow River given the potential of asset dispositions during such proceeding, and for some time thereafter as 227 seeks to carry on business thereafter.

90. The temporary sealing order sought for the Confidential Exhibits is the least restrictive and prejudicial alternative to prevent dissemination of commercially sensitive information

[135] Dumaine Affidavit at para 26.
[136] Dumaine Affidavit at para 27.
[137] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 [***Sierra Club***] [**TAB 29**].
[138] *Sierra Club* at para 53 [**TAB 29**].

relating to 227 and the Assets, and it is fair and just in the circumstances to restrict public access to the Confidential Exhibits.

V. CONCLUSION

91. The relief sought by 227 in its proposed form of SAVO and Sealing Order should be granted. The SISP and the Stalking Horse Bid have been approved by this Court. The AER and the OWA are estopped from raising objections related to the propriety thereto, and have not otherwise identified any issues regarding the implementation of the SISP. Furthermore, the criticisms asserted by the AER and the OWA are unfounded, as there is no legal requirement for insolvent oil and gas debtors' assets to be sold only in *en bloc* sales, and the Proposal is the best way to address Bow River's liabilities to the maximum extent possible, given the present dire market conditions. The positions taken by the AER and the OWA now have seriously jeopardized 227's rights and entitlements, all of which have been approved by this Honourable Court, as well as the chances of maximized recovery for any of Bow River's stakeholders.

VI. RELIEF REQUESTED

92. 227 respectfully requests that this Court grants an Order substantially in the form of the SAVO attached as Schedule "**B**" to its Application filed October 8, 2020, and an Order substantially in the form of the Sealing Order attached as Schedule "**B**" to its Application submitted for filing on October 15, 2020, providing for, *inter alia*, the following relief:

(a) declaring compliance with the SISP approved by the SISP Approval Order;

(b) declaring that the Stalking Horse Bid approved by this Court pursuant to the SISP Approval Order is a successful bid;

(c) directing Bow River to specifically perform its obligations under Transaction;

(d) directing that, upon completion of the performance of Bow River's obligations under the APA, the Assets (as defined in the APA) shall vest absolutely in the name of 227 or its nominee, free and clear of all interests, liens, charges, and encumbrances other than permitted encumbrances, on the terms set out in the APA;

(e) issuing an interim injunction to restrain Bow River from transferring the Assets (as defined in the APA) to any other party(ies);

(f) granting costs of this Application to 227 as against any party(ies) opposing it;

(g) sealing Confidential Exhibits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 19th day of October, 2020.

BORDEN LADNER GERVAIS LLP

Per: Matti Lemmens

VII. LIST OF AUTHORITIES AND OTHER ATTACHMENTS

TAB NO.	DOCUMENT DESCRIPTION
1.	*Companies Creditors' Arrangement Act*, RSC 1985, c C-36, as amended
2.	*Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, [2019] 1 SCR 150
3.	*Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379
4.	*9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10, 444 DLR (4th) 373
5.	*Re Nortel Networks Corp*, 2009 CarswellOnt 4467, 55 CBR (5th) 229 (OntSCJ [Commercial List])
6.	*Re Sanjel Corp*, 2016 ABQB 257, 36 CBR (6th) 239
7.	*Royal Bank v Soundair Corp*, 1991 CarswellOnt 205, 83 DLR (4th) 76 (ONCA)
8.	*CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750, 90 CBR (5th) 74
9.	*Re Brainhunter Inc*, 2009 CarswellOnt 8207, 62 CBR (5th) 41 (OntSCJ [Commercial List])
10.	*Re Grant Forest Products Inc*, 2010 ONSC 1846, 67 CBR (5th) 258
11.	In the Matter of the Court Appointed Receivership of the Property of Traverse Energy Ltd., Court of Queen's Bench of Alberta Action No. 1901-16844, Order (SISP and Stalking Horse APA Approval) granted by the Honourable Justice P.R. Jeffrey on February 14, 2020
12.	In the Matter of the Court Appointed Receivership of the Property of Traverse Energy Ltd., Court of Queen's Bench of Alberta Action No. 1901-16844, Notice and Statement to Receiver dated December 12 2019
13.	In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 as amended, in the Matter of the *Business Corporations Act*, RSA 2000 c B-9, as amended, and In the Matter of the Plan of Compromise or Arrangement of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd., Court of Queen's Bench of Alberta Action No. 1901-05089, Order (Approval of SISP, Stalking Horse and Stay Extension) granted by the Honourable Madam Justice M.H, Hollins on May 9, 2019

TAB NO.	DOCUMENT DESCRIPTION
14.	In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 As Amended, and In the Matter of a Plan of Compromise or Arrangement of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd., Court of Queen's Bench of Alberta Action No. 1901-05089, Second Supplemental Report of The Monitor dated May 9, 2019
15.	In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 As Amended, and In the Matter of a Plan of Compromise or Arrangement of Strategic Oil & Gas Ltd. and Strategic Transmission Ltd., Court of Queen's Bench of Alberta Action No. 1901-05089, First Supplemental Report of The Monitor dated May 3, 2019
16.	*Erschbamer v Wallster*, 2013 BCCA 76, 356 DLR (4th) 634
17.	*Re Cliffs Over Maple Bay Investments Ltd*, 2011 BCCA 180, 77 CBR (5th) 1
18.	*Milner v Sostar*, 2013 ABCA 386, 566 AR 29
19.	*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460
20.	*Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855, 17 CBR (6th) 41
21.	*Re Concrete Equities Inc*, 2012 ABQB 19, 85 CBR (5th) 156
22.	*Re Lightstream Resources Ltd*, 2016 ABQB 665, 41 CBR (6th) 204
23.	*Re Abitibibowater Inc*, 2009 QCCS 6463, 2009 CarswellQue 14221
24.	Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Tomson Reuters Canada)
25.	*Re Sydco Energy Inc*, 2018 ABQB 75, 57 CBR (6th) 73
26.	*Google Inc v Equustek Solutions Inc*, 2017 SCC 34, [2017] 1 SCR 824
27.	*R v Canadian Broadcasting Corp,* 2018 SCC 5, [2018] 1 SCR 196
28.	*Modry v Alberta Health Services*, 2015 ABCA 265, 388 DLR (4th) 352

TAB NO.	DOCUMENT DESCRIPTION
29.	*Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522

Tab 1

18.2 [Repealed, 2005, c. 47, s. 131]

18.3 [Repealed, 2005, c. 47, s. 131]

18.4 [Repealed, 2005, c. 47, s. 131]

18.5 [Repealed, 2005, c. 47, s. 131]

PART III

General

Duty of Good Faith

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

1997, c. 12, s. 125; 2005, c. 47, s. 131; 2019, c. 29, s. 140.

Claims

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company

18.2 [Abrogé, 2005, ch. 47, art. 131]

18.3 [Abrogé, 2005, ch. 47, art. 131]

18.4 [Abrogé, 2005, ch. 47, art. 131]

18.5 [Abrogé, 2005, ch. 47, art. 131]

PARTIE III

Dispositions générales

Obligation d'agir de bonne foi

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

1997, ch. 12, art. 125; 2005, ch. 47, art. 131; 2019, ch. 29, art. 140.

Réclamations

Réclamations considérées dans le cadre des transactions ou arrangements

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de

offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269.

toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Autorisation de disposer des actifs en les libérant de restrictions

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

Restriction à l'égard de la propriété intellectuelle

(8) Si, à la date à laquelle une ordonnance est rendue à son égard sous le régime de la présente loi, la compagnie est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (6), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78; 2017, ch. 26, art. 14; 2018, ch. 27, art. 269.

Tab 2

Most Negative Treatment: Check subsequent history and related treatments.

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 SCC 5, 2019 CSC 5, [2019] 1 S.C.R. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury Branches) (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

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

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

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Richard James Fyfe, for Intervener, Attorney General of Saskatchewan
Robert Normey, Vivienne Ball, for Intervener, Attorney General of Alberta
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Christine Laing, Shaun Fluker, for Intervener, Action Surface Rights Association
Caireen E. Hanert, Adam Maerov, for Intervener, Canadian Association of Insolvency and Restructuring Professionals
Howard A. Gorman, Q.C., D. Aaron Stephenson, for Intervener, Canadian Bankers' Association

Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.7 Unsecured claims

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X.7.b Priority with respect to secured creditors
Bankruptcy and insolvency
XIV Administration of estate
XIV.2 Trustees
XIV.2.m Miscellaneous
Bankruptcy and insolvency
XIV Administration of estate
XIV.3 Trustee's possession of assets
XIV.3.d Miscellaneous
Natural resources
III Oil and gas
III.3 Constitutional issues
III.3.c Miscellaneous
Natural resources
III Oil and gas
III.8 Statutory regulation
III.8.a General principles

Headnote

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to secured creditors

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — "Disclaimer" did not empower trustee to simply walk away from "disclaimed" assets when bankrupt estate had been ordered to remedy any environmental condition or damage — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA.

Bankruptcy and insolvency --- Administration of estate — Trustees — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous

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Natural resources --- Oil and gas — Constitutional issues — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — Under either branch of paramountcy analysis, Alberta legislation authorizing Regulator's use of its disputed powers would be inoperative to extent that use of those powers during bankruptcy altered or reordered priorities established by BIA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Natural resources --- Oil and gas — Statutory regulation — General principles

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Faillite et insolvabilité --- Priorité des créances — Réclamations non garanties — Priorité par rapport aux créanciers garantis

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli

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la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Faillite et insolvabilité --- Administration de l'actif — Syndics — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Faillite et insolvabilité --- Administration de l'actif — Possession de l'actif par le syndic — Divers

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Ressources naturelles --- Pétrole et gaz — Questions d'ordre constitutionnel — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.

Ressources naturelles --- Pétrole et gaz — Réglementation statutaire — Principes généraux

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In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas, surface rights and a licence issued by the Alberta Energy Regulator. The Regulator administers the licensing scheme and enforces the abandonment and reclamation obligations of the licensees. The Regulator has delegated to the Orphan Wells Association (OWA) the authority to abandon and reclaim "orphans". On application by a creditor, G Ltd. was appointed receiver for R Corp. G Ltd. informed the Regulator that it was taking possession and control only of R Corp.'s 17 most productive wells, three associated facilities and 12 associated pipelines, and that it was not taking possession or control of any of R Corp.'s other licensed assets. The Regulator issued an order under the Oil and Gas Conservation Act (OGCA) and the Pipeline Act (PA) requiring R Corp. to suspend and abandon the renounced assets. The Regulator and the OWA filed an application for a declaration that G Ltd.'s renunciation of the renounced assets was void, an order requiring G Ltd. to comply with the abandonment orders and an order

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requiring G Ltd. to fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation of all of R Corp.'s licensed properties. G Ltd. brought a cross-application seeking approval to pursue a sales process excluding the renounced assets. A bankruptcy order was issued for R Corp. and G Ltd. was appointed as trustee. G Ltd. sent another letter to the Regulator invoking s. 14.06(4)(a)(ii) of the Bankruptcy and Insolvency Act (BIA) in relation to the renounced assets.

The chambers judge found an operational conflict between s. 14.06 of the BIA and the definition of "licensee" in the OGCA and the PA, and approved the proposed sale procedure. Appeals by the Regulator and the OWA were dismissed. The majority of the court stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the BIA. Section 14.06 of the BIA did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7). Section 14.06(4) of the BIA did not limit the power of the trustee to renounce properties to those circumstances where it might be exposed to personal liability. In terms of constitutional analysis, the majority concluded that the role of G Ltd. as a "licensee" under the OGCA and the PA was in operational conflict with the provisions of the BIA that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims. The dissenting judge would have allowed the appeal on the basis that there was no conflict between Alberta's environmental legislation and the BIA. The dissenting judge was of the view that s. 14.06 of the BIA did not operate to relieve G Ltd. of R Corp.'s obligations with respect to its licensed assets and that the Regulator was not asserting any provable claims, so the priority scheme in the BIA was not upended. The Regulator and the OWA appealed.

Held: The appeal was allowed.

Per Wagner C.J.C. (Abella, Karakatsanis, Gascon, Brown JJ. concurring): There is no conflict between Alberta's regulatory regime and the BIA requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although G Ltd. remained fully protected from personal liability by federal law, it could not walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4) of the BIA. Section 14.06(4) of the BIA was clear and unambiguous when read on its own. There was no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) of the BIA as encompassing the liability of the bankrupt estate. "Disclaimer" did not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate had been ordered to remedy any environmental condition or damage. The operational conflicts between the BIA and the Alberta legislation alleged by G Ltd. arose from its status as a "licensee" under the OGCA and the PA. In light of the proper interpretation of s. 14.06(4) of the BIA, no operational conflict was caused by the fact that, under Alberta law, G Ltd. as "licensee" remained responsible for abandoning the renounced assets utilizing the remaining assets of the estate. The burden was on G Ltd. to establish the specific purposes of ss. 14.06(2) and 14.06(4) of the BIA if it wished to demonstrate a conflict. Based on the plain wording of the sections and the Hansard evidence, it was evident that the purpose of these provisions was to protect trustees from personal liability in respect of environmental matters affecting the estates they were administering. This purpose was not frustrated by the inclusion of trustees in the definition of "licensee" in the OGCA and the PA.

Under either branch of the paramountcy analysis, the Alberta legislation authorizing the Regulator's use of its disputed powers would be inoperative to the extent that the use of those powers during bankruptcy altered or reordered the priorities established by the BIA. Only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In the test set out in a 2012 Supreme Court case, the court clearly stated that not all environmental obligations enforced by a regulator would be claims provable in bankruptcy. On a proper understanding of the "creditor" step, it was clear that the Regulator acted in the public interest and for the public good and that it was not a creditor of R Corp. No fairness concerns were raised by disregarding the Regulator's concession. The end-of-life obligations binding on G Ltd. were not claims provable in the R Corp. bankruptcy, so they did not conflict with the general priority scheme in the BIA. Requiring R Corp. to pay for abandonment before distributing value to creditors did not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the BIA, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Per Côté J. (dissenting) (Moldaver J. concurring): The appeal should be dismissed. Two aspects of Alberta's regulatory regime conflict with the BIA. First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition was that insolvency professionals were subject to the same obligations and liabilities as R Corp. itself, including the obligation to comply with the abandonment orders and the risk of personal liability for failing to do so. G Ltd. validly disclaimed the non-producing assets and the result was that it was no longer subject to the

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environmental liabilities associated with those assets. Because Alberta's statutory regime did not recognize these disclaimers as lawful, there was an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should be held inoperable to the extent that it did not recognize the legal effect of G Ltd.'s disclaimers. Section 14.06 of the BIA, when read as a whole, indicated that s. 14.06(4) did more than merely protect trustees from personal liability. Parliament did not make the disclaimer power in s. 14.06(4) of the BIA conditional on the availability of the Crown's super priority. There was an operational conflict to the extent that Alberta's statutory regime held receivers and trustees liable as "licensees" in relation to disclaimed assets.

Second, the Regulator has required that G Ltd. satisfy R Corp.'s environmental liabilities ahead of the estate's other debts, which contravened the BIA's priority scheme. Because the abandonment orders were "claims provable in bankruptcy" under the three-part test outlined in the 2012 Supreme Court of Canada case, the Regulator could not assert those claims outside of the bankruptcy process. To do so would frustrate an essential purpose of the BIA of distributing the estate's value in accordance with the statutory priority scheme. Nor could the Regulator achieve the same result indirectly by imposing conditions on the sale of R Corp.'s valuable assets. The province's licensing scheme effectively operated as a debt collection mechanism in relation to a bankrupt company. It should be held inoperative as applied to R Corp. under the second prong of the paramountcy test, frustration of purpose. G Ltd. and the creditor had satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. The Court should continue to apply the "creditor" prong of the test as it was clearly articulated in the 2012 Supreme Court of Canada decision. Under that standard, the Regulator plainly acted as a creditor with respect to the R Corp. estate. It was sufficiently certain that either the Regulator or the OWA would ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement.

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et d'un permis délivré par un organisme de réglementation, l'Alberta Energy Regulator. Cet organisme administre le régime de délivrance de permis et s'assure du respect des engagements d'abandon et de remise en état des titulaires de permis. L'organisme a délégué une association de puits orphelins, l'Orphan Wells Association, le pouvoir d'abandonner et de remettre en état les « orphelins ». À la demande d'un créancier, G Ltd. a été nommé séquestre de R Corp. G Ltd. a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de R Corp., ainsi que de trois installations et de 12 pipelines connexes, et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de R Corp. visés par des permis. L'organisme de réglementation a rendu une ordonnance en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) enjoignant à R Corp. de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner. L'organisme de réglementation et l'association ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par G Ltd. des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant G Ltd. à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à G Ltd. de remplir les obligations légales en tant que titulaire de permis concernant l'abandon, la remise en état et la décontamination de tous les biens de R Corp. visés par des permis. G Ltd. a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. Une ordonnance de faillite a été rendue à l'égard de R Corp., et G Ltd. a été nommé syndic. G Ltd. a envoyé une autre lettre à l'organisme de réglementation dans laquelle il invoquait l'art. 14.06(4)a)(ii) de la Loi sur la faillite et l'insolvabilité (LFI) à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en son cabinet a conclu à un conflit d'application entre l'art. 14.06 de la LFI et la définition de « titulaire de permis » que l'on trouve dans l'OGCA et la PA et a approuvé la procédure de vente proposée. Les appels interjetés par l'organisme de réglementation et l'association ont été rejetés. Les juges majoritaires de la cour ont déclaré que les questions constitutionnelles soulevées dans les appels étaient complémentaires à la question principale, soit l'interprétation de la LFI. L'article 14.06 de la LFI n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7). L'article 14.06(4) de la LFI n'a pas limité le pouvoir du syndic de renoncer aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle. Sur le plan de l'analyse constitutionnelle, les juges majoritaires ont conclu que le rôle de G Ltd. en tant que « titulaire de permis » au sens de l'OGCA et de la PA était en conflit d'application avec les dispositions de la LFI qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales. La juge dissidente aurait accueilli l'appel au motif qu'il n'y avait aucun conflit entre la législation albertaine sur l'environnement et la LFI. La juge dissidente était d'avis que l'art. 14.06 de la LFI n'a pas eu pour effet de libérer G Ltd. des obligations de R Corp. à l'égard de ses

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biens visés par des permis et que l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la LFI n'était pas renversé. L'organisme de réglementation et l'association ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C. (Abella, Karakatsanis, Gascon, Brown, JJ., souscrivant à son opinion) : Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que G Ltd. demeurait entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du failli en invoquant l'art. 14.06(4) de la LFI. À la simple lecture de ses termes, l'art. 14.06(4) était clair et sans équivoque. Il n'y avait aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant à l'art. 14.06(4) de la LFI visaient la responsabilité de l'actif du failli. La « renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement. Les conflits d'application entre la LFI et la législation albertaine allégués par G Ltd. résultaient de sa qualité de « titulaire de permis » au sens de l'OGCA et de la PA. Vu l'interprétation qu'il convenait de donner à l'art. 14.06(4) de la LFI, aucun conflit d'application n'était imputable au fait que, suivant le droit albertain, G Ltd. demeurait, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif. Il incombait à G Ltd. d'établir les objectifs précis des art. 14.06(2) et (4) s'il souhaitait démontrer qu'il y avait conflit. Compte tenu du libellé clair des art. 14.06(2) et (4) et des débats parlementaires, l'objectif de ces dispositions était manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent. Cet objectif n'a pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'OGCA et la PA.

Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI. On doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient toujours l'actif. Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp. Aucune préoccupation n'a été soulevée en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation. Les obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI. Obliger R Corp. à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbait pas le régime de priorité établi dans la LFI. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Côté, J. (dissidente) (Moldaver, J., souscrivant à son opinion) : Le pourvoi devrait être rejeté. Deux aspects du régime de réglementation albertain entraient en conflit avec la LFI. D'abord, les lois albertaines qui règlementent l'industrie pétrolière et gazière précisent que le terme « titulaire de permis » vise les séquestres et syndics de faillite. Cette définition avait pour effet d'assujettir les professionnels de l'insolvabilité aux mêmes obligations et responsabilités que R Corp. elle-même, notamment l'obligation de se conformer aux ordonnances d'abandon et le risque d'engager sa responsabilité personnelle pour ne pas l'avoir fait. G Ltd. ayant valablement renoncé aux biens inexploités, il n'était donc plus assujetti aux engagements environnementaux liés à ces biens. Étant donné que le régime législatif albertain ne reconnaissait pas la légalité de ces renonciations, il y avait un conflit d'application inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaissait pas l'effet juridique des renonciations de G Ltd. Lu dans son ensemble, l'art. 14.06 indiquait que l'art. 14.06(4) ne se bornait pas à dégager les syndics de toute responsabilité personnelle. Le Parlement n'a pas rendu le pouvoir de renonciation prévu à l'art. 14.06(4) conditionnel à la possibilité pour la Couronne de se prévaloir de sa superpriorité. Il y avait un conflit d'application dans la mesure où le régime législatif albertain tenait les séquestres et les syndics responsables en tant que « titulaires de permis » relativement aux biens faisant l'objet d'une renonciation.

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Ensuite, l'organisme de réglementation a exigé que G Ltd. acquitte les engagements environnementaux de R Corp. avant les autres dettes de l'actif, ce qui contrevenait au régime de priorité établi par la LFI. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour suprême du Canada dans une décision rendue en 2012, l'organisme de réglementation ne pouvait faire valoir ces réclamations en dehors du processus de faillite. Agir ainsi entraverait la réalisation d'un objet essentiel de la LFI : le partage de la valeur de l'actif conformément au régime de priorités établi par la loi. L'organisme de réglementation ne pouvait pas non plus atteindre indirectement le même résultat en imposant des conditions à la vente des biens de valeur de R Corp. Le régime provincial de délivrance de permis servait en fait de mécanisme de recouvrement de créances à l'endroit d'une société en faillite. Il devrait être déclaré inopérant en ce qui concernait R Corp., suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. G Ltd. et le créancier se sont acquittés de leur fardeau de démontrer qu'il existait une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance. La Cour devrait continuer d'appliquer l'analyse relative au « créancier » telle qu'elle a été clairement formulée dans la décision rendue en 2012 par la Cour suprême du Canada. Suivant ce critère, l'organisme de réglementation a clairement agi comme créancier relativement à l'actif de R Corp. Il était suffisamment certain que l'organisme de réglementation ou l'association effectuerait ultimement les travaux d'abandon et de remise en état et ferait valoir une réclamation pécuniaire afin d'obtenir un remboursement.

Table of Authorities

Cases considered by *Wagner C.J.C.*:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — followed

AbitibiBowater inc., Re (2010), 2010 QCCS 1261, 2010 CarswellQue 2812, 52 C.E.L.R. (3d) 17, 68 C.B.R. (5th) 1 (C.S. Que.) — considered

Alberta (Attorney General) v. Moloney (2015), 2015 SCC 51, 2015 CSC 51, 2015 CarswellAlta 2091, 2015 CarswellAlta 2092, [2015] 12 W.W.R. 1, 29 C.B.R. (6th) 173, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 476 N.R. 318, 85 M.V.R. (6th) 37, 22 Alta. L.R. (6th) 287, 391 D.L.R. (4th) 189, [2015] 3 S.C.R. 327, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 606 A.R. 123, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 652 W.A.C. 123 (S.C.C.) — distinguished

Alberta Energy Regulator v. Grant Thornton Limited (2017), 2017 ABCA 278, 2017 CarswellAlta 1568, 57 Alta. L.R. (6th) 37, 52 C.B.R. (6th) 1, 9 C.P.C. (8th) 238, [2018] 2 W.W.R. 639 (Alta. C.A.) — considered

Berkheiser v. Berkheiser (1957), [1957] S.C.R. 387, 7 D.L.R. (2d) 721, 1957 CarswellSask 60 (S.C.C.) — referred to

Canada (Attorney General) v. Law Society (British Columbia) (1982), [1982] 2 S.C.R. 307, 37 B.C.L.R. 145, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 43 N.R. 451, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1, 1982 CarswellBC 133, 1982 CarswellBC 743 (S.C.C.) — referred to

Canada Trustco Mortgage Co. v. R. (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, (sub nom. *Canada Trustco Mortgage Co. v. Canada)* 2005 D.T.C. 5523 (Eng.), (sub nom. *Hypothèques Trustco Canada v. Canada)* 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, (sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.)* 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — considered

Canadian Western Bank v. Alberta (2007), 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 49 C.C.L.I. (4th) 1, [2007] 8 W.W.R. 1, 362 N.R. 111, 75 Alta. L.R. (4th) 1, 281 D.L.R. (4th) 125, [2007] I.L.R. I-4622, 409 A.R. 207, 402 W.A.C. 207, [2007] 2 S.C.R. 3 (S.C.C.) — considered

Daishowa-Marubeni International Ltd. v. R. (2013), 2013 SCC 29, 2013 CarswellNat 1469, 2013 CarswellNat 1470, [2013] 4 C.T.C. 97, 357 D.L.R. (4th) 617, 2013 D.T.C. 5085 (Eng.), 2013 D.T.C. 5086 (Fr.), (sub nom. *Daishowa-Marubeni International Ltd. v. Minister of National Revenue)* 445 N.R. 73, (sub nom. *Daishowa-Marubeni International Ltd. v. Canada)* [2013] 2 S.C.R. 336 (S.C.C.) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 2006 SCC 35, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, 351 N.R. 326, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193, 215 O.A.C. 313, [2006] 2 S.C.R. 123 (S.C.C.) — considered

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Gardner v. Newton (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) — considered

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) — considered

Imperial Oil Ltd. v. Quebec (Minister of the Environment) (2003), 2003 SCC 58, 2003 CarswellQue 2315, 2003 CarswellQue 2316, 5 Admin. L.R. (4th) 1, 310 N.R. 343, 5 C.E.L.R. (3d) 38, 2003 CSC 58, 231 D.L.R. (4th) 577, [2003] 2 S.C.R. 624 (S.C.C.) — referred to

Lamford Forest Products Ltd., Re (1991), 10 C.B.R. (3d) 137, 8 C.E.L.R. (N.S.) 186, 63 B.C.L.R. (3d) 388, 86 D.L.R. (4th) 534, 1991 CarswellBC 443, 63 B.C.L.R. (2d) 388 (B.C. S.C.) — referred to

M. v. H. (1999), 171 D.L.R. (4th) 577, (sub nom. *M. v. H.)* 238 N.R. 179, 1999 CarswellOnt 1348, 1999 CarswellOnt 1349, (sub nom. *M. v. H.)* 62 C.R.R. (2d) 1, (sub nom. *M. v. H.)* 121 O.A.C. 1, 46 R.F.L. (4th) 32, (sub nom. *Attorney General for Ontario v. M. & H.)* 1999 C.E.B. & P.G.R. 8354 (headnote only), (sub nom. *M. v. H.)* [1999] 2 S.C.R. 3, 7 B.H.R.C. 489, 43 O.R. (3d) 254 (note) (S.C.C.) — referred to

Multiple Access Ltd. v. McCutcheon (1982), [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 128, 1982 CarswellOnt 738 (S.C.C.) — considered

New Skeena Forest Products Inc. v. Kitwanga Lumber Co. (2005), 2005 BCCA 154, 2005 CarswellBC 578, 9 C.B.R. (5th) 267, 39 B.C.L.R. (4th) 327, (sub nom. *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.)* 251 D.L.R. (4th) 328, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 210 B.C.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 348 W.A.C. 185 (B.C. C.A.) — referred to

Nortel Networks Corp., Re (2012), 2012 ONSC 1213, 2012 CarswellOnt 3153, 88 C.B.R. (5th) 111, 66 C.E.L.R. (3d) 310 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2013), 2013 ONCA 599, 2013 CarswellOnt 13651, 78 C.E.L.R. (3d) 43, 6 C.B.R. (6th) 159, 311 O.A.C. 101, 368 D.L.R. (4th) 122 (Ont. C.A.) — followed

Northstar Aerospace Inc., Re (2013), 2013 ONCA 600, 2013 CarswellOnt 13653, 8 C.B.R. (6th) 154 (Ont. C.A.) — distinguished

Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch) (2001), 2001 SCC 52, 2001 CarswellBC 1877, 2001 CarswellBC 1878, 93 B.C.L.R. (3d) 1, 274 N.R. 116, [2001] 10 W.W.R. 1, 204 D.L.R. (4th) 33, (sub nom. *Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.))* 155 B.C.A.C. 193, (sub nom. *Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.))* 254 W.A.C. 193, 34 Admin. L.R. (3d) 1, [2001] 2 S.C.R. 781 (S.C.C.) — referred to

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315, 1991 ABCA 181 (Alta. C.A.) — followed

Peters v. Remington (2004), 2004 ABCA 5, 2004 CarswellAlta 20, 20 Alta. L.R. (4th) 1, [2004] 3 W.W.R. 614, 339 A.R. 326, 312 W.A.C. 326, 49 C.B.R. (4th) 273 (Alta. C.A.) — considered

Quebec (Attorney General) v. Canadian Owners and Pilots Association (2010), 2010 SCC 39, 2010 CarswellQue 10212, 2010 CarswellQue 10213, 75 M.P.L.R. (4th) 113, (sub nom. *Laferrière v. Québec (Procureur Général))* 324 D.L.R. (4th) 692, 407 N.R. 102, [2010] 2 S.C.R. 536 (S.C.C.) — considered

R. v. Elshaw (1991), 7 C.R. (4th) 333, 128 N.R. 241, 67 C.C.C. (3d) 97, 59 B.C.L.R. (2d) 143, 6 C.R.R. (2d) 1, 3 B.C.A.C. 81, 7 W.A.C. 81, [1991] 3 S.C.R. 24, 1991 CarswellBC 215, 1991 CarswellBC 922 (S.C.C.) — considered

R. v. Sappier (2006), 2006 SCC 54, 2006 CarswellNB 676, 2006 CarswellNB 677, 50 R.P.R. (4th) 1, [2007] 1 C.N.L.R. 359, 274 D.L.R. (4th) 75, 355 N.R. 1, [2006] 2 S.C.R. 686, 214 C.C.C. (3d) 161, 309 N.B.R. (2d) 199, 799 A.P.R. 199 (S.C.C.) — referred to

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd. (2015), 2015 SCC 53, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, [2016] 1 W.W.R. 423, 391 D.L.R. (4th) 383, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 477 N.R. 26, [2015] 3 S.C.R. 419, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 467 Sask. R. 1, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 651 W.A.C. 1 (S.C.C.) — considered

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Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of) (2005), 2005 ABQB 559, 2005 CarswellAlta 1018, 13 C.B.R. (5th) 145, 256 D.L.R. (4th) 536, 12 M.P.L.R. (4th) 167, 47 Alta. L.R. (4th) 138, [2006] 3 W.W.R. 195, 386 A.R. 338 (Alta. Q.B.) — followed

Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of) (2005), 2005 ABQB 794, 2005 CarswellAlta 1558, 16 C.B.R. (5th) 88, 261 D.L.R. (4th) 221, 16 M.P.L.R. (4th) 263, 56 Alta. L.R. (4th) 354, 386 A.R. 350, [2006] 9 W.W.R. 363, 10 P.P.S.A.C. (3d) 107 (Alta. Q.B.) — considered

Cases considered by *Côté J.* (dissenting):

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — considered in a minority or dissenting opinion

Alberta (Attorney General) v. Moloney (2015), 2015 SCC 51, 2015 CSC 51, 2015 CarswellAlta 2091, 2015 CarswellAlta 2092, [2015] 12 W.W.R. 1, 29 C.B.R. (6th) 173, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 476 N.R. 318, 85 M.V.R. (6th) 37, 22 Alta. L.R. (6th) 287, 391 D.L.R. (4th) 189, [2015] 3 S.C.R. 327, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 606 A.R. 123, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 652 W.A.C. 123 (S.C.C.) — considered in a minority or dissenting opinion

Bank of Montreal v. Hall (1990), 9 P.P.S.A.C. 177, 46 B.L.R. 161, [1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361, 104 N.R. 110, [1990] 2 W.W.R. 193, 82 Sask. R. 120, 1990 CarswellSask 25, 1990 CarswellSask 405 (S.C.C.) — refered to in a minority or dissenting opinion

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559, 2002 CSC 42 (S.C.C.) — considered in a minority or dissenting opinion

Canadian Pacific Air Lines Ltd. v. C.A.L.P.A. (1993), 93 C.L.L.C. 14,062, 17 Admin. L.R. (2d) 141, 160 N.R. 321, [1993] 3 S.C.R. 724, 108 D.L.R. (4th) 1, 1993 CarswellNat 816, 1993 CarswellNat 1385 (S.C.C.) — considered in a minority or dissenting opinion

Canadian Western Bank v. Alberta (2007), 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 49 C.C.L.I. (4th) 1, [2007] 8 W.W.R. 1, 362 N.R. 111, 75 Alta. L.R. (4th) 1, 281 D.L.R. (4th) 125, [2007] I.L.R. I-4622, 409 A.R. 207, 402 W.A.C. 207, [2007] 2 S.C.R. 3 (S.C.C.) — refered to in a minority or dissenting opinion

Craig v. R. (2012), 2012 SCC 43, 2012 CarswellNat 2737, 2012 CarswellNat 2738, (sub nom. *Craig v. Canada)* 347 D.L.R. (4th) 385, [2012] 5 C.T.C. 205, (sub nom. *R. v. Craig)* 2012 D.T.C. 5115 (Eng.), (sub nom. *R. v. Craig)* 2012 D.T.C. 5116 (Fr.), (sub nom. *Minister of National Revenue v. Craig)* 433 N.R. 111, (sub nom. *Canada v. Craig)* [2012] 2 S.C.R. 489 (S.C.C.) — considered in a minority or dissenting opinion

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 2006 SCC 35, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, 351 N.R. 326, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193, 215 O.A.C. 313, [2006] 2 S.C.R. 123 (S.C.C.) — considered in a minority or dissenting opinion

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — refered to in a minority or dissenting opinion

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) — considered in a minority or dissenting opinion

J.T.I. MacDonald Corp. c. Canada (Procureure générale) (2007), 2007 SCC 30, 2007 CarswellQue 5573, 2007 CarswellQue 5574, 364 N.R. 89, 281 D.L.R. (4th) 589, (sub nom. *Canada (Attorney General) v. JTI-MacDonald Corp.)* 158 C.R.R. (2d) 127, [2007] 2 S.C.R. 610 (S.C.C.) — refered to in a minority or dissenting opinion

Mitchell v. Peguis Indian Band (1990), [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, 3 T.C.T. 5219, 67 Man. R. (2d) 81, 110 N.R. 241, [1990] 3 C.N.L.R. 46, 1990 CarswellMan 209, 1990 CarswellMan 380, [1990] 5 W.W.R. 97 (S.C.C.) — considered in a minority or dissenting opinion

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Multiple Access Ltd. v. McCutcheon (1982), [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 128, 1982 CarswellOnt 738 (S.C.C.) — considered in a minority or dissenting opinion

New Skeena Forest Products Inc. v. Kitwanga Lumber Co. (2005), 2005 BCCA 154, 2005 CarswellBC 578, 9 C.B.R. (5th) 267, 39 B.C.L.R. (4th) 327, (sub nom. *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.)* 251 D.L.R. (4th) 328, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 210 B.C.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 348 W.A.C. 185 (B.C. C.A.) — refered to in a minority or dissenting opinion

Nortel Networks Corp., Re (2013), 2013 ONCA 599, 2013 CarswellOnt 13651, 78 C.E.L.R. (3d) 43, 6 C.B.R. (6th) 159, 311 O.A.C. 101, 368 D.L.R. (4th) 122 (Ont. C.A.) — considered in a minority or dissenting opinion

Northstar Aerospace Inc., Re (2013), 2013 ONCA 600, 2013 CarswellOnt 13653, 8 C.B.R. (6th) 154 (Ont. C.A.) — considered in a minority or dissenting opinion

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315, 1991 ABCA 181 (Alta. C.A.) — refered to in a minority or dissenting opinion

Québec (Procureur général) c. Carrières Ste-Thérèse ltée (1985), 13 Admin. L.R. 144, (sub nom. *Quebec v. Carrières Ste-Thérèse Ltée)* 59 N.R. 391, (sub nom. *Attorney General of Québec v. Carrières Ste-Thérèse Ltée)* 20 C.C.C. (3d) 408, (sub nom. *Attorney General of Québec v. Carrières Ste-Thérèse Ltée)* 20 D.L.R. (4th) 602, [1985] 1 S.C.R. 831, 1985 CarswellQue 85, 1985 CarswellQue 109 (S.C.C.) — considered in a minority or dissenting opinion

R. v. H. (L.) (2008), 2008 SCC 49, 2008 CarswellNS 454, 2008 CarswellNS 455, (sub nom. *R. v. H. (L.T.))* 234 C.C.C. (3d) 301, 59 C.R. (6th) 1, (sub nom. *R. v. H. (L.T.))* 297 D.L.R. (4th) 1, (sub nom. *R. v. L.T.H.)* 379 N.R. 247, (sub nom. *R. v. L.T.H.)* 268 N.S.R. (2d) 200, (sub nom. *R. v. L.T.H.)* 857 A.P.R. 200, (sub nom. *R. v. L.T.H.)* [2008] 2 S.C.R. 739, (sub nom. *R. v. H. (L.T.))* 179 C.R.R. (2d) 279 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Morgentaler (1975), [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 4 N.R. 277, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, 1975 CarswellQue 3, 1975 CarswellQue 31F (S.C.C.) — considered in a minority or dissenting opinion

Reference re Pan-Canadian Securities Regulation (2018), 2018 SCC 48, 2018 CSC 48, 2018 CarswellQue 9836, 2018 CarswellQue 9837, 41 Admin. L.R. (6th) 1, 428 D.L.R. (4th) 68, [2018] 3 S.C.R. 189 (S.C.C.) — refered to in a minority or dissenting opinion

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — considered in a minority or dissenting opinion

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd. (2015), 2015 SCC 53, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, [2016] 1 W.W.R. 423, 391 D.L.R. (4th) 383, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 477 N.R. 26, [2015] 3 S.C.R. 419, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 467 Sask. R. 1, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 651 W.A.C. 1 (S.C.C.) — refered to in a minority or dissenting opinion

Sydco Energy Inc (Re) (2018), 2018 ABQB 75, 2018 CarswellAlta 157, 64 Alta. L.R. (6th) 156, 57 C.B.R. (6th) 73 (Alta. Q.B.) — refered to in a minority or dissenting opinion

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — refered to in a minority or dissenting opinion

Teva Canada Ltd. v. TD Canada Trust (2017), 2017 SCC 51, 2017 CSC 51, 2017 CarswellOnt 16542, 2017 CarswellOnt 16543, 415 D.L.R. (4th) 1, 42 C.C.L.T. (4th) 213, 72 B.L.R. (5th) 1, [2017] 2 S.C.R. 317 (S.C.C.) — considered in a minority or dissenting opinion

Thomson Knitting Co., Re (1925), 5 C.B.R. 489, 56 O.L.R. 625, [1925] 2 D.L.R. 1007, 1925 CarswellOnt 5 (Ont. C.A.) — refered to in a minority or dissenting opinion

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Statutes considered by *Wagner C.J.C.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "claim provable in bankruptcy, provable claim or claim provable" — considered

s. 2 "creditor" — considered

s. 14.06 [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(1.2) [en. 2005, c. 47, s. 17] — considered

s. 14.06(2) [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(4) [en. 1997, c. 12, s. 15] — considered

s. 14.06(4)(a)(ii) [en. 1997, c. 12, s. 15] — considered

s. 14.06(4)(c) [en. 1997, c. 12, s. 15] — referred to

s. 14.06(4)-14.06(8) [en. 1997, c. 12, s. 15] — referred to

s. 14.06(7) [en. 1997, c. 12, s. 15] — considered

s. 14.06(8) [en. 1997, c. 12, s. 15] — considered

s. 20 — referred to

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.3(2) [en. 1992, c. 27, s. 36(1)] — considered

s. 72(1) — considered

s. 80 — referred to

s. 121(1) — considered

s. 121(2) — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

s. 136(1) — considered

s. 141 — considered

s. 197(3) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 21 — considered

s. 92 ¶ 13 — considered

s. 92A(1)(c) — considered

Environmental Protection Act, S.N. 2002, c. E-14.2

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Generally — referred to

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

Generally — referred to

s. 1(ddd) "reclamation" — considered

ss. 112-122 — referred to

s. 134(b) "operator" — considered

s. 134(b) "operator" (vi) — considered

s. 137 — considered

s. 140 — considered

s. 142(1)(a)(ii) — considered

ss. 227-230 — referred to

s. 240 — referred to

s. 240(3) — referred to

s. 245 — referred to

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

Generally — referred to

s. 1(1)(a) "abandonment" — considered

s. 1(1)(w) "facility" — considered

s. 1(1)(cc) "licensee" — considered

s. 1(1)(eee) "well" — considered

s. 11(1) — considered

s. 12(1) — considered

s. 18(1) — referred to

s. 24(2) — referred to

s. 25 — referred to

s. 27(3) — considered

ss. 27-30 — referred to

s. 30(5) — referred to

s. 30(6) — referred to

s. 68(d) "facility" — considered

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s. 70(1) — considered

s. 70(2)(a) — considered

s. 73(1) — referred to

s. 73(2) — referred to

s. 106 — referred to

s. 106(3)(a) — referred to

s. 106(3)(b) — referred to

s. 106(3)(c) — referred to

s. 106(3)(d) — referred to

s. 106(3)(e) — referred to

s. 108 — referred to

s. 110 — referred to

Pipeline Act, R.S.A. 2000, c. P-15

Generally — referred to

s. 1(1)(a) "abandonment" — considered

s. 1(1)(n) "licensee" — considered

s. 1(1)(t) "pipeline" — considered

s. 6(1) — referred to

s. 9(1) — referred to

s. 23 — considered

ss. 23-26 — referred to

ss. 51-54 — referred to

Responsible Energy Development Act, S.A. 2012, c. R-17.3

s. 2(1)(a) — considered

s. 2(2)(h) — referred to

s. 3(1) — referred to

s. 28 — referred to

s. 29 — referred to

Surface Rights Act, R.S.A. 2000, c. S-24

s. 1(h) "operator" — considered

s. 15 — considered

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Statutes considered by *Côté J.* (dissenting):

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 14.06 [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(2) [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(4) [en. 1997, c. 12, s. 15] — considered

s. 14.06(5) [en. 1997, c. 12, s. 15] — considered

s. 14.06(6) [en. 1997, c. 12, s. 15] — considered

s. 14.06(7) [en. 1997, c. 12, s. 15] — considered

ss. 16-38 — referred to

s. 20(1) — considered

s. 40 — referred to

s. 72(1) — considered

ss. 121-154 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 11.8(8) [en. 1997, c. 12, s. 124] — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

s. 91 ¶ 21 — considered

Environmental Protection Act, S.N. 2002, c. E-14.2

Generally — referred to

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

Generally — referred to

s. 240(3) — considered

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

Generally — referred to

s. 1(1)(cc) "licensee" — considered

s. 27 — referred to

s. 29 — referred to

s. 30 — referred to

s. 30(5) — referred to

s. 70(1)(a)(ii) — referred to

s. 70(2) — considered

s. 74 — referred to

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s. 108 — referred to

s. 110(1) — referred to

Pipeline Act, R.S.A. 2000, c. P-15

Generally — referred to

s. 1(1)(n) "licensee" — considered

s. 23 — referred to

s. 25 — referred to

s. 52(2) — referred to

s. 54(1) — referred to

Rules considered by *Wagner C.J.C.*:

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

Generally — referred to

Oil and Gas Conservation Rules, Alta. Reg. 151/71

R. 3.012 — referred to

R. 3.012(d) — considered

Rules considered by *Côté J.* (dissenting):

Oil and Gas Conservation Rules, Alta. Reg. 151/71

R. 1.100(2) — referred to

R. 3.012 — referred to

Treaties considered by *Wagner C.J.C.*:

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612

Generally — referred to

Treaties considered by *Côté J.* (dissenting):

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612

Generally — referred to

Regulations considered by *Wagner C.J.C.*:

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

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

Generally — referred to

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

Orphan Fund Delegated Administration Regulation, Alta. Reg. 45/2001

Generally — referred to

Regulations considered by *Côté J.* (dissenting):

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

Orphan Fund Delegated Administration Regulation, Alta. Reg. 45/2001

Generally — referred to

s. 3(2)(b) — considered

s. 6 — considered

Authorities considered:

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

Generally — referred to

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

Generally — referred to

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

Generally — referred to

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

p. 482 — referred to

p. 528 — referred to

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

Para. 197 — considered

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

p. 15 — considered

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

Para.. 198 — referred to

pp. 15-6 — referred to

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

p. 200 — referred to

p. 202 — referred to

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

p. 4-19 — referred to

Grand Robert de la langue francaise (Paris: Le Robert, 2001)

"és" — referred to

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

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p. 1387 — referred to

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

p. 178 — referred to

*Oxford English Dictionary*online: http://www.oed.com/view/Entry/151694?redirectedFrom=probably#eid)

"probably" — referred to

Robert & Collins (online: https://grc.bvdep.com/login_.asp)

"ès qualités" — referred to

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

Generally — referred to

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

p. 39 — referred to

p. 189 — referred to

p. 193 — referred to

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

p. 43 — referred to

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

p. 337 — referred to

Words and phrases considered:

facility

A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (*OGCA*[Oil and Gas Conservation Act, R.S.A. 2000, c. O-6], s. 1(1)(w)).

operator

. . . an "operator", that is, the person having the right to a mineral or the right to work it (*Surface Rights Act*, R.S.A. 2000, c. S-24, ss. 1(h) and 15).

orphans

. . . "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings.

profit à prendre

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Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.)).

Termes et locutions cités:

exploitant

[Un] « exploitant » [est] la personne qui a droit à une substance minérale ou le droit de la travailler (*Surface Rights Act*, R.S.A. 2000, c. S-24, al. 1(h) et art. 15).

installation

L'« installation » est définie au sens large et englobe tous les bâtiments, structures, installations et matériaux qui sont liés ou associés à la récupération, à la mise en valeur, à la production, à la manutention, au traitement ou à l'élimination de ressources pétrolières et gazières ([*Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6], art. 1(1)(w)).

orphelins

[L]es « orphelins » [sont] les biens pétroliers et gaziers ainsi que leurs sites délaissés sans que les processus en question n'aient été correctement effectués par les sociétés liquidées à la fin de leur procédure d'insolvabilité.

profit à prendre

Les tribunaux canadiens qualifient le bail d'exploitation minière permettant à une société d'exploiter des ressources pétrolières et gazières de profit à prendre. Il n'est pas contesté qu'un profit à prendre constitue une forme d'intérêt détenue par la société sur un bien réel (*Berkheiser c. Berkheiser*, [1957] R.C.S. 387).

APPEAL from judgment reported at *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), dismissing appeal from judgment dismissing application for declaration that trustee-in-bankruptcy's disclaimer of licensed wells was void and granting cross-application for approval of sales process that excluded renounced wells.

POURVOI formé à l'encontre d'une décision publiée à *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant rejeté une demande visant à faire déclarer que la renonciation du syndic de faillite à des puits autorisés était nulle et ayant accueilli une demande reconventionnelle visant à obtenir l'approbation d'un processus de vente qui excluait les puits ayant fait l'objet d'une renonciation.

Wagner C.J.C. **(Abella, Karakatsanis, Gascon, Brown JJ. concurring):**

I. Introduction

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

2 The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the *Bankruptcy and Insolvency Act*,

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R.S.C. 1985, c. B-3 ("*BIA*"). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

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

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

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

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

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

II. Background

A. Alberta's Regulatory Regime

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

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9 In order to exploit oil and gas resources in Alberta, a company needs three things: a property interest in the oil or gas, surface rights and a licence issued by the Regulator. In Alberta, mineral rights are typically reserved from ownership rights in land. About 90 percent of Alberta's mineral rights are held by the Crown on behalf of the public.

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

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

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

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

14 The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. The Regulator is not an agent of the Crown. It is established as a corporation by s. 3(1) of the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 ("*REDA*"). It exercises a wide range of powers under the *OGCA* and the *Pipeline Act*. It also acts as the regulator in respect of energy resource activities under the *EPEA*, Alberta's more general environmental protection legislation (*REDA*, s. 2(2)(h)). The Regulator's mandate is set out in the *REDA* and includes "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates, and it collects its budget through an administration fee (Stewart, at p. 219; *REDA*, ss. 28 and 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

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

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16 "Abandonment" refers to "the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules" made by the Regulator (*OGCA*, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as "the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe" (*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45 (Alta. C.A.) ("*Northern Badger*"), at para. 2). The abandonment of a pipeline refers to its "permanent deactivation ... in the manner prescribed by the rules" (*Pipeline Act*, s. 1(1)(a)). "Reclamation" includes "the removal of equipment or buildings", "the decontamination of buildings ... land or water", and the "stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land" (*EPEA*, s. 1(ddd)). A further duty binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (*EPEA*, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.

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

18 The Licensee Liability Rating Program, which was, at the time of Redwater's insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12, 2013) ("Directive 006") is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees rather than being offloaded onto the Alberta public. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package, without any segregation or parcelling of assets. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio (1.0 at the time of Redwater's insolvency), the licensee is required to pay a security deposit. The security deposit is added to the licensee's "deemed assets" and must bring its LMR back up to the ratio prescribed by the Regulator. If the required security deposit is not paid, the Regulator may cancel or suspend the company's licences (*OGCA*, s. 25). As an alternative to posting security, the licensee can perform end-of-life obligations or transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

19 Licences can be transferred only with the Regulator's approval. The Regulator uses the Licensee Liability Rating Program to ensure that end-of-life obligations will not be negatively affected by licence transfers. Upon receipt of an application to transfer one or more licences, the Regulator assesses how the transfer, if approved, would affect the LMR of both the transferor and the transferee. At the time of Redwater's insolvency, if both the transferor and the transferee would have a post-transfer LMR equal to or exceeding 1.0, the Regulator would approve the transfer, absent other concerns. Following the chambers judge's decision in this case, the Regulator implemented changes to its policies, including the requirement that transferees have an LMR of 2.0 or higher immediately following any licence transfer: Alberta Energy Regulator, *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (online). For the purposes of this appeal, I will be referring to the regulatory regime as it existed at the time of Redwater's insolvency.

20 As discussed in greater detail below, if either the transferor or the transferee would have a post-transfer LMR below 1.0, the Regulator would refuse to approve the licence transfer. In such a situation, the Regulator would insist on certain remedial steps being taken to ensure that neither LMR would drop below 1.0. Although Directive 006, as it was in the 2013 version,

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required both the transferee and transferor to have a post transfer LMR of at least 1.0, during this litigation, the Regulator stated that, when licensees are in receivership or bankruptcy, its working rule is to approve transfers as long as they do not cause a deterioration in the transferor's LMR, even where its LMR will remain below 1.0 following the transfer. The explanation for this working rule is that it helps to facilitate purchases. The Regulator's position is that the Licensee Liability Rating Program continues to apply to the transfer of licences as part of insolvency proceedings.

21 The *OGCA*, the *Pipeline Act* and the *EPEA* all contemplate that a licensee's regulatory obligations will continue to be fulfilled when it is subject to insolvency proceedings. The *EPEA* achieves this by including the trustee of a licensee in the definition of "operator" for the purposes of the duty to reclaim (s. 134(b)(vi)). The *EPEA* also specifically provides that an order to perform reclamation work (known as an "environmental protection order") may be issued to a trustee (ss. 140 and 142(1)(a)(ii)). The *EPEA* imposes responsibility for carrying out the terms of an environmental protection order on the person to whom the order is directed (ss. 240 and 245). However, absent gross negligence or wilful misconduct, a trustee's liability in relation to such an order is expressly limited to the value of the assets in the bankrupt estate (s. 240(3)). The *OGCA* and the *Pipeline Act* take a more generic approach to applying the various obligations of licensees to trustees in the insolvency context: they simply include trustees in the definition of "licensee" (*OGCA*, s. 1(1)(cc); *Pipeline Act*, s. 1(1)(n)). As a result, every power which these Acts give the Regulator against a licensee can theoretically also be exercised against a trustee.

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

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

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

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

26 A licensee that contravenes or fails to comply with an order of the Regulator, or that has an outstanding debt to the Regulator in respect of abandonment or reclamation costs, is subject to a number of potential enforcement measures. The Regulator may suspend operations, refuse to consider licence applications or licence transfer applications (*OGCA*, s. 106(3)(a), (b) and (c)), or require the payment of security deposits, generally or as a condition of granting any further licences, approvals or transfers (*OGCA*, s. 106(3)(d) and (e)). Where a licensee contravenes the Act, regulations or rules, any order or direction of the Regulator,

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or any condition of a licence, the Regulator may prosecute the licensee for a regulatory offence and a fine may be imposed as a penalty, although the licensee can raise a due diligence defence (*OGCA*, ss. 108 and 110). A similar scheme applies with respect to pipelines (*Pipeline Act*, ss. 51 to 54) and the *EPEA* contains similar debt-creating provisions with respect to environmental protection orders. The *EPEA* also provides for the prosecution of regulatory offences in cases of non-compliance, with an available due diligence defence. However, as noted, a trustee's liability in relation to environmental protection orders is capped at estate assets, unless the trustee is guilty of gross negligence or wilful misconduct (*EPEA*, ss. 227 to 230, 240 and 245).

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

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

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

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

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

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B. The Relevant Provisions of the BIA

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

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

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

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

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

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

36 A claim may be provable in a bankruptcy proceeding even if it is a contingent claim. A "contingent claim is 'a claim which may or may not ever ripen into a debt, according as some future event does or does not happen'" (*Peters v. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273 (Alta. C.A.), at para. 23, quoting *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.) , at p. 281). Sections 121(2) and 135(1.1) provide guidance on when a contingent claim will be a provable claim:

> **121 (2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> . . . . .
>
> **135 (1.1)** The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

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

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

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

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

40 The *BIA* establishes a comprehensive priority scheme for the satisfaction of the provable claims asserted against the bankrupt in the collective proceeding. Section 141 sets out the general rule, which is that all creditors rank equally and share rateably in the bankrupt's assets. However, the rule set out in s. 141 applies "[s]ubject to [the *BIA*]". Section 136(1) lists the claims of preferred creditors and the order of priority for their payment. It also states that this order of priority is "[s]ubject to the rights of secured creditors". Under s. 69.3(2), the stay of proceedings does not prevent secured creditors from realizing their

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security interest. The *BIA* therefore sets out a priority scheme for paying claims provable in bankruptcy, with secured creditors being paid first, preferred creditors second and unsecured creditors last (see *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at paras. 32-35).

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

42 Section 14.06(2) reads as follows:

> **(2)** Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred
>
> (a) before the trustee's appointment; or
>
> (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

43 Section 14.06(4) reads as follows:

> **(4)** Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,
>
> (a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee
>
> (i) complies with the order, or
>
> (ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;
>
> (b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by
>
> (i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or
>
> (ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or
>
> (c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

44 As I will discuss, a main point of contention between the parties is the very different interpretations they ascribe to s. 14.06(4) of the *BIA*. I note that s. 14.06(4)(a)(ii), which is relied upon by GTL, refers to a trustee who "abandons, disposes of or otherwise releases any interest in any real property". The word "disclaim" is used in these reasons, as it has been throughout this litigation, as a shorthand for these terms.

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

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C. The Events of the Redwater Bankruptcy

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

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

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

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

50 In its Second Report to the Alberta Court of Queen's Bench dated October 3, 2015, GTL explained why it had concluded that it could not meet the Regulator's requirements. GTL had concluded that the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. It viewed a sale of the non-producing wells — even if bundled with producing wells — as unlikely. If such a sale were possible, the purchase price would be reduced by the end-of-life obligations, negating the benefit to the estate. Based on this assessment, by letter dated July 3, 2015, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells (including a leaking well that was subsequently abandoned), 3 associated facilities and 12 associated pipelines ("Retained Assets"), and that, pursuant to para. 3(a) of the Receivership Order, it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets.

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

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Redwater through the use of s. 106 of the *OGCA*. The Regulator further stated that, once abandonment had taken place, the surface would need to be reclaimed and reclamation certificates obtained in accordance with s. 137 of the *EPEA*.

52 On September 22, 2015, the Regulator and the OWA filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, an order requiring GTL to comply with the Abandonment Orders, and an order requiring GTL to "fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation" of all of Redwater's licensed properties (A.R., vol. II, at p. 41). The Regulator did not seek to hold GTL liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application on October 5, 2015, seeking approval to pursue a sales process excluding the Renounced Assets. GTL sought a court order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or any outstanding debts owed by Redwater to the Regulator. GTL did not seek to foreclose the possibility that the Regulator might have some other valid reason to reject a proposed transfer.

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

D. Judicial History

(1) Court of Queen's Bench of Alberta

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

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

56 The chambers judge approved the sale procedure proposed by GTL. He declared that the *OGCA* and the *Pipeline Act* were inoperative to the extent that they conflicted with the *BIA* by deeming GTL to be the "licensee" of the Renounced Assets; that GTL was entitled to disclaim the Renounced Assets pursuant to s. 14.06(4)(a)(ii) and (c), and was not subject to any obligations in relation to those assets; that the Abandonment Orders were inoperative to the extent that they required GTL to comply or to provide security deposits; and that Directive 006 was inoperative to the extent it conflicted with s. 14.06 of the *BIA*. Lastly, he declared that the Regulator, in exercising its discretion to approve a transfer of the licences for the Retained Assets, could not consider the Renounced Assets for the purpose of calculating Redwater's LMR before or after the transfer, nor could it consider any other issue involving the Renounced Assets.

(2) Court of Appeal of Alberta

(a) Majority Reasons

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

58 Slatter J.A. identified the essential issue as "whether the environmental obligations of Redwater meet the test for a provable claim" (para. 73). He agreed with the chambers judge that the third branch of the *Abitibi* test was met, but concluded that that test had been met "in both a technical and substantive way" (para. 76). The Regulator's policies essentially stripped away from the bankrupt estate enough value to meet environmental obligations. Requiring the depositing of security, or diverting value from the bankrupt estate, clearly met the standard of "certainty". The Regulator's policies required that the full value of the bankrupt's assets be applied first to environmental liabilities, creating a super priority for environmental claims. Slatter J.A. concluded that, "[n]otwithstanding their intended effect as conditions of licensing, the Regulator's policies [had] a direct effect on property, priorities, and the Trustee's right to renounce assets, all of which [were] governed by the *BIA*" (para. 86).

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

(b) Dissenting Reasons

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

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

62 As there was no entitlement under the *BIA* to renounce the end-of-life obligations imposed by Alberta's regulatory regime, there was no operational conflict in enforcing those obligations under provincial law. Nor was there any frustration of purpose. The Regulator was not asserting any claims provable in bankruptcy: "The continued application of [Alberta's] regulatory regime

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following bankruptcy did not determine or reorder priorities among creditors, but rather value[d] accurately the assets available for distribution" (para. 240).

III. Analysis

A. The Doctrine of Paramountcy

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

64 The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the *BIA* confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see *Moloney*, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 3).

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

66 Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility ... [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

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

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

69 The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

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

71 I will consider each alleged conflict in turn.

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

72 As a statutory scheme, s. 14.06 of the *BIA* raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on which all the parties to this litigation can agree is that it "is not a model of clarity" (C.A. reasons, at para. 201). Given the confusion caused by attempts to interpret s. 14.06 as a coherent scheme during this litigation, Parliament may very well wish to re-examine s. 14.06 during its next review of the *BIA*.

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

74 I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose

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very different interpretations of s. 14.06(4). However, s. 14.06(4) is clear and unambiguous when read on its own: where it is invoked by a trustee, the result is that "the trustee is not personally liable" for failure to comply with certain environmental orders or for the costs incurred by any person in carrying out the terms of such orders. The provision says nothing about the liability of the "bankrupt" or the "estate" — distinct concepts referenced many times throughout the *BIA*. Section 14.06(4), on its own wording, does not support the interpretation urged upon this Court by GTL.

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

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

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

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

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

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

79 Section 14.06(4) says nothing about the "bankrupt estate" avoiding the applicability of valid provincial law. In drafting s. 14.06(4), Parliament could easily have referred to the liability of the bankrupt estate. Parliament chose instead to refer simply to the personal liability of a trustee. Notably, s. 14.06(7) and s. 14.06(8) both refer to a "debtor in a bankruptcy". Parliament's choice in this regard cannot be ignored. I agree with Martin J.A. that there is no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) as encompassing the liability of the bankrupt estate. As noted by Martin J.A., it is apparent from the express language chosen by Parliament that s. 14.06(4) was motivated by and aimed at concerns about the protection of trustees, not the protection of the full value of the estate for creditors. Nothing in the wording of s. 14.06(4) suggests that it was intended to extend to estate liability.

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

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.
>
> (Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:49-15:55, as cited in C.A. reasons, at para. 197.)

Several months later, Mr. Hains stated:

> What Parliament tried to do in 1992 was to provide a relief to insolvency practitioners ... because they were at risk when they accepted a mandate to liquidate an insolvent business. Under environmental laws, therefore, they could have been subject to personal liability to clean up the environment. I am speaking of personal liability here, meaning "out of their own pockets."
>
> (*Proceedings of the Standing Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 15)

Mr. Hains proceeded to explain how the 1997 amendments were intended to improve on the 1992 reforms to the *BIA* that had included the original version of s. 14.06(2) (as discussed further below), but he gave no indication that the focus had somehow shifted away from a trustee's "personal liability".

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

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

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

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

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

86 Although the dissenting reasons focus on the source of the "disclaimer" power in s. 14.06(4), nothing in this case turns on either the source of the "disclaimer" power or on whether GTL successfully "disclaimed" the Renounced Assets. I would note that, while the dissenting reasons rely on a purported common law power of "disclaimer", the Court has been referred to no cases — and the dissenting reasons have cited none — demonstrating the existence of a common law power allowing trustees to "disclaim" *real property*. In any case, regardless of the source of the "disclaimer" power, nothing in s. 14.06(4) suggests that, where a trustee does "disclaim" real property, the result is that it is simply free to walk away from the environmental orders applicable to it. Quite the contrary — the provision is clear that, where an environmental order has been made, the result of an act of "disclaimer" is the cessation of personal liability. No effect of "disclaimer" on the liability of the bankrupt estate is specified. Had Parliament intended to empower trustees to walk away entirely from assets subject to environmental liabilities, it could easily have said so.

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

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

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

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

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

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

92 First, the Regulator submits that the protection offered by s. 14.06(4) should be distinguished from that offered by s. 14.06(2) on the basis that the former is concerned with orders while the latter is concerned with environmental obligations generally. I agree with the dissenting reasons that a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage (purportedly covered by s. 14.06(2)) and liability for failure to comply with an order to remedy such a condition or such damage (purportedly covered by s. 14.06(4)). As the dissenting reasons note, "[t]his distinction is entirely artificial" (para. 212). The underlying liability addressed through environmental orders is the liability provided for in s. 14.06(2): an "environmental condition that arose or environmental damage that occurred". Second, on the face of s. 14.06(4), no exceptions are carved out for gross negligence or wilful misconduct post-appointment, unlike in s. 14.06(2). However, s. 14.06(4) is expressly made "subject to subsection (2)". I agree with the dissenting reasons that the only possible interpretation of this proviso is that, where the trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee will still be personally liable, regardless of its reliance on s. 14.06(4).

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

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

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

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

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

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

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

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

101 I offer the following brief comment on the balance of the s. 14.06 scheme, although, as mentioned, none of those provision is actually in issue before this Court. The dissenting reasons argue that interpreting s. 14.06(4) as being concerned

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

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

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

103 Thus, regardless of whether it has effectively "disclaimed", s. 14.06(2) fully protects GTL from personal liability in respect of environmental matters affecting the Redwater estate. GTL notes that, on the face of the *OGCA* and the *Pipeline Act*, there is nothing specifically preventing the Regulator from holding it personally liable as a "licensee" for the costs of carrying out the Abandonment Orders. GTL submits that the mere possibility that it may be held personally liable for abandonment under the Alberta legislation creates an operational conflict with the protection from personal liability provided by s. 14.06(2) of the *BIA*.

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

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

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

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

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

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

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

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

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

113 Regardless, even if it is assumed that such broader goals are part of the purpose of s. 14.06(2) and s. 14.06(4), the evidence does not show that they are frustrated by the inclusion of trustees in the statutory definition of "licensee". Relying on statements made by GTL in the Second Report, ATB asserts that, if trustees continue to be considered licensees and if environmental claims continue to be binding on estates, then, in situations akin to that of the Redwater insolvency, trustees will refuse to accept appointments. The fact that, prior to this litigation, it had been settled in Alberta since at least *Northern Badger* that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency

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professionals personally liable for such obligations. As noted by the Canadian Association of Petroleum Producers, there is nothing to suggest that this well-established state of affairs has led insolvency professionals to refuse to accept appointments or has increased the number of orphaned sites. There is no reason why the Regulator and trustees cannot continue to work together collaboratively, as they have for many years, to ensure that end-of-life obligations are satisfied, while at same time maximizing recovery for creditors.

(3) Conclusion on Section 14.06 of the BIA

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

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

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

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

117 GTL says that this is precisely the effect of the obligations imposed on the Redwater estate by the Regulator through the use of its statutory powers, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4). Parliament has assigned a particular rank to environmental claims that are provable in bankruptcy. It is accepted that the limited super priority for environmental claims created by s. 14.06(7) of the *BIA* does not apply here, and accordingly, says GTL, the Regulator is an ordinary creditor as regards its environmental claims — in other words, neither a secured nor a preferred creditor. The Regulator's environmental claims are thus to be paid rateably with those of Redwater's other ordinary creditors under s. 141 of the *BIA*. GTL argues that, to comply with the Abandonment Orders or LMR requirements, the Redwater estate will have to expend funds prior to distributing its assets to the secured creditors, and that this amounts to the Regulator using its statutory powers to create for itself a priority in bankruptcy to which it is not entitled.

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

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

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

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

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

122 In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

(1) The Regulator Is Not a Creditor of Redwater

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

124 GTL submits that these lower courts have correctly interpreted and applied the "creditor" step. It further submits that, because of *Abitibi*, the 1991 Alberta Court of Appeal decision in *Northern Badger* is of no assistance in analyzing the creditor issue. Conversely, the Regulator forcefully argues that *Abitibi* must be understood in the context of its own unique facts and that it did not overrule *Northern Badger*. Relying on *Northern Badger*, the Regulator argues that a regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Like Martin J.A., I agree with the Regulator on this point. If, as GTL urges and the majority of the Court of Appeal concluded, the "creditor" step is satisfied whenever a regulator exercises its enforcement powers against a debtor, then it is hard to imagine a situation in which the

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"creditor" step would not be satisfied by the actions of an environmental regulator. Stewart was correct to suppose that "[s]urely, the Court did not intend this result" (p. 189). For the "creditor" step to have meaning, "there must be situations where the other two steps could be met... but the order [or obligation] is still not a provable claim because the regulator is not a creditor of the bankrupt" (Attorney General of Ontario's factum, at para. 39).

125 Before further explaining my conclusion on this point, I must address a preliminary issue: the fact that the Regulator conceded in the courts below that it was a creditor. It is well established that concessions of law are not binding on this Court: see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 (S.C.C.) , at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3 (S.C.C.) , at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.) , at para. 62. As noted by L'Heureux-Dubé J., in dissent, but not on this point, in *R. v. Elshaw*, [1991] 3 S.C.R. 24 (S.C.C.) , at p. 48, "the fact that an issue is conceded below means nothing in and of itself". Although concessions by the parties are often relied upon, it is ultimately for this Court to determine points of law. For several reasons, no fairness concerns are raised by disregarding the Regulator's concession in this case.

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

127 Returning to the analysis, I note that the unique factual matrix of*Abitibi* must be kept in mind. In that case, Newfoundland and Labrador expropriated most of AbitibiBowater's property in the province without compensation. Subsequently, AbitibiBowater was granted a stay under the *CCAA*. It then filed a notice of intent to submit a claim to arbitration under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2 ("NAFTA"), for losses resulting from the expropriation. In response, Newfoundland's Minister of Environment and Conservation ordered AbitibiBowater to remediate five sites pursuant to the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("EPA"). Three of the five sites had been expropriated by Newfoundland and Labrador. The evidence led to the conclusion that "the Province never truly intended that Abitibi was to perform the remediation work", but instead sought a claim that could be used as an offset in connection with AbitibiBowater's NAFTA claim (*Abitibi*, at para. 54). In other words, the Province sought a financial benefit from the remediation orders.

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

> ... the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.
>
> With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.

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> This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.
>
> From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.
>
> (*AbitibiBowater inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.))

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

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

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

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

133 The conclusion that the reasoning in *Northern Badger* continues to be relevant since *Abitibi* and the amendments to insolvency legislation also finds support in the writings of academic commentators. Stewart's position is that, while*Abitibi* discussed*Northern Badger*, it did not overturn it. He urges this Court to clarify that there remains "a distinction between a regulatory body that is a creditor because it is enforcing a debt, and a regulatory body that is not a creditor because it is enforcing

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the law" (p. 221). Similarly, Lund argues that a court should "consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor" (p. 178).

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

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

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

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

137 Strictly speaking, this is sufficient to dispose of this aspect of the appeal. However, additional guidance on the sufficient certainty analysis may prove helpful in future cases. Accordingly, I turn now to a discussion of the "sufficient certainty" step and of the reasons why the Abandonment Orders and the LMR conditions both fail on this step of the *Abitibi* test.

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

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

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

140 What a court must determine is whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to a regulator. In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement.

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

(a) The Abandonment Orders

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

143 The chambers judge acknowledged that it was "unclear" whether the Regulator would perform the abandonments itself or would deem the wells subject to the Abandonment Orders to be orphans (para. 173). He stated that, in the latter case, the OWA would probably carry out the abandonments, although it was not clear when they would be completed. Indeed, the chambers judge acknowledged that, given the OWA's resources, it could take as long as 10 years for it to get around to performing the required environmental work on the Redwater property. He nonetheless concluded that — even though the "sufficient certainty" step was not satisfied in a "technical sense" — the situation met what had been intended in*Abitibi*. That conclusion was at least partly based on his finding that the Abandonment Orders were "intrinsically financial" (para. 173).

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

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

146 Below, I will explain why the OWA's involvement is insufficient to satisfy the "sufficient certainty" test. First, I note that any reliance the chambers judge placed on the intrinsically financial nature of the Abandonment Orders was an error. In this regard, I am in complete agreement with Martin J.A. Considering whether an order is intrinsically financial is an erroneous interpretation of the third step of the *Abitibi* test. It is too broad and would result in a provable claim being found even where

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the existence of a monetary claim in bankruptcy is merely speculative. Thus, in *Nortel* CA, Juriansz J.A. rightly rejected the argument that the *Abitibi* test did not require a determination that the regulator would perform the environmental work and claim reimbursement, and that it was sufficient for there to be an environmental order requiring an expenditure of funds by the bankrupt estate. He held the following, at paras. 31-32:

> As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.
>
> The respondents' approach is not only inconsistent with *AbitibiBowater Inc., Re*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risks materialize, the costs are borne by those who hold a stake in the company. A risk that results in an environmental obligation becomes subject to the insolvency process only when it is in substance monetary and is in substance a provable claim.

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

148 The creation of the OWA was not an attempt by the Regulator to avoid the *BIA* order of priorities in bankruptcy. It is a non-profit organization with its own mandate and independent board of directors, and it operates as a financially independent entity pursuant to legally delegated authority. Although the OWA's board includes a representative of the Regulator and a representative of Alberta Environment and Parks, its independence is not in question. The OWA's 2014-2015 annual report indicates that five out of six voting directors represent industry. The OWA uses a risk assessment tool to prioritize when and how it will perform environmental work on the many hundreds of orphans in Alberta. There is no suggestion that the Regulator has any say in the order in which the OWA chooses to perform environmental work. The 2014-2015 annual report also states that, since 1992, 87 percent of the money collected and invested to fund OWA activities has been provided by industry via the orphan levy. The Regulator, at para. 99 of its factum, hints obliquely that additional provincial or federal funding may be forthcoming in the future, but even if it materializes, it will be almost entirely in the form of loans. I cannot accept the suggestion in the dissenting reasons that the Regulator and the OWA are "inextricably intertwined" (para. 273).

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

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

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151 At the beginning of this litigation, the OWA estimated that it would take 10 to 12 years to get through the backlog of orphans. By 2015, that backlog was increasing rapidly, and it may well have continued to increase at the same or an even greater speed in the intervening years, as submitted by the Regulator. If anything, this suggests the possibility of an even larger backlog. There is no indication that the Renounced Assets would have a particularly high priority in the backlog. Even if the potential additional funding materializes, the Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans.

152 The dissenting reasons rely on the chambers judge's conclusion that the OWA would "probably" perform the abandonments eventually, while downplaying the fact that he also concluded that this would not "necessarily [occur] within a definite timeframe" (paras. 261 and 278, citing the chambers judge's reasons, at para. 173). Given the most conservative timeline — the 10 years discussed by the chambers judge — it is difficult to predict anything occurring with sufficient certainty. Much could change within the next decade, both in terms of government policy and in terms of the willingness of those in the Alberta oil and gas industry to discharge environmental liabilities. This is not at all the same situation as in *Northstar*, in which the MOE had already commenced environmental work.

153 Perhaps more to the point, this lengthy timeline means that, should it ultimately perform the work, the OWA will not advance a claim for reimbursement. Advancement of a claim is an element of the test that is just as essential as performance of the work. The OWA itself has no ability to seek reimbursement of its costs from licensees and, although the costs of abandonment carried out by a person authorized by the Regulator constitute a debt payable to the Regulator under s. 30(5) of the *OGCA*, no evidence has been adduced that the Regulator has exercised its power to recover such costs in comparable cases. There is a good reason for this: the reality is that, by the time the OWA got around to abandoning any of Redwater's wells, the estate would be finalized and GTL long since discharged. In sum, the chambers judge erred in failing to consider whether the OWA can be treated as the regulator and in failing to appreciate that, even if it can, it is not sufficiently certain that the OWA will in fact perform the abandonments and advance a claim for reimbursement.

154 Accordingly, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it cannot be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement.

(b) The Conditions for the Transfer of Licenses

155 I will deal briefly with the LMR conditions for the transfer of licences. Much of the foregoing analysis with regard to the Abandonment Orders also applies to these conditions. As noted by Martin J.A., the requirement of regulatory approval for licence transfers is difficult to compare directly with the remediation orders at issue in *Abitibi*. However, this Court confirmed that the *Abitibi* test applies to a class of regulatory obligations that is broader than "orders" in *Moloney* , at paras. 54-55. The LMR conditions are a "non-monetary obligation" for the Redwater estate, since they must be satisfied before the Regulator will approve the transfer of any of Redwater's licences. However, it is notable that, even apart from the LMR conditions, licences are far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.

156 In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline Act* in respect of abandonment, but there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

157 Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were

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received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. R.*, 2013 SCC 29, [2013] 2 S.C.R. 336 (S.C.C.) , which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

158 The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the Abitibi test

159 Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney* , the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

161 Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (*BIA*, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

162 There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot

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walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

163 Accordingly, the appeal is allowed. In *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37 (Alta. C.A.), Wakeling J.A. declined to stay the precedential effect of the Court of Appeal's decision. As he noted, the interests of the Regulator itself were already protected. Pursuant to earlier orders of the Alberta courts, GTL had already sold or renounced all of Redwater's assets, and the sale proceeds were being held in trust. Accordingly, the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted. Additionally, the chambers judge's declarations in paras. 3 and 5-16 of his order are set aside.

164 As the successful party in the appeal, the Regulator would normally be entitled to its costs. However, the Regulator specifically did not seek costs. Accordingly, there will be no order made as to costs.

***Côté J.* (dissenting) (Moldaver J. concurring):**

I. Introduction

165 Redwater Energy Corporation ("Redwater") is a bankrupt oil and gas company. Its estate principally consists of two types of properties or assets: valuable, producing oil wells and facilities that are still capable of generating revenue; and value-negative, non-producing assets, including depleted wells that are subject to onerous environmental liabilities. Redwater's receiver and trustee in bankruptcy, Grant Thornton Limited ("GTL"), purports to have disclaimed ownership of the non-producing assets. It did so in order to sell the valuable, producing wells separately — unencumbered by the liabilities attached to the disclaimed properties — and to distribute the proceeds of that sale to the estate's creditors.

166 However, Alberta law does not recognize GTL's disclaimers as enforceable. Shortly after GTL's appointment as receiver, the Alberta Energy Regulator ("AER") issued "Abandonment Orders" for the disclaimed assets, directing Redwater and its working interest participants to carry out environmental work on those properties. Specifically, the AER sought to have GTL "abandon" the non-producing properties, which meant to render the wells environmentally safe according to the AER's directives. It later notified GTL that it would refuse to approve any sale of Redwater's valuable assets unless GTL did one of three things: sell the disclaimed properties in a single package with the producing wells and facilities; complete the abandonment and reclamation work itself; or post security to cover the environmental liabilities associated with the disclaimed properties.

167 The evidence reveals that none of these options is economically viable. The net value of Redwater's 127 licensed properties is negative, so no rational purchaser would ever agree to buy them as a package. This is precisely why GTL opted to disclaim the burdensome properties in the first place. As to the remaining options, GTL cannot undertake or guarantee the abandonment and reclamation work because the environmental liabilities attached to the disclaimed assets exceed the estate's realizable value — and in any event, GTL could not access the funds necessary to satisfy these commitments until after a sale of the estate's valuable assets was completed. The effect of the AER's position, then, is to hamper GTL in its administration of the estate, preventing it from realizing *any* value for *any* of Redwater's creditors, including the AER. And the AER's position effectively leaves the valuable and producing wells in limbo, creating a real risk that they, too, will become "orphans" — assets that are unable to be sold to another company and are left entirely unrealized.

168 According to Wagner C.J., GTL is without recourse because federal law enables it only to protect itself from personal liability and because the AER was entitled to assert its environmental liability claims outside of the bankruptcy process. I disagree on both points. In my view, two aspects of Alberta's regulatory regime conflict with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). This result flows from a proper and accurate understanding of fundamental principles of constitutional and insolvency law.

169 First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition is that insolvency professionals are subject to the same obligations and liabilities as Redwater itself — including the obligation to comply with the AER's Abandonment Orders and the risk of personal liability for failing to do so. The *BIA*, however, permits a trustee in bankruptcy to disclaim assets encumbered by environmental liabilities.

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This power was available to GTL in the circumstances of this case, and GTL validly disclaimed the non-productive assets. The result is that it is no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime does not recognize these disclaimers as lawful (by virtue of the fact that receivers and trustees are regulated as licensees, who cannot disclaim assets), there is an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers.

170 Second, the AER has required that GTL satisfy Redwater's environmental liabilities ahead of the estate's other debts, which contravenes the *BIA*'s priority scheme. Because the Abandonment Orders are "claims provable in bankruptcy" under the three-part test outlined by this Court in *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.) — from which this Court should not depart either explicitly or implicitly — the AER cannot assert those claims outside the bankruptcy process. To do so would frustrate an essential purpose of the *BIA*: distributing the estate's value in accordance with the statutory priority scheme. Nor can the AER achieve the same result indirectly by imposing conditions on the sale of Redwater's valuable assets. The province's licensing scheme effectively operates as a debt collection mechanism in relation to a bankrupt company: it prevents GTL from discharging its duties as trustee unless the AER's environmental claims are satisfied. As such, it should be held inoperative as applied to Redwater under the second prong of the paramountcy test, frustration of purpose.

II. Background

171 Redwater was a publicly traded oil and gas company that operated wells, pipelines and other facilities in central Alberta. In mid-2014, it suffered a number of financial setbacks following a series of acquisitions and unsuccessful drilling initiatives. As a result, it became unable to meet its obligations to its largest secured creditor, ATB Financial, which commenced enforcement proceedings.

172 GTL was appointed as Redwater's receiver on May 12, 2015. Upon its appointment, but before taking possession of any AER-licensed properties, GTL carried out an analysis of the economic viability and marketability of Redwater's assets. It determined that only a portion of the company's properties was actually saleable and that it would not be in Redwater's best interests — or in the interests of its creditors — for GTL, as receiver, to take possession of the non-producing properties. It therefore informed the AER on July 3, 2015, that it would take possession of only 20 of Redwater's 127 licensed wells and facilities. On November 2, 2015, shortly after its appointment as trustee, GTL again disclaimed the same non-producing properties it had previously renounced in its capacity as receiver.

173 According to GTL's assessment, Redwater's valuable assets were worth $4.152 million and would generate significant value for the estate's creditors if they were sold at auction. On the other hand, the net value of the non-producing properties was -$4.705 million, reflecting the extensive abandonment and reclamation liabilities owed to the AER. The net value of the estate as a whole was -$0.553 million. This was why, in GTL's business judgment, a sale of all the estate's assets together was simply not realistic.

174 The AER responded to GTL's first disclaimer notice by issuing the Abandonment Orders which required Redwater to carry out environmental work on the non-producing properties that GTL had disclaimed. But the AER's enforcement efforts were not limited to the debtor's estate itself. In its initial application that spurred this litigation, the AER filed suit against GTL seeking three principal remedies: (1) a declaration that GTL's disclaimers were void and unenforceable; (2) an order compelling GTL, in its capacity as receiver, to comply with the Abandonment Orders issued in relation to a portion of Redwater's assets; and (3) an order compelling GTL to fulfill its obligations as licensee under Alberta's legislation, specifically in relation to the abandonment, reclamation and remediation of Redwater's licensed properties.

175 The genesis of this litigation, then, was a clear and forceful effort by the AER to require GTL to satisfy Redwater's environmental obligations. To understand why the AER took that approach, it is important to note that it had provincial law on its side. Under the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 ("*OGCA*") and the *Pipeline Act*, R.S.A. 2000, c. P-15 ("*PLA*"), the term "licensee" is defined to include receivers and trustees in bankruptcy (*OGCA*, s. 1(1)(cc); *PLA*, s. 1(1)(n)). As a result, insolvency professionals become subject to the same regulatory obligations as the insolvent debtor itself by

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effectively stepping into its shoes. They can therefore be compelled to carry out abandonment and reclamation work on the direction of the AER (*OGCA*, s. 27; *PLA*, s. 23; *Oil and Gas Conservation Rules*, Alta. Reg. 151/71 ("*OGCA Rules*"), s. 3.012); to reimburse anyone else who does abandonment work (*OGCA*, ss. 29 and 30; *PLA*, s. 25); to pay the orphan fund levy for any of the debtor's assets (*OGCA*, s. 74); to provide a security deposit, under certain circumstances, at the AER's request (*OGCA Rules*, s. 1.100(2)); and to pay a fine for failing to comply with an order made by the AER (*OGCA*, ss. 108 and 110(1); *PLA*, ss. 52(2) and 54(1)). These liabilities are all personal in nature. Other comparable legislation expressly limits the liability of insolvency professionals. For example, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, states that the liability of a receiver or trustee under an environmental protection order "is limited to the value of the assets that the person is administering", absent "gross negligence or wilful misconduct" (s. 240(3)). Alberta's oil and gas statutory regime, however, does not include such a clause protecting receivers and trustees. And as the AER's initial application makes clear, the AER itself viewed these obligations as personal. This was why it sued GTL to compel it, among other things, to comply with its obligations as a licensee under provincial law.

176 The AER also exercised its enforcement power in another capacity. In addition to issuing the Abandonment Orders, the AER imposed restrictions and conditions on the sale of Redwater's assets — conditions that effectively required GTL to satisfy those same obligations before a sale could be approved. Thus, even if GTL defied the AER's request to abandon the non-producing properties, it would still be unable to discharge its duties as receiver and trustee.

177 Both the chambers judge and the majority of the Court of Appeal found in favour of GTL on each prong of the paramountcy test, concluding that there is an operational conflict and a frustration of purpose (2016 ABQB 278, 33 Alta. L.R. (6th) 221 (Alta. Q.B.); 2017 ABCA 124, 50 Alta. L.R. (6th) 1 (Alta. C.A.)). They agreed with GTL and ATB Financial that the provisions of Alberta's statutory regime permitting the AER to enforce compliance with Redwater's environmental abandonment and reclamation obligations were constitutionally inoperative during bankruptcy. The AER and the Orphan Well Association ("OWA") then appealed to this Court.

III. Analysis

178 The *Constitution Act, 1867*, grants the federal government exclusive jurisdiction to regulate matters relating to bankruptcy and insolvency (s. 91(21)). In the exercise of that jurisdiction, Parliament enacted the *BIA*, "a complete code governing bankruptcy" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at para. 40; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 85). The *BIA* outlines, among other things, the powers, duties and functions of receivers and trustees responsible for administering bankrupt or insolvent estates and the scope of claims that fall within the bankruptcy process (see *BIA*, ss. 16 to 38 and 121 to 154).

179 Although the operation of the *BIA* "depends upon the survival of various provincial rights" (*Moloney* , at para. 40), this is true only to the extent that "substantive provisions of any [provincial] law or statute relating to property ... are not in conflict with [the *BIA*]" (*BIA*, s. 72(1)). When a conflict arises, the *BIA* necessarily prevails (*Moloney* , at paras. 16 and 29; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.) , at para. 16). This reflects the constitutional principle that federal laws are paramount (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) , at para. 32).

180 The respondents in this appeal — GTL and ATB Financial — posit two distinct conflicts between the federal and provincial legislation. First, they argue that the *BIA* grants receivers and trustees the power to disclaim any interest in any real property, even where they are not at risk of personal liability by virtue of their possession of the property. This disclaimer power enables trustees to renounce valueless and liability-laden property of a bankrupt in pursuit of their primary goal, which is to maximize global recovery for all creditors. The respondents argue that GTL validly disclaimed the non-producing assets and therefore cannot be held responsible for carrying out the Abandonment Orders; nor can the AER make any sale of Redwater's assets conditional on the fulfillment of obligations with respect to the disclaimed properties.

181 Second, they argue that the AER's Abandonment Orders constitute "claims provable in bankruptcy". In their view, it would undermine the *BIA*'s priority scheme if the AER could assert those claims outside the bankruptcy process — and ahead

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of the estate's secured creditors — whether by compelling GTL to carry out those orders or by making the sale of Redwater's valuable assets conditional on the fulfillment of those obligations.

182 In my view, GTL and ATB Financial have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. In what follows, I first discuss the operational conflict that arises between Alberta's regulatory regime and s. 14.06(4) of the *BIA*. I then turn to the second branch of the paramountcy analysis, frustration of purpose.

A. Operational Conflict

183 The first branch of the paramountcy test is operational conflict. An operational conflict arises where "it is impossible to comply with both laws" (*Moloney* , at para. 18) — "where one enactment says 'yes' and the other says 'no'", or where "the same citizens are being told to do inconsistent things" (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191; see also *Lemare Lake*, at para. 18).

184 In essence, an operational conflict analysis is an exercise in statutory interpretation: the Court must ascertain the meaning of each competing enactment in order to determine whether dual compliance is possible. Although this interpretation exercise takes place within the guiding confines of cooperative federalism, a concept that allows for some interplay and overlap between federal and provincial legislation, this Court recently set out the limits to this concept:

> [C]ooperative federalism may be used neither to "override nor [to] modify the division of powers itself" (*Rogers Communications Inc. v. Châteauguay (City)*, [2016 SCC 23, [2016] 1 S.C.R. 467] at para. 39), nor to impose "limits on the otherwise valid exercise of legislative competence" (*Quebec (Attorney General) v. Canada (Attorney General)*, [2015 SCC 14, [2015] 1 S.C.R. 693] at para. 19; *Reference re Securities Act*, [2011 SCC 66, [2011] 3 S.C.R. 837] at paras. 61-62). It cannot, therefore, be used to make *ultra vires* legislation *intra vires*. By fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries, however, cooperative federalism works to support, rather than supplant, the division of legislative powers (see: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22).
>
> (*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 (S.C.C.), at para. 18)

185 Properly understood, cooperative federalism operates as a straightforward interpretive presumption — one that supports, rather than supplants, the modern approach to statutory interpretation. This Court recognized as much in *Moloney* , where Gascon J. wrote that courts should "favour an interpretation of the federal legislation that allows the concurrent operation of both laws" on the basis of a presumption "that Parliament intends its laws to co-exist with provincial laws" (*Moloney* (para. 27). But where "the proper meaning of the provision" — one that is not limited to "a mere literal reading of the provisions at issue" — cannot support a harmonious interpretation, it is beyond this Court's power to create harmony where Parliament did not intend it (*Moloney* (para. 23; see also *Pan-Canadian Securities Regulation*, at para. 18; *Lemare Lake*, at paras. 78-79, per Côté J., dissenting, but not on this point).

186 In my view, my colleague places undue reliance on the principle of cooperative federalism to narrow the scope of federal law and find a harmonious interpretation where no plausible one exists. Courts must be especially careful about using cooperative federalism to interpret legislative provisions narrowly in a case like this where Parliament expressly envisioned that the disclaimer right could come into conflict with provincial law. This is evident from the very first line of s. 14.06(4), which states that the disclaimer power applies "[n]otwithstanding *anything* in *any* federal or *provincial law*". The notion that judicial restraint should compel a different interpretation is therefore belied by the fact that Parliament considered, acknowledged and *accepted* the potential for conflict. To rely on judicial restraint, then, to avoid a conflict between federal and provincial law is to disregard Parliament's express instruction. Simply put, this is not a case where a drastic power is to be assumed from the statute; it is one where such a power is clearly provided for. In my view, reliance on cooperative federalism must never result in an interpretation of s. 14.06(4) that is inconsonant with its language, context and purpose.

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187 It is undisputed in this appeal that Alberta law does not recognize GTL's disclaimers of assets licensed by the AER as enforceable to the extent that they relieve GTL of the obligation to satisfy the environmental liabilities associated with the assets. As receiver and trustee, GTL steps into Redwater's shoes as a "licensee" under provincial law; and, GTL submits, it can therefore, without the disclaimers, be held liable for the debtor's abandonment and reclamation obligations in the same manner as Redwater itself. The question, then, is whether the *BIA* permits GTL to disclaim these properties and what legal effect results from such disclaimer.

188 Section 14.06 of the *BIA*, reproduced in full in the appendix, outlines a trustee's powers and duties with respect to environmental liabilities and the disclaimer of property. Specifically, s. 14.06(4) states that the trustee is "not personally liable for failure to comply" with an order requiring it to "remedy any environmental condition or environmental damage affecting property involved in a bankruptcy", provided that the trustee "abandons, disposes of or otherwise releases any interest in any real property... affected by the condition or damage" within the statutory timeframes. The timing of GTL's disclaimers is not at issue here.

189 My colleague concludes that, regardless of whether GTL could have properly invoked the disclaimer power in this case, the effect of any such disclaimer would simply be to protect it from personal liability. He states that, in any event, the exercise of the disclaimer power was unnecessary in this case because GTL was already fully protected from personal liability through the operation of s. 14.06(2). Further, he argues, because the AER has not sought to hold GTL personally liable, there is no conflict between federal and provincial law on the facts of this case. With respect, I disagree with this approach to the language of the *BIA*, which does not properly account for fundamental principles of constitutional and insolvency law. I will begin by addressing the proper scope of the disclaimer power provided to trustees, explaining that the actual existence of a risk of personal liability is not a necessary condition for the exercise of this power and that, while protection from personal liability is one effect of a valid disclaimer, it is not the only one. In my view, this interpretation makes s. 14.06(4) consistent with the remainder of the section and is therefore to be preferred. With respect, I do not accept that Parliament intended s. 14.06(4) simply to protect trustees from the exact same liability that it had already addressed through s. 14.06(2). Subsection (4) must have a meaningful role to play within Parliament's bankruptcy and insolvency regime; I reject the suggestion that Parliament crafted a superfluous provision. I will also deal briefly with the AER's argument that the disclaimer power is not available at all in the context of Alberta's oil and gas statutory regime. In my view, it is available in this context.

(1) The Power to Disclaim Under Section 14.06(4)

190 The "natural meaning which appears when the provision is simply read through" (*Canadian Pacific Air Lines Ltd. v. C.A.L.P.A.*, [1993] 3 S.C.R. 724 (S.C.C.) , at p. 735) is that s. 14.06(4) assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency (see L. Silverstein, "Rejection of Executory Contracts in Bankruptcy and Reorganization" (1964), 31 *U. Chi. L. Rev.* 467, at pp. 468-72; *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 251 D.L.R. (4th) 328 (B.C. C.A.), at paras. 24-31; *Thomson Knitting Co., Re*, [1925] 2 D.L.R. 1007 (Ont. C.A.), at p. 1008). This right is in keeping with the fundamental objective of court officers in insolvencies: the maximization of recovery for creditors as a whole by realizing the estate's valuable assets. By allowing trustees to disclaim assets with substantial liabilities, this power enables them to administer the estate in the most efficient manner and to avoid significant costs of administration that would reduce creditor recovery. Section 14.06(4) recognizes and supports this foundational principle of insolvency law.

191 This reading offers the clearest and most obvious explanation for the manner in which the provision is drafted, in that it plainly describes a result or legal effect of disclaimer: a trustee "is not personally liable for failure to comply" with an environmental order "*if* ... the trustee ... abandons, disposes of or otherwise releases any interest in any real property" (s. 14.06(4)). We should interpret s. 14.06(4) as authorizing the act of disclaimer in light of the principle that "[t]he legislator does not speak in vain" (*Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) , at para. 37, citing *Québec (Procureur général) c. Carrières Ste-Thérèse ltée*, [1985] 1 S.C.R. 831 (S.C.C.) , at p. 838). If a trustee did not have the power to disclaim property, and if that power were not recognized and provided for in the statute, a provision describing the effect of such a disclaimer would serve no purpose.

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192 The AER submits that property may be disclaimed only where it is necessary for a trustee to avoid personal liability with respect to an environmental order. This interpretation entirely inverts the language of the provision, turning a stated *effect* of disclaimer into a necessary condition that circumscribes the exercise of the power. The operative clauses are neither written nor ordered in this manner. Rather, s. 14.06(4) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. If Parliament truly intended to condition the right to disclaim property on the actual existence of a risk of personal liability, "it is hard to conceive of a more convoluted and sibylline way of stating something that could be so easily expressed in clear and direct terms" (*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) , at p. 124).

193 My colleague adopts a slightly different approach. Rather than accepting the argument that the risk of personal liability is a necessary condition to the exercise of the disclaimer power in s. 14.06(4), he concludes that protection from personal liability for non-compliance with environmental orders is the only consequence of a valid disclaimer. Therefore, he says, the bankrupt's estate is not relieved of its obligations under the environmental orders and the trustee can be compelled to expend the entirety of the estate's assets on compliance. With respect, this also cannot be the correct reading of the subsection. Nor do I believe that the brief references to s. 14.06(4) in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) — a case in which this subsection was not directly in issue and this Court was not tasked with interpreting it in any meaningful way — provide much assistance in this case.

194 I accept that the opening words of s. 14.06(4) refer to the personal liability of the trustee. However, when the words of the subsection are read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament", as the courts are required to do (see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) ; *Bell ExpressVu* , at para. 26, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87), their meaning becomes apparent.

195 Section 14.06(4) both assumes and relies on the common law power of trustees to disclaim assets, a power that the majority of the Court of Appeal described as "commonplace" (para. 47). Even my colleague appears to accept that this disclaimer power "predates" s. 14.06(4) itself (at para. 95). Indeed, the majority of the Court of Appeal recognized that "[s]ection 14.06 does not appear to create a right in a trustee to abandon properties without value, but rather assumes that one exists upon bankruptcy" (para. 63). This is the only rational explanation for why Parliament made the effects of s. 14.06(4) available when the trustee "abandons, disposes of or otherwise releases any interest in any real property". While avoiding personal liability is one effect of the appropriate exercise of this power, it is not the only effect. Disclaimer operates to "determine, as from the date of the disclaimer, the rights, interests and liabilities" in the disclaimed property (R. Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011), at p. 202). By properly disclaiming certain assets, the trustee is relieved of any liabilities associated with the disclaimed property and loses the ability to sell the property for the benefit of the estate. The author Frank Bennett, writing about the administration of the bankrupt's real property, explains that "[w]here the trustee disclaims its interest, the disclaimer releases and disclaims any and all right, title and interest to the property" (*Bennett on Creditors' and Debtors' Rights and Remedies* (5th ed. 2006), at p. 482 (footnote omitted)).

196 The majority asserts that s. 14.06(4) does not allow a trustee to "walk away" from assets and the environmental liabilities associated with them (paras. 86, 100 and 102). However, *disclaiming* property does have precisely this effect. It permits the trustee not to realize assets that would provide no value to the estate's creditors and whose realization would therefore undermine the trustee's fundamental objective. A recognized purpose of the disclaimer power is to "avoid the continuance of liabilities in respect of onerous property which would be payable as expenses of the liquidation, to the detriment of unsecured creditors" (Goode, at p. 200 (footnote omitted)). These principles are no less valid in relation to valueless real property than they are in relation to unprofitable and burdensome executory contracts. Indeed, there has been no suggestion in this appeal, including from the AER and the OWA, that trustees can never disclaim onerous real property.

197 This explanation of the disclaimer power is borne out by GTL's actions in the instant case. After assessing the economic viability and marketability of Redwater's assets, GTL determined that it would be most beneficial to Redwater's creditors as a whole if it disclaimed the non-producing, liability-laden assets.

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198 Parliament's recognition of this common law disclaimer power in s. 14.06(4) is not new. The power is also referred to in another section, albeit in a broader context. Section 20(1) of the *BIA*, provides trustees with the ability to "divest" themselves of "any real property or immovable of the bankrupt" generally. However, the disclaimer power itself does not derive from this section. Nor is a trustee required to invoke s. 20(1) in order to exercise the disclaimer power described in s. 14.06(4), which incorporates that power and spells out the particular effects of its exercise in the specific context of environmental remediation orders. In any event, this Court is not required in this appeal to comment on the full effects of s. 20(1).

199 Under my colleague's interpretation, it is unclear why Parliament chose to enact the disclaimer mechanism. It is surely true that Parliament could have achieved the same outcome through the use of simpler language. Had it merely intended to protect trustees from personal liability for failure to comply with environmental orders, it could have easily done so directly — in fact, it had already done so in s. 14.06(2). There is no reason why Parliament would have attempted to achieve this relatively straightforward result through the convoluted mechanism of requiring trustees to disclaim property while at the same time not intending such disclaimer to have its "commonplace" common law effects. There is a reason why Parliament has referred to the power to disclaim in s. 14.06(4); we must give effect to this choice and to the words that Parliament has used.

200 It follows, then, that I respectfully disagree that s. 14.06(4) only protects trustees from specific types of personal liability. But it does not follow that the *estate* is relieved of its liabilities once a trustee exercises the disclaimer power — a misconception that is pervasive in the AER's submissions and the majority's analysis. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets (see *BIA*, s. 40; see also Bennett, at p. 528). The estate remains liable for the remediation obligations attached to the land. Whether the estate has sufficient assets capable of satisfying those liabilities at that point in time is a separate question that is unrelated to the underlying fact of ongoing liability. In any case, the regulatory scheme continues to apply with respect to the retained assets. In referring repeatedly to the idea that disclaimer does not "immunize bankrupt estates from environmental liabilities" (para. 81), the majority misunderstands the impact and purpose of the disclaimer power. The estate itself is not relieved of environmental obligations. As I have noted, the trustee does not take possession of the bankrupt's assets in order to continue the life of the bankrupt indefinitely. The trustee's function is to realize on the estate's valuable assets and maximize global recovery for all creditors. Allowing the trustee to deal only with the value-positive assets to achieve this goal does not relieve the *estate* of its environmental obligations. As a result, the disclaimer power, and its incorporation into s. 14.06(4), is entirely consistent with the foundational principles of insolvency law.

201 In s. 14.06(4), Parliament has expressly referred to this disclaimer power and spelled out the particular effects flowing from its proper exercise. By doing so, it has purposefully incorporated the disclaimer power into its statutory scheme to achieve its desired purposes.

202 My interpretation of s. 14.06(4) finds ample support in the Hansard evidence. In the debates preceding the enactment of s. 14.06(4) in 1997, Jacques Hains, a director in the Department of Industry Canada who had been involved in drafting the amendments to the *BIA*, discussed the new options being provided to trustees when faced with an environmental remediation order:

> First, he could decide to carry out the order and remedy the environmental damage, the costs to be charged as costs of administration from the bankrupt's assets.
>
> The second option would be to challenge this order to remedy before the appropriate courts; these two options are already to be found in environmental legislation.
>
> The third option would be for the monitor to apply to the appropriate court for a period of stay to assess the economic viability of complying with the order, whether it is worth the trouble and whether the assets are sufficient to cover the clean up costs.
>
> As a fourth option, <u>if he considers that this course has absolutely no economic viability, he may give notification that he has renounced the real property to which the order applies.</u> [Emphasis added.]

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(Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:45 to 15:50)

The above passage makes no reference to the personal liability of a trustee who is considering whether to invoke the "fourth option" and disclaim the property. Mr. Hains was clear that the decision to disclaim is based on the "economic viability" of complying with the remediation orders, specifically "whether the assets are sufficient to cover the clean up costs". This makes sense only in the context of the trustee's obligation to maximize economic recovery for creditors.

203 Several months later, Mr. Hains reiterated this fourth option, explaining that, after assessing the economic viability of complying with the order and "knowing that the bill will be too expensive and will not be economically viable, *the trustees are then out of it and can abandon that piece of property* subject to the order" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 13:68 (emphasis added)). This description plainly reflects the function of the disclaimer power, which does indeed allow trustees to "walk away" from liability-laden assets that will not contribute to maximizing creditor recovery.

204 Mr. Hains' answers to questions from the House of Commons Standing Committee further confirms this interpretation of the disclaimer power. The following exchange is very telling:

> **Mr. Lebel [Member of Parliament for Chambly]**: When a trustee decides to give up the land and realize[s] assets elsewhere, for example by making a profit from the sale of assets, having released himself from the obligation to clean up the land, he would be sharing a dividend realized from other profitable assets and telling the creditors to manage as best they can with the real property. If the creditors are not willing to touch it, he will then tell the government to clean it up. In such a case, each of the bankruptcy creditors would also ... stand to earn a small dividend, as it is referred to in Bankruptcy Law.
>
> Do you not think that your bill should require the trustee to carry out a clean-up from the assets of the bankruptcy before the dividends are distributed?
>
> **Mr. Hains**: It's an excellent question that was put to me only three weeks ago by colleagues from the Department of the Environment of Quebec, whom I was meeting to discuss this subject. There were a number of matters of interest to them, particularly the one raised by Mr. Lebel. [Emphasis added.]
>
> (Standing Committee on Industry, June 11, 1996, at 16:55)

Mr. Hains went on to reference various other features of the scheme to assuage Mr. Lebel's concerns and noted that provincial environmental agencies would be responsible for performing the remediation work. Significantly, at no point did Mr. Hains contradict Mr. Lebel's understanding of the bill's provisions. Nor did he take issue with the premise underlying the question: that the new legislation does not "require the trustee to carry out a clean-up from the assets of the bankruptcy" before they are distributed to creditors. Mr. Hains did not claim that provincial regulators might still enforce such a requirement.

205 This exchange between Mr. Lebel and Mr. Hains clearly demonstrates the collective understanding of all parties that the proposed amendments, containing what would become s. 14.06(4), specifically *did not* require the trustee to expend the estate's assets to comply with environmental remediation orders. The drafters of s. 14.06(4) thus turned their minds directly to this issue, and their understanding of the provision's effects was contrary to that proposed by the majority.

206 Based on these references to Hansard, I cannot agree with the majority's statement that the legislative debates provide "no hint" of a parliamentary intention to relieve trustees of the obligation to expend estate assets on environmental remediation (para. 81). This intention was clearly expressed on multiple occasions.

207 As courts must read statutory provisions in their entire context, and as Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole, it is important to carefully examine the other subsections of s. 14.06. This is true regardless of whether a party to litigation seeks to apply them or to put them directly in issue (majority reasons, at paras. 88 and 101). Significantly, the immediate statutory context surrounding s. 14.06(4) confirms that a trustee's right to

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disclaim property is not limited in the manner suggested by the AER or my colleague. Four provisions adjacent to s. 14.06(4) support this conclusion.

208 First, s. 14.06(5) provides that a court may stay an environmental order "for the purpose of enabling the trustee to assess the economic viability of complying with the order". Assessing "economic viability" is, on its face, broader than assessing the risk of personal liability. This provision indicates that a trustee is entitled to disclaim assets based on a rational economic analysis geared toward maximizing the value of the estate, and not merely in order to protect itself from personal liability. Otherwise, there would be no reason for Parliament to permit a court to grant a stay for the purpose of assessing economic viability. This understanding is consistent with the fundamental principles of insolvency law and with the Hansard evidence, as noted above, as well as with one of the recognized justifications for the disclaimer power more generally: to allow a trustee "to complete the administration of the liquidation without being held up by continuing obligations on the company under ... continued ownership and possession of assets which are of no value to the estate" (Goode, at p. 200).

209 Second, s. 14.06(7) grants the government a super priority for environmental claims in cases where it has already taken action to remedy the condition or damage. This provision would serve little purpose if a government regulator could assert a super priority for *all* environmental claims, as the AER effectively purports to do here by refusing to recognize GTL's disclaimers as lawful. It also suggests that Parliament specifically envisioned that the government could obtain a super priority and leapfrog other creditors, but *only* where the government itself has already remediated the environmental damage. An analogous argument was central to the reasoning in *Abitibi*, where this Court observed that the existence of a Crown priority limited to the contaminated property and certain related property under s. 11.8(8) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, undercut the argument that Parliament "intended that the debtor always satisfy all remediation costs" in circumstances where that express priority was inapplicable and where the Crown had no further priority with respect to the totality of the estate's assets (para. 33).

210 Third, s. 14.06(6) provides that claims for costs of remedying an environmental condition or environmental damage cannot rank as costs of administration if the trustee has disclaimed the property in question. Again, if the AER could effectively assert a super priority by compelling GTL to use all of Redwater's assets to satisfy its outstanding environmental liabilities, this provision would be unnecessary, because the costs of environmental remediation would rank *ahead* of administrative costs in the priority structure. Moreover, s. 14.06(6) highlights the potential for a direct conflict between federal and provincial law. A trustee cannot comply with the AER's instruction to pay environmental costs as part of its administration of the estate while simultaneously complying with the *BIA*'s requirement that such costs *not* be included in the trustee's administrative costs. This further raises the spectre of bankruptcy professionals being forced to expend their own funds under Alberta's regulatory regime — a notion that Parliament clearly rejected by amending the *BIA* in response to *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280 (Alta. C.A.) (see C.A. reasons, at para. 63). This is a risk that is not adequately addressed under my colleague's interpretation.

211 Fourth, s. 14.06(2) already deals with the circumstances in which a trustee can be held personally liable for a bankrupt's environmental liabilities. Under this provision, personal liability can arise only where environmental damage occurs as a result of the trustee's gross negligence or wilful misconduct. If a risk of personal liability is, in fact, a necessary condition to disclaim under s. 14.06(4), or if protection from personal liability is the only effect of disclaimer, this would mean that the disclaimer power is available or useful only in cases where the underlying environmental condition arises after the trustee's appointment and the trustee is responsible for gross negligence or wilful misconduct.

212 This obvious absurdity cannot be sidestepped by trying to distinguish between liability for environmental *damage* (purportedly covered by s. 14.06(2)) and liability for *a failure to comply with an order* to remedy such damage (purportedly covered by s. 14.06(4)). This distinction is entirely artificial. If the AER issues an abandonment order in relation to a licensed property, it effectively creates liability for the underlying condition itself — liability that would still be encompassed by s. 14.06(2). This is evident from the marginal note for s. 14.06(2), "[l]iability in respect of environmental *matters*", which is capacious enough to include liability that flows from a failure to comply with an environmental order. In any event, it is difficult to imagine why Parliament would intend to immunize a trustee from personal liability for an environmental *condition*, but still hold the trustee liable for a failure to comply with an *order* to remedy that exact same condition — and then further, permit

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the trustee to avoid that very liability by disclaiming the property, but either not permit the trustee to disclaim that property in any other circumstance or make it pointless to do so. This convoluted reasoning not only misreads s. 14.06(4), but also rewrites s. 14.06(2) in the process. It effectively creates a sector specific exemption from bankruptcy law that would prohibit many receivers and trustees that operate in the oil and gas industry from disclaiming assets (see N. Bankes, *Majority of the Court of Appeal Confirms Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (online)).

213 I also cannot accept that Parliament enacted s. 14.06(4) simply to protect trustees from personal liability in the narrow subset of circumstances not already covered by s. 14.06(2) — namely where an environmental condition or environmental damage arises after a trustee's appointment and as a result of the trustee's gross negligence or wilful misconduct — for two main reasons. Firstly, the terms of the provision itself belie this theory. The opening lines of s. 14.06(4) expressly make the limitation of liability "subject to subsection (2)". This indicates that Parliament deliberately intended subs. (2) to supersede subs. (4) in the determination of liability. Thus, where a trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee *will still be personally liable*, despite any valid disclaimer under subs. (4). Secondly, there is no evidence, or indeed any rationale, to explain why Parliament would have drafted s. 14.06(4) to protect trustees in such narrow circumstances, through the method of disclaiming property, and to shield them from liability where they cause environmental issues through their own wrongdoing.

214 The majority of this Court accepts that, on its interpretation, no meaningful distinction can be drawn between the protection from personal liability provided by subs. (2) and that provided by subs. (4). Indeed, the majority appears to believe that such a distinction is not even necessary, accepting that "s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2)" (para. 93). However, the effect of this interpretation is to render subs. (4) entirely meaningless and redundant. Trustees would have no reason to exercise their power to disclaim assets, as the only effect of doing so would be to protect them from personal liability from which they are already fully shielded by subs. (2). Section 14.06(4) would therefore serve no purpose whatsoever within Parliament's bankruptcy regime. I cannot understand the logic of Parliament explicitly referring to, and incorporating, the ability of trustees to disclaim assets — and specifically outlining one consequence of that power — simply to mandate that such an action has no meaningful effect. We must presume that Parliament does not speak in vain and did not craft a pointless provision (*J.T.I. MacDonald Corp. c. Canada (Procureure générale)*, 2007 SCC 30, [2007] 2 S.C.R. 610 (S.C.C.) , at para. 87). It is a trite principle of statutory interpretation that every provision of a statute should be given meaning:

> It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; ... it does not make the same point twice.
>
> (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 43)

215 This evident absurdity cannot be avoided by suggesting that s. 14.06(4) was created to clarify to trustees that they may be required to expend the entire value of a bankrupt estate to comply with environmental orders, despite valid disclaimers. If Parliament's intent was truly to undermine the disclaimer power in this way, it is difficult to conceive of a more convoluted, tortuous and unclear method to achieve this result than s. 14.06(4). Had Parliament simply sought to make clear to trustees that disclaimer would not allow them to relieve themselves from satisfying environmental liabilities, it could easily have done so directly rather than enacting a provision that describes protection from personal liability they do not actually face.

216 Section 14.06, when read as a whole, indicates that subs. (4) does more than merely protect trustees from personal liability. My colleague has declined to even consider the remaining subsections of s. 14.06 that I have discussed, other than subs. (2). Nonetheless, he says that the plain meaning of a provision cannot be "contorted to make its scheme more coherent" (para. 101). The conclusion that would result from such an approach would be that Parliament simply intended to craft a largely incoherent framework. I disagree that we should reach this conclusion here. As Dickson J. (as he then was) stated in *R. v. Morgentaler* (1975), [1976] 1 S.C.R. 616 (S.C.C.) , at p. 676: "We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities." A determination that Parliament designed s. 14.06 as an incoherent whole is

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inconsistent with the role of the courts in statutory interpretation, which is to read the words of a statute in their entire context, harmoniously with the scheme of the statute. As Ruth Sullivan has noted:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.
>
> The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. [Footnote omitted.]
>
> (*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337; see also *R. v. H. (L.)*, 2008 SCC 49, [2008] 2 S.C.R. 739 (S.C.C.), at para. 47.)

217 Where it is possible to read the provisions of a statute — especially the various subsections of a single section — in a consistent manner, that interpretation is to be preferred over one that results in internal inconsistency. In my view, as I have set out above, it is possible to read s. 14.06(4) coherently with the remainder of the section. This is the interpretation that Parliament is presumed to have intended. In this case, I see no compelling reason to depart from this presumption.

218 My colleague's analysis is reminiscent of the strictly textual or literal approach to statutory interpretation — the "plain meaning rule" — that this Court squarely rejected in *Rizzo*. This is apparent from the fact that he relies strictly on what he alleges to be the "clear and unambiguous" wording of s. 14.06(4), while discounting the context of the provision. With respect, I am of the view that the Court should rely on the predominant and well-established modern approach to statutory interpretation: the words of an Act must be "'read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'" (*Rizzo*, at para. 21; *Bell ExpressVu* , at para. 26, both quoting Driedger, at p. 87).

219 In *Rizzo*, Iaccobucci J. explained that "statutory interpretation cannot be founded on the wording of the legislation alone" (para. 21). The Court of Appeal in *Rizzo*, which had adopted the plain meaning interpretation, "did not pay sufficient attention to the scheme of the [Act], its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized" (para. 23).

220 In interpreting s. 14.06(4) of the *BIA*, the majority similarly relies on the supposed plain meaning of the words of the provision but does not pay sufficient attention to the scheme of s. 14.06 as a whole; nor does it appropriately recognize the context of the words.

221 Even if we were to leave aside the wording of the provision itself and its immediate statutory context, a purposive interpretation would lead to the same result. Consider the consequences of the analysis of the AER or the analysis of my colleague in other cases like this, where an oil company's environmental liabilities exceed the value of its realizable assets. Insolvency professionals, knowing in advance that they can be compelled to funnel all of the estate's remaining assets toward those environmental liabilities (either because they cannot disclaim value-negative assets absent a risk of personal liability or because their disclaimer will be ineffective to prevent this), will never accept mandates in the first place. This is sensible business practice: if the estate's entire realizable value must go toward its environmental liabilities, leaving nothing behind to cover administrative costs, insolvency professionals will have nothing to gain — and much to lose — by stepping in to serve as receivers and trustees, irrespective of whether they are protected from personal liability. Debtors and creditors alike, knowing that this is the case, will have no reason to even petition for bankruptcy. The result is that *none* of a bankrupt estate's assets will be sold — not even an oil company's valuable wells — and the number of orphaned properties will increase. This is a far cry from the objectives of the 1997 amendments to the *BIA* as discussed in Parliament, which were to "encourage [insolvency professionals] to accept mandates" and to "reduce the number of abandoned sites" (Standing Committee on Industry, June

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11, 1996, at 15:49). It is difficult to imagine that Parliament would have intended a construction of s. 14.06(4) that explicitly undermines its stated purposes.

222 The majority appears to accept that the purposes of s. 14.06(4) of the *BIA* included encouraging insolvency professionals to accept mandates in cases where there may be environmental liabilities (paras. 80-81). However, merely protecting trustees from personal liability in such cases will fail to achieve Parliament's desired result. As I have explained, even where prospective trustees face no risk of personal liability, they will be reluctant to accept mandates if provincial entities can require the entire value of a bankrupt's realizable estate to be applied to satisfy environmental obligations.

223 Since I have explained that s. 14.06(4) provides trustees with the power to disclaim assets even where there is no risk of personal liability, it is now necessary to briefly consider whether this power was available to GTL on the facts of this case. Here, the statutory conditions to the exercise of this power were met. The Abandonment Orders clearly relate to the remediation of an "environmental condition" (or "tout fait ... lié à l'environnement" in the French version of the *BIA*, which can be translated literally as "any fact ... related to the environment"). Indeed, even the AER and the OWA have never contested this point. In response to such orders, GTL was therefore entitled to exercise the disclaimer power provided for in s. 14.06(4).

(2) Section 14.06(4) Applies to Alberta's Oil and Gas Industry

224 The AER raised an additional argument that the right of disclaimer is entirely inapplicable in the context of the statutory regime governing the oil and gas industry due to the role played by third-party surface landowners and the nature of the property interests involved which rendered the Crown's super priority under s. 14.06(7) impractical. Martin J.A. (as she then was), writing in dissent at the Alberta Court of Appeal, reached the same conclusion. With respect, I cannot agree. Parliament did not make the disclaimer power in s. 14.06(4) conditional on the availability of the Crown's super priority.

225 In delineating what interests may be disclaimed by a trustee under s. 14.06(4), Parliament used exceptionally broad language. The trustee is permitted to disclaim "any interest" in "any real property". While Redwater's AER-issued licences may not be real property, all of the parties accept that *profits à prendre* and surface leases can be characterized as real property interests. In the context of this case, it is these interests that GTL truly sought to disclaim. The AER argued that s. 14.06(4) permits the disclaimer only of "true real property", meaning land currently or previously owned by the bankrupt, without any third-party landowners. This interpretation is not consistent with the actual language used by Parliament. Had Parliament intended to restrict the disclaimer power solely to fee simple interests, it could have stated this, rather than referring to "any interest in any real property".

226 Further, the Alberta oil and gas industry is far from the only natural resource sector in which companies traditionally operate on the land of third parties, whether the Crown or private landowners. The potential liability of trustees would explode if the mere presence of these third-party landowners rendered the disclaimer power in s. 14.06(4) entirely inapplicable. The language of the section is clearly broad enough to capture the statutory regime governing Alberta's oil and gas sector.

(3) Conclusion on Operational Conflict

227 In light of this interpretation of s. 14.06(4), I agree with both courts below that there is an operational conflict to the extent that Alberta's statutory regime holds receivers and trustees liable as "licensees" in relation to the disclaimed assets (see chambers judge reasons, at para. 181; C.A. reasons, at para. 57). This conflict is far from hypothetical. Under federal law, GTL is entitled to disclaim the bankrupt's assets affected by the Abandonment Orders. Under the *BIA*, GTL cannot be compelled to take action with respect to properties it has validly disclaimed, since the act of disclaimer relieves it of any rights, interests and liabilities in respect of the disclaimed properties. But under provincial law, the AER can order GTL to abandon the disclaimed assets, among other things (see para. 11). This is exactly what happened here. Not only did the AER order GTL to complete the work, but it also made the sale of Redwater's valuable assets conditional on GTL either abandoning the non-producing properties itself or packaging those properties with the estate's valuable assets for the purposes of any sale. In doing so, the AER impermissibly disregarded the effect of GTL's disclaimers. This remains the case, irrespective of whether GTL could (or would) ever be held personally liable for the costs of abandoning the properties above and beyond the entire value of the estate.

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228 My colleague claims that the AER "has never attempted to hold a trustee personally liable" (para. 107). What is clear is that, on the facts of this case, the AER directly sought to require GTL to perform or pay for the abandonment work itself, whether this is referred to as personal liability or not. It is critical to observe that this litigation began when the AER filed an application seeking to compel GTL to comply with its obligations as a licensee, including the obligation to abandon the non-producing properties. Practically speaking, this amounted to an effort to hold GTL personally liable. Where else would the money required to abandon the disclaimed properties have come from? The value of the estate as a whole was negative, and the AER refused to permit GTL to sell the valuable properties on their own. No purchaser would have agreed to buy all of the assets together. Therefore, GTL had no way to recoup any value from the estate, as Redwater was bankrupt and no longer generating income. The *only* source of funds, in this scenario, was GTL itself. This is why the AER filed suit to compel GTL to carry out Redwater's abandonment obligations. As this makes clear, I cannot agree with the suggestion that the provincial regime has never been utilized to hold trustees personally liable in contravention of federal law. That is precisely what happened in this very case.

229 This conclusion cannot be avoided by referring to the fact that, pursuant to orders of the Alberta courts, GTL has already sold the valuable Redwater assets and the proceeds are being held in trust pending the outcome of this appeal (see majority reasons, at para. 108). This is precisely the result the AER sought to prevent by precluding GTL from selling only the valuable properties, without the disclaimed ones. GTL was able to do so only as a direct result of this litigation.

230 My colleague states that, if the AER "were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline Act*, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict" (para. 107). Thus, even on my colleague's interpretation of s. 14.06 — which I do not accept — an operational conflict does exist on the facts of this case, specifically as a result of the AER's application to the Alberta Court of Queen's Bench seeking to have GTL personally satisfy the environmental obligations associated with the disclaimed assets.

231 All of that being said, creditors with provable claims can still seek payment in accordance with the *BIA*'s priority scheme (*Abitibi*, at para. 98). As I discuss below, the AER's environmental claims remain valid as against the Redwater estate, and it may pursue those claims through the normal bankruptcy process. Thus, even if s. 14.06(4) does not permit GTL to disclaim the non-producing wells and relieve itself of the environmental obligations associated with them, it is nevertheless the case that the AER cannot compel GTL to satisfy its claims ahead of those of Redwater's secured creditors.

B. Frustration of Purpose

232 The second branch of the paramountcy test is frustration of purpose. Even where dual compliance with both federal and provincial law is, strictly speaking, possible, provincial legislation or provisions will nevertheless be rendered inoperative to the extent that they have the effect of frustrating a valid federal legislative purpose (*Moloney* , at para. 25; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.) , at pp. 154-55; *Canadian Western Bank* , at para. 73). The focus of the analysis is on the effect of the provincial legislation or provisions, not its purpose (*Moloney* , at para. 28; *Husky Oil* , at para. 39).

233 This Court has repeatedly recognized that one of the purposes of the *BIA* is "the equitable distribution of the bankrupt's assets among his or her creditors" (*Moloney* , at para. 32; *Husky Oil* , at para. 7). It achieves this goal through a collective proceeding model — one that maximizes creditors' total recovery and promotes order and efficiency by distributing the estate's assets in accordance with a designated priority scheme (*Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) , at para. 22). All claims that are "provable in bankruptcy" are subject to this priority scheme. Exercises of provincial power that have the effect of altering bankruptcy priorities are therefore inoperative because they frustrate Parliament's purpose of equitably distributing the estate's assets in accordance with the federal statutory regime (*Abitibi*, at para. 19; *Husky Oil* , at para. 32).

234 The question here is whether the environmental claims asserted by the AER (i.e., the Abandonment Orders) are provable in bankruptcy. If they are, then the AER is not permitted to assert those claims outside of the bankruptcy process and ahead of Redwater's secured creditors because this would frustrate the purpose of the federal priority scheme. Rather, it must abide by the *BIA* and seek recovery from the estate through the normal bankruptcy procedures (*Abitibi*, at para. 40).

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235 In *Abitibi*, this Court established a three-part test, rooted in the language of the *BIA*, to determine whether a claim is provable in bankruptcy: "First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation" (para. 26 (emphasis in original)). Since there is no dispute that Redwater's environmental obligations arose before it became bankrupt, I limit my analysis below to the first and third prongs of the *Abitibi* test: whether the liability is owed to a creditor, and whether it is possible to attach a monetary value to that liability.

236 The first prong of the *Abitibi* test asks whether the debt, liability or obligation at issue is owed by a bankrupt entity to a creditor. Deschamps J., writing for a majority of the Court, suggested that this is not an exacting requirement: "The *only determination* that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied" (para. 27 (emphasis added)). Though I would not go so far as to suggest that the analysis under the first prong is merely perfunctory or pro forma, and circumstances may well exist where it is not satisfied, Deschamps J. made clear in *Abitibi* that "*[m]ost* environmental regulatory bodies can be creditors", again stressing that government entities cannot systematically evade the priority requirements of federal bankruptcy legislation under the guise of enforcing public duties (para. 27 (emphasis added)). Even Martin J.A., writing in dissent at the Court of Appeal in this case, acknowledged that "*Abitibi* cast[s] the creditor net widely" (para. 186). The language of *Abitibi* admits of no ambiguity, uncertainty or doubt in this regard.

237 The majority suggests that applying *Abitibi* on its own terms will make it "impossible for a regulator *not* to be a creditor" (para. 136 (emphasis in original)). Without seeking to speculate on all possible scenarios, I would simply note that there will be many obvious circumstances in which regulators are not even exercising enforcement powers against particular debtors and the analysis from*Abitibi* can be concluded at a very early stage. Provincial regulators do many things that do not qualify as enforcement mechanisms against specific parties. For example, a regulatory agency may publish guidelines for the benefit of all actors in a certain industry or it may issue a license or permit to an individual. In such cases, any discussion of frustrating federal purposes will not go far. However, as Deschamps J. expressly acknowledged, the first prong of the test will have very broad application. This Court should not feel compelled to limit its scope when*Abitibi* employed clear language in full recognition of its wide-ranging effects.

238 Here, there is no doubt that the AER exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. The reasoning is simple: Redwater owes a debt to the AER, and the AER has attempted to enforce that debt by issuing the Abandonment Orders, which require Redwater to make good on its obligation. If Redwater (or GTL, as the receiver and trustee) does not abide by those orders — to the detriment of the estate's other creditors — it can be held liable under provincial law. This is, by any definition, an exercise of enforcement power, which is precisely what *Abitibi* describes. In fact, the AER itself conceded this point *twice* — first before the Court of Queen's Bench, and again at the Court of Appeal (chambers judge reasons, at para. 164; C.A. reasons, at para. 73).

239 The conclusion that I reach with respect to the AER's status as a creditor follows from a straightforward application of *Abitibi*. My colleague, however, seeks to reformulate this prong of the test. He suggests that a regulator is acting as a creditor only where it is not acting in the public interest and where the regulator itself, or the general revenue fund, is the beneficiary of the environmental obligation. He endorses the holding allegedly made in *Northern Badger* that "a regulator enforcing a public duty by way of non-monetary order is not a creditor" (para. 130).

240 In my view, it is neither appropriate nor necessary in this case to attempt to redefine this prong of *Abitibi* and narrow the broad definition of "creditor" provided by Deschamps J. This Court should leave her clear description of the provable claim standard to stand on its own terms. Respectfully, I disagree with the manner in which the majority is attempting to reformulate the "creditor" analysis, for a number of reasons.

241 Firstly, I do not believe that this case represents an appropriate opportunity to revisit the "creditor" stage of the *Abitibi* test. The AER conceded in both of the courts below that it was in fact a creditor of GTL. As a direct result of these concessions, neither the Alberta Court of Queen's Bench nor the majority of the Court of Appeal directly addressed this issue; instead, they merely

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provided cursory comments. This issue appears to have been raised for the first time by Martin J.A. in her dissenting judgment. However, even her analysis is relatively brief, comprising only three paragraphs and consisting mainly of the statement that the costs of abandonment are "not owed to the Regulator, or to the province" (para. 185). While it is true that the parties briefly addressed this issue in their written and oral submissions to this Court, it was clearly not a substantial focus of their arguments. Without the benefit of considered reasons from the lower courts or thorough submissions on the continued application of the first prong of the test formulated in *Abitibi*, this Court should not attempt to significantly alter it.

242 Secondly, the majority states that no fairness concerns are raised by disregarding the AER's concessions below. It makes this point predominantly because the issue was raised and argued before this Court and because of the AER's unilateral assertion in its letter to GTL in May 2015. However, it is important to note that the effect of the AER's concessions was that GTL and ATB Financial were no longer required to adduce any evidence on this issue (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (5th ed. 2018), at p. 1387). This point is important given that the majority's reformulation of the "creditor" requirement under the first prong of the test is highly fact-specific and dependent on the circumstances of the particular case. As a direct result of the AER's concession in the Alberta Court of Queen's Bench, we cannot know what evidence GTL or ATB Financial could have adduced on this issue. Therefore, there may indeed be real prejudice occasioned to these parties by disregarding the AER's concession at this point in time.

243 Thirdly, my colleague relies on the fact that the chambers judge in*Abitibi* found that the Province had already expropriated three of the five sites for which it issued remediation orders and was likely using the orders as a means to offset AbitibiBowater's NAFTA claims. While the chambers judge did in fact make these findings, they were inconsequential to Deschamps J.'s analysis on the "creditor" prong of the test. When applying the test to the facts of*Abitibi*, she explained that the first prong was "easily satisfied" because "the Province had identified itself as a creditor by resorting to [*Environmental Protection Act*, S.N.L. 2002, c. E-14.2] enforcement mechanisms" (*Abitibi*, at para. 49). She placed no reliance on the fact that the Province might itself derive a financial benefit from its actions and was not enforcing a purely public duty. Her analysis was in no way based on a finding that the Province's actions were a "colourable attempt" to recover a debt or that they demonstrated an "ulterior motive" (majority reasons, at para. 128).

244 Fourthly, in my view, it is incorrect to rely on *Northern Badger* in this case. That decision does not support my colleague's position in the manner he alleges. The issue in *Northern Badger* was also whether environmental remediation orders could be considered claims provable in bankruptcy. However, the crux of the dispute was whether "enforcing the requirement for the proper abandonment of oil and gas wells" (p. 57) gave rise to a provable claim because it would require the receiver to expend funds. Laycraft C.J.A. never addressed the question of whether the regulator could be said to have a contingent claim because it would complete the abandonment work itself and assert a claim for reimbursement. It was in the context of the regulator requiring the receiver to fulfill the abandonment obligations *itself* that the Alberta Court of Appeal discussed the enforcement of a public duty. It is important to carefully examine what the Court of Appeal actually said in this regard:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.
>
> It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under Sections 91(1) and (2) of the *Oil and Gas Conservation Act* (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the Board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta. [Emphasis added; paras. 33-34.]

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245 As is evident from para. 34 of *Northern Badger*, quoted above, the Court of Appeal never stated in that case that a regulator is not — or cannot be — a creditor when it is acting to enforce a public duty. In *Abitibi*, when referring to *Northern Badger*, Deschamps J. explained that the Alberta Court of Appeal "found that the duty to undertake remediation work is owed to the public at large *until the regulator exercises its power to assert a monetary claim*" (*Abitibi*, at para. 44 (emphasis added)). Laycraft C.J.A. accepted that when the regulator fulfills an environmental obligation itself and asserts a claim for reimbursement, it does indeed "become a creditor for the sums expended". Even in this situation, the public is still the ultimate beneficiary of the remediation work. This is largely consistent with Deschamps J.'s formulation of the test for a provable claim. In fact, this Court simply extended this principle in *Abitibi*, concluding that a regulator may also be a creditor with a provable contingent claim when it is sufficiently certain that the regulator will perform the remediation work and advance a claim for reimbursement. This is precisely the situation with the AER and the OWA here, as I will explain in more detail below. The Alberta Court of Appeal did not frame the issue in terms of the three-part test that would later be developed in *Abitibi*; it did not divide its analysis of whether a provable claim existed. However, viewed properly, Deschamps J. dealt with the concerns raised in *Northern Badger* under the third prong of the *Abitibi* test. It is not appropriate to duplicate these principles under the first prong as well, as the majority proposes. For this reason, it is misguided to rely on *Northern Badger* in this appeal to conclude that the AER is not a creditor.

246 However, even if the majority were correct about the reasoning in *Northern Badger* with respect to whether regulators enforcing public duties can be creditors — which I do not concede — I do not accept its conclusion that*Abitibi* did not overturn that reasoning. The Court was well aware of the decision in *Northern Badger* and cited it directly. Despite this, Deschamps J., when formulating the first prong of the test, made no distinction between regulators acting in the public interest and regulators acting for their own benefit. Instead, she stated that "the only determination that has to be made" (para. 27) is whether the regulator is exercising its enforcement powers against a debtor. In referring to *Northern Badger*, she expressly noted that "*[t]he real question is not to whom the obligation is owed*, as this question is answered by the statute, which determines who can require that it be discharged" (paras. 27 and 46 (emphasis added)).

247 Finally, and perhaps most importantly, suggesting that a regulator is not acting as a creditor where its environmental enforcement activities are aimed at the public good and are for the benefit of the public effectively overrules the first prong of the *Abitibi* test. Under my colleague's approach, it is no longer the case that the *only* determination that has to be made at the creditor stage of the analysis is "whether the regulatory body has exercised its enforcement power against a debtor" (*Abitibi*, at para. 27). Instead, the court must consider whether the regulatory body is enforcing a public duty and whether it stands to benefit financially from the fulfillment of the obligation in question.

248 Provincial regulators, in exercising their statutory environmental powers, will, in some sense, virtually always be acting in some public interest or for the benefit of some segment of the public. Under my colleague's reformulation of the first prong of the *Abitibi* test, it will be nearly impossible to find that regulators acting to protect environmental interests are ever creditors, outside the facts of*Abitibi* itself. As a result, provincial entities will be able to completely disregard the *BIA*'s priority scheme as long as they can plausibly point to some public interest that is furthered by their actions. Such a result strips*Abitibi* of its central holding and entitles provincial regulators to easily upend Parliament's purpose of providing an equitable recovery scheme in bankruptcy for all creditors.

249 In my view, it is insufficient to simply note that the facts of *Abitibi*differ from those of the present appeal (majority reasons, at para. 136). Deschamps J.'s broad articulation of the first prong of the test was in no way made dependent upon the particular facts of *Abitibi*. She sought to provide a clear general framework for determining when a regulator will be classified as a creditor — a framework that the majority's reasons effectively rewrite.

250 Further, it is worth noting that this Court in *Moloney* followed *Abitibi* in applying the broad definition of "creditor". In *Moloney* , this Court concluded that the Province of Alberta was acting as a creditor even though the debt it was collecting was reimbursement for compensating a third party who had been injured by the debtor in a car accident (para. 55). I fail to see how any meaningful distinction can be drawn between that situation and a situation in which a regulator seeks reimbursement for the costs incurred to remedy environmental damage caused to the land of third parties by the debtor.

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251 "[G]reat care should be taken" before this Court overturns or overrules one of its prior decisions (*Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317 (S.C.C.) , at para. 65). It is "a step not to be lightly undertaken" (*Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.) , at para. 24). In order to do so, "the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled" (*Craig* , at para. 25; see also *Teva* , at para. 65). The reasons for exercising such caution are clear and sound, namely to ensure "certainty, consistency and institutional legitimacy" and to recognize that "the public relies on our disciplined ability to respect precedent" (*Teva* , at para. 65). When this Court decides that it is necessary to depart from one of its past decision, it should be clear about what it is doing and why.

252 Despite these clear admonitions against this Court too easily overturning its own precedents, that is precisely what the majority proposes to do in this case. Its approach effectively overrules the unequivocal definition of "creditor" provided in*Abitibi* — a considered decision rendered by a majority of this Court a mere six years ago. Not only does the majority fail to provide compelling reasons why Deschamps J.'s clear definition is wrong, but it also does not acknowledge that it is overturning a recent decision of this Court, rejecting the suggestion that this is the impact of its reasoning (para. 136). Further, this is being done without complete and robust submissions on the issue. Such an approach to our own precedents does not serve the goals of certainty, consistency or institutional legitimacy.

253 This Court should continue to apply the "creditor" prong of the test as it was clearly articulated in *Abitibi*. Deschamps J.'s definition ensures that provincial regulators are not able to easily appropriate for themselves a higher priority in bankruptcy and undermine Parliament's priority scheme. It advances the goals of orderliness and fairness in insolvency proceedings. Under that broad standard, the AER plainly acted as a creditor with respect to the Redwater estate. That is likely why it conceded this point in both of the courts below.

254 Since there is no dispute that the second prong of the *Abitibi* test is satisfied, I turn next to the third prong, which asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. As explained in *Abitibi* in the context of an environmental order:

> With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.
>
> . . . . .
>
> The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process. [Emphasis added; paras. 30 and 36.]

255 In my view, it is sufficiently certain that either the AER or the OWA will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. Therefore, the final prong of the *Abitibi* test is satisfied. The chambers judge made three critical findings of fact — each of which is entitled to deference on appeal (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) , at para. 10) — that easily support this conclusion.

256 First, Wittmann C.J. found that GTL was not in possession of the disclaimed properties and, in any event, "has no ability to perform any kind of work on these assets" because the environmental liabilities exceeded the value of the estate itself (para. 170; see also *Abitibi*, at para. 53 where the Court stated that: "Abitibi had no means to perform the remediation work"). He discounted the possibility that any of Redwater's working interest participants would step in to perform the work, even for the small number of Redwater's licensed assets for which such partners existed (chambers judge reasons, at para. 171). In sum, he concluded that "there is no other party who could be compelled to carry out the abandonment work" (para. 172).

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257 Two decisions of the Ontario Court of Appeal highlight why this is important. In *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159 (Ont. C.A.), Juriansz J.A. found that the "sufficient certainty" standard was *not* satisfied in respect of certain sites because those sites had already been sold so the purchasers could be compelled to carry out the work on the basis that they were jointly and severally liable for the remediation obligations (paras. 39-40). But in *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154 (Ont. C.A.), Juriansz J.A. found that the "sufficient certainty" standard *was* satisfied because there was no purchaser that could be compelled by the regulator to complete the work. While it is true that fresh evidence on appeal revealed that the Ministry of the Environment had commenced the remediation work, Juriansz J.A. found that the fact that there were no subsequent purchasers had grounded the application judge's implicit conclusion regarding sufficient certainty (paras. 16-17). The present case is like *Northstar*, which is perfectly applicable to the facts of this case: there is no purchaser to take on Redwater's assets, and the debtor itself is insolvent. The chambers judge in this case concluded that there was no other party who could be compelled to carry out the work.

258 Second, in light of the fact that neither GTL nor Redwater's working interest participants would (or could) undertake this work, Wittmann C.J. found as a fact that "the AER will ultimately be responsible for [the abandonment] costs" (para. 171). He concluded that "the AER has the power [to seek recovery of abandonment costs] and has actually performed the work on occasion" (para. 168). In fact, in this very case, "the AER has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets" (para. 172). This conclusion finds ample support in the record. In a cover letter sent with the Abandonment Orders on July 15, 2015, the AER unambiguously stated that if Redwater failed to abandon the disclaimed properties in accordance with its instructions, "the AER *will, without further notice, use its process to have the properties abandoned*" (GTL's Record, vol. I, at p. 102 (emphasis added)). The letter further stated that "[t]he AER *will exercise all remedies available to it to recover the costs from the liable parties*" (p. 102 (emphasis added)). The chambers judge did not err in relying on these unequivocal statements from the AER itself — to the effect that it *will* have the abandonment work performed and seek reimbursement — to conclude that sufficient certainty existed in this case.

259 Although there is some contrary evidence in the record — principally, the remarks of an AER affiant, who stated that the AER would not abandon the properties — Wittmann C.J. did not commit any palpable and overriding error by giving more weight to the letter that the AER sent contemporaneously with the Abandonment Orders. Likewise, to the extent that the AER sent other correspondence stating that it was not a creditor and that it was not asserting a provable claim, Wittmann C.J. did not err in discounting these self-serving statements as insufficiently probative on the ultimate legal questions. There is therefore no basis to disturb these factual findings or to reweigh this evidence on appeal.

260 Even if the AER's admission that it would abandon the properties itself is not sufficient on its own, Wittmann C.J. made a third critical finding of fact: the AER's only "realistic alternativ[e] to performing the remediation work itself" was to deem the renounced assets to be orphan wells (para. 172). In this circumstance, he found that "the legislation and evidence shows that if the AER deems a well an orphan, *then the OWA will perform the work*" (para. 166 (emphasis added)).

261 In light of these factual determinations, Wittmann C.J. rightly concluded that the "sufficient certainty" standard of *Abitibi* was satisfied. He elaborated on the legal basis for that conclusion as follows:

> Does this situation meet the sufficient certainty criterion as described in *AbitibiBowater*? The answer is no in a narrow and technical sense, since it is unclear whether the AER will perform the work itself or if it will deem the properties subject to the orders, orphans. If so, the OWA will probably perform the work, although not necessarily within a definite timeframe. However, the situation does meet, in my opinion, what was intended by the majority of the Court in *AbitibiBowater*. ... In the result, I find that although not expressed in monetary terms, the AER orders are in this case intrinsically financial. [para. 173]

262 My colleague does not specify the standard of review he applies in overturning Wittmann C.J.'s application of the third prong of the *Abitibi* test to this case. Nevertheless, he disagrees with the chambers judge and holds that the "sufficient certainty" standard is not satisfied. He offers two reasons for overruling Wittmann C.J.'s finding; but in doing so, he does not identify

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any palpable and overriding error (or, even under the non-deferential standard of correctness, *any* true error) in the chambers judge's ultimate conclusion.

263 The first reason — the purported legal error of determining that the Abandonment Orders are "intrinsically financial" — is little more than a distraction. Even if this is an erroneous application of *Abitibi*, it is evident that Wittmann C.J. was of the view, *at a minimum*, that either the AER or the OWA would complete the abandonment work. And as I describe below, this alone is enough to satisfy the "sufficient certainty" standard. My colleague overemphasizes the import of this stray comment in the context of a thorough set of reasons that otherwise faithfully applies the correct standard. Any legal error on this basis, to the extent that one exists, does not displace the result that the chambers judge reached.

264 The second reason is more substantial. According to Wagner C.J., whether the AER will perform the abandonment work itself or delegate that task to the OWA is dispositive, since it was the Province itself that undertook the reclamation work in*Abitibi*. Here, he suggests, "the OWA is not the regulator" (para. 147) and thus the involvement of the OWA "is insufficient to satisfy the 'sufficient certainty' test" (para. 146).

265 Accepting, for a moment, the potential relevance of this distinction, I am of the view that any uncertainty as to whether the AER *would* delegate the reclamation work to the OWA is questionable. My colleague's emphasis on the self-serving remarks of an AER affiant and the fact that the AER took no immediate steps to perform the abandonment work itself amounts to little more than *post hoc* appellate fact finding, especially in light of the AER's own statement. Although Wittmann C.J. suggested that it was "unclear" whether the AER would complete this work itself, his other findings of fact and law — that the AER has the statutory power to perform the work, that it has actually done so in the past, and that it expressly stated its intention to seek reimbursement here — suggest otherwise. Regardless, Wittmann C.J.'s remark that the "sufficient certainty" standard was not satisfied "in a narrow and technical sense" must be read in this context: he was simply suggesting that there was some uncertainty as to "whether the AER will perform the work itself" as opposed to delegating the work to the OWA (para. 173). He was *not* implying — let alone concluding as a matter of law — that GTL had failed to prove the third prong of the *Abitibi* test. That reading would vastly overstate, and completely decontextualize, the meaning of a few isolated words in his reasons.

266 The more important problem, though, is that any distinction between the performance of the abandonment work by the AER and its performance by the OWA is meaningless. Form is elevated over substance if it is concluded that the "sufficient certainty" standard is not satisfied when a regulatory body's delegate, as opposed to the regulatory body itself, performs the work. And despite my colleague's suggestion that a regulatory body cannot act strategically to evade*Abitibi*, that is precisely what his analysis permits.

267 We are told that the "OWA's true nature" (majority reasons, at para. 147) — and therefore what purports to distinguish this case from impermissible examples of strategic delegation — rests on four factors: (1) the OWA is a non-profit organization; (2) it has an independent board of directors; (3) it has its own mandate and determines "when and how it will perform environmental work" (para. 148); and (4) it is "financially independent" (para. 148) as it is funded "almost entirely" by a tax on the oil and gas industry (para. 23).

268 The first point is true, but irrelevant. Why does an organization's non-profit status have any bearing on whether it is being used as a vehicle to avoid the "sufficient certainty" standard under *Abitibi*?

269 The second point is not accurate. The AER appoints members of the OWA's board of directors, as does another provincial body, Alberta Environment and Parks — underscoring the extent to which the provincial government can influence the OWA's activities.

270 The third point overstates the OWA's level of independence. The *Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001, gives the AER substantial power to influence the OWA's decision making. Section 3(2)(b) of the regulation expressly states that, in fulfilling its delegated powers, duties and functions, the OWA must act in accordance with "applicable requirements, guidelines, directions and orders of the [AER]". The regulation also mandates that the OWA provide information to the AER on request and regularly submit reports indicating or containing its budget, "goals, strategies and performance

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measures", activities for the previous year and financial statements (s. 6). The AER appears to be able to exercise substantial control and oversight over the OWA if it so chooses, including over the manner in which the OWA carries out its environmental work.

271 The fourth point is also inaccurate and would probably be irrelevant even if it were accurate. The Province has provided funding to the OWA in the past, including a $30 million contribution in 2009 and an additional $50,000 in 2012, and it has announced that it will loan the OWA an additional $230 million (see A.F., at para. 99 (alluding to this loan); recall *Abitibi*, at para. 58 where the Court stated that: "Earmarking money may be a strong indicator that a province will perform remediation work").

272 In any event, it is important to note the more salient features of the OWA and its relationship with the AER (and, more generally, with the provincial government). The OWA operates under legal authority delegated to it by the AER and in accordance with a Memorandum of Understanding it has signed with both the AER and Alberta Environment and Parks. The orphan fund itself is administered by the AER, which prescribes and collects industry contributions and remits the funds to the OWA. The OWA cannot increase the industry levy without first obtaining approval from the Alberta Treasury Board. In addition, the *OGCA* makes clear that abandonment costs incurred by any person authorized by the AER — which would include the OWA — constitute a debt payable to the AER (*OGCA*, s. 30(5)). The record shows that the AER has remitted abandonment costs to the OWA in the past, in the form of security deposits and amounts recovered through successful enforcement action against licensees.

273 The AER and the OWA are therefore inextricably intertwined. We should see this arrangement for what it is: when the AER exercises its statutory powers to declare a property an "orphan" under s. 70(2) of the *OGCA*, it effectively delegates the abandonment work to the OWA. Treating the OWA's work as meaningfully different from abandonment activities carried out by the AER turns a blind eye to this reality and does nothing to further the underlying principles of paramountcy. To the contrary, it provides provincial regulators with an easy way to evade the test of *Abitibi* through strategic behaviour, thereby undermining the legitimate federal interest in enforcing the *BIA*'s priority scheme. It should not matter which body carries out the work (see C.A. reasons, at para. 78; *OGCA*, s. 70(1)(a)(ii)).

274 The majority faults the chambers judge for "failing to consider whether the OWA can be treated as the regulator" (para. 153). However, the chambers judge cannot have erred by failing to appreciate a level of independence that simply does not exist.

275 The majority also offers an alternative conclusion: it is not sufficiently certain that even the OWA will perform the abandonment work (para. 149). Whether the chambers judge's conclusion to the contrary amounts to a palpable and overriding error, or something else, we are not told.

276 Again, such an approach would permit the AER to benefit from strategic gamesmanship by manipulating the timing of its intervention in order to escape the insolvency regime and strip Redwater of its assets. This arbitrary line-drawing exercise, in which a period of 10 years before the wells are abandoned is too long (but presumably some shorter time line would not be), has no basis in law. As Slatter J.A. convincingly observed in his reasons, the AER

> cannot insist that security be posted to cover environmental costs, but at the same time argue that it may be a long time before the Orphan Well Association actually does the remediation. If the Regulator takes security for remediating Redwater's orphan wells, those funds cannot be used for any other purpose. If security is taken, it is no answer that the security might be held for an indefinite period of time; the consequences to the insolvency proceedings and distribution of funds to the creditors are immediate and certain. Further, if security is taken, the environmental obligation has clearly been reduced to monetary terms. [Emphasis added; para. 79.]

277 Moreover, the OWA's estimate of 10 to 12 years was put forward at the start of this litigation more than 3 years ago. Whether that estimate remains accurate after the province's proposed infusion of nearly a quarter of a billion dollars into the orphan fund (A.F., at para. 99) [1] — money that will undoubtedly speed up the OWA's abandonment efforts — is an open question. In any case, the changing factual context highlights the essential problem with the majority's approach: pinning the

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constitutional analysis on the timing of the OWA's intervention is arbitrary and irrational, as it causes the result to shift based on decisions made by the very actor that stands to benefit from a finding that the "sufficient certainty" standard is not satisfied.

278 All that aside, the chambers judge's recognition that the OWA will "probably" abandon the properties should be enough (chambers judge reasons, at para. 173). Concluding otherwise is not justified, since it would mean applying a stricter certainty requirement than is called for by *Abitibi* itself. Deschamps J. expressly rejected an alternative standard — a "likelihood approaching certainty" — adopted by McLachlin C.J. in dissent (*Abitibi*, at para. 60). But here, dismissing as insufficient the chambers judge's conclusion that the OWA would "probably" complete the work essentially means requiring a "likelihood approaching certainty". Since *Abitibi*does not require absolute certainty, or even a likelihood approaching certainty, Wittmann C.J. did not err in concluding that the third prong was satisfied (see the *Oxford English Dictionary* (online), which defines "probably" as "with likelihood (though not with certainty)"; "almost certainly; as far as one knows or can tell; in all probability; most likely" (online)).

279 After concluding that it is not sufficiently certain that the AER will abandon the sites, the majority goes on to find that the AER's licence transfer restrictions similarly do not satisfy the *Abitibi* test. This is so, it says, because the AER's refusal to approve a licence transfer does not give it a monetary claim against Redwater and because compliance with the Licensee Management Ratio ("LMR") conditions "reflects the inherent value of the assets held by the bankrupt estate" (para. 157). At the outset, I wish to make clear that I have already concluded that, since GTL lawfully disclaimed the non-producing properties under s. 14.06(4) of the *BIA*, an operational conflict arises to the extent that the AER included those disclaimed properties in calculating Redwater's LMR for the purpose of imposing conditions on the sale of Redwater's assets. In the analysis that follows, I reach that same conclusion under the frustration of purpose aspect of the paramountcy test as well.

280 I take issue with the majority's conclusion regarding the LMR conditions for two reasons. First, this approach elevates form over substance, disregarding Gascon J.'s admonition in *Moloney* that "[t]he province cannot do indirectly what it is precluded from doing directly" (para. 28; see also *Husky Oil* , at para. 41). Refusing to approve a sale of Redwater's assets unless GTL satisfies Redwater's environmental liabilities is no different, in substance, from directly ordering Redwater or GTL to undertake that work. This is because the AER achieves the exact same thing — the fulfillment of Redwater's environmental obligations — by making any sale conditional on GTL completing the work itself, posting security or packaging the non-producing assets into the sale, which reduces the sale price by the exact amount of those liabilities and ensures that the purchaser can be compelled, as the subsequent "licensee" under provincial law, to comply with the Abandonment Orders.

281 The only difference between these two exercises of provincial power is the means by which the AER has opted to enforce the underlying obligations. The Abandonment Orders carry a threat of liability for non-compliance; imposing conditions on the sale of Redwater's assets, on the other hand, does not create a liability in a formal sense, but it does preclude any sale from occurring unless and until those obligations are satisfied. Since the trustee must sell the assets in order to carry out its mandate, the *effect* of imposing conditions on the sale of Redwater's assets is the same as that of issuing abandonment orders — and, as my colleague acknowledges, it is the effect of provincial action, not its intent or its form, that is central to the paramountcy analysis (para. 116; see also *Husky Oil* , at para. 40). In either case, then, the effect of the AER's action is to create a debt enforcement scheme — one that requires the environmental obligations owed to the AER to be discharged ahead of the bankrupt's other debts.

282 Second, it is irrelevant to this analysis that the licensing requirements predate Redwater's bankruptcy and apply to all licensees. This is no different from*Abitibi*, where the obligation to close down and remediate the properties predated AbitibiBowater's bankruptcy and could also have been said to constitute an "inherent" limitation on the value of the regulatory licence. Yet the obligations at issue there were provable claims. So too here. Alberta is, of course, free to affect the priority of claims in non-bankruptcy contexts. For example, it can leverage its licensing power to condition the sale of assets by *solvent* corporations on the payment of outstanding debts to the province. But "once bankruptcy has occurred [the *BIA*] determines the status and priority of the claims" (*Husky Oil* , at para. 32, quoting A. J. Roman and M. J. Sweatman, "The Conflict between Canadian Provincial Personal Property Security Acts and The Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. B. Rev.* 77, at p. 79).

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283 In this case, imposing conditions on the sale of Redwater's valuable assets *does* result in a monetary debt in the AER's favour, whether in the form of: (1) the posting of security; (2) actual completion of the environmental work; or (3) the sale of the non-producing properties to another entity that is then regulated as a "licensee" and, as such, can be compelled under provincial law to complete the work. In each case, the result is the same: the AER is conditioning any sale of Redwater's assets on its ability to recover a pre-existing debt owed to it by the bankrupt.

284 An approach which artificially separates the Abandonment Orders and the transfer requirements in order to treat them as analytically distinct under the *Abitibi* test would cause the paramountcy analysis to turn on irrelevant subtleties in the manner or form in which the province has chosen to exercise its power. The two measures must be seen in tandem as the AER's means of enforcing a debt against the Redwater estate. As I have described, there is no meaningful difference in the bankruptcy context between a formal abandonment order directing a trustee to engage in remediation work and a rigid licensing system that imposes the exact same obligations as a condition of sale — a sale that, if the trustee is to carry out its mandate, *must* occur. The only effect of the majority's analysis is to encourage regulators to collect on their debts in more creative ways. None of this serves the purposes of paramountcy; and, more critically, nothing in that analysis offers insolvency professionals (or regulators, for that matter) clear guidance as to the types of obligations that will or will not satisfy the *Abitibi* test.

285 Since it is sufficiently certain that the AER (or the OWA, as its delegate) will complete the abandonment and reclamation work, all three prongs of the *Abitibi* test are satisfied. The Abandonment Orders are provable claims, and therefore the AER may not compel Redwater or its trustee to fulfill the obligations in question outside of the *BIA*'s priority scheme. Likewise, the AER may not condition the sale of Redwater's valuable assets on the performance of those same obligations.

286 Towards the end of its analysis, the majority makes the point that the AER's enforcement actions in this case facilitate, rather than frustrate, Parliament's intentions behind the *BIA* priority scheme due to the super priority for environmental remediation costs set out in s. 14.06(7) (para. 159). Respectfully, I completely reject this contention. No party attempted to argue that the super priority in subs. (7) was applicable on the facts of this case. Indeed, it is clear that it is not, as the majority itself acknowledges. I cannot accept that where Parliament has set out a particular super priority for the Crown for environmental remediation costs, secured against specific real property assets of the bankrupt, and where certain conditions are met, it somehow "facilitates" Parliament's priority scheme to, in effect, impose that super priority over other assets, in the absence of those statutory conditions being satisfied. It is wrong to rely on s. 14.06(7) to recognize an effective super priority for the AER in circumstances where the terms of that subsection are inapplicable. Doing so clearly undermines the detailed and comprehensive priority scheme that Parliament set out in the *BIA* to achieve its purposes. Had Parliament wished to extend a Crown super priority for environmental remediation costs beyond the circumstances in s. 14.06(7), it could have done so.

287 As a final note, GTL and ATB Financial advance alternative arguments that some aspects of Alberta's statutory regime, including the definition of "licensee", frustrate the purposes of the 1997 amendments to the *BIA* — purposes that, they say, include protecting insolvency professionals from liability and reducing the number of orphaned sites.

288 It is not strictly necessary for me to address these arguments, since I have already found that there is an operational conflict (the Alberta regime's failure to recognize the lawfulness of GTL's disclaimers) as well as a frustration of purpose on other grounds (interference with the *BIA*'s priority scheme). I would note, however, that GTL has stated that it would immediately seek a discharge if it were required to carry out the abandonment work, which would result in the remaining Redwater assets being surrendered to the OWA. The result in this circumstance, which does not appear to be acknowledged, or which appears to be ignored, in my colleague's reasons, would be *more* orphaned oil wells. To the extent, then, that the 1997 amendments were intended to reduce the number of orphaned properties, that purpose is also frustrated by preventing a receiver or trustee from disclaiming value-negative assets.

IV. Conclusion

289 There is much to be said in the context of this appeal about which outcome will optimally balance environmental protection and economic development. On the one hand, enforcing the AER's remediation orders would effectively wipe out

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the estate's remaining value and leave all of its creditors (except the AER) without any recovery. It would also likely discourage insolvency professionals from accepting mandates in cases such as this one — potentially resulting in more orphaned properties across the province. On the other hand, permitting GTL to disclaim the non-producing wells and preventing the AER from enforcing environmental obligations before the estate's value is depleted would leave open the question of who, exactly, should foot the bill for remediating the affected land.

290 Whatever the merits of these competing positions, in matters of statutory interpretation this Court is one of law, not of policy. As the majority recognizes, at para. 30, "it is not the role of this Court to decide the best regulatory approach to the oil and gas industry"; decisions on these matters are made — indeed, they *have been made* — by legislators, not judges. And the law in this case supports only one outcome. But this does not mean that the AER is without options to protect the public from bearing the costs of abandoning oil wells. It could adjust its LMR requirements to prevent other oil companies from reaching the point of bankruptcy with unfunded abandonment obligations (as it has already done since this litigation began). It could adopt strategies used in other jurisdictions, such as requiring the posting of security up-front so that abandonment costs are not borne entirely at the end of an oil well's life cycle. One of the interveners, the Canadian Bankers' Association, noted that such systems of up-front bonding are prevalent in American jurisdictions. The AER could work with industry to increase levies so that the orphan fund has sufficient resources to respond to the recent increase in the number of orphaned properties. It could seek judicial intervention in cases where it suspects that a company is strategically using insolvency as a voluntary step to avoid its environmental liabilities (*Sydco Energy Inc (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156 (Alta. Q.B.), at para. 84). And, as I have noted, it can continue to apply the province's statutory regime to all assets of an insolvent or bankrupt debtor that are retained by a receiver or trustee, including wells and facilities that the receiver or trustee seeks to operate rather than sell.

291 The AER may not, however, disregard federal bankruptcy law in the pursuit of otherwise valid statutory objectives. Yet that is precisely what it has done here by effectively displacing the "polluter-pays" principle enacted by Parliament in favour of a "lender-pays" regime, in which responsibility for the bankrupt's environmental liabilities is transferred to the estate's creditors. Our paramountcy jurisprudence does not permit that result.

292 For the foregoing reasons, I would dismiss the appeal and affirm the orders made by the chambers judge.

Appeal allowed.

Pourvoi accueilli.

Appendix

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

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

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

(a) an interim receiver;

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

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

. . . . .

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

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(a) before the trustee's appointment; or

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

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

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

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

(i) complies with the order, or

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

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

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

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

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

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

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

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

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

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

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

Footnotes

1 I am assuming that the AER's factum is accurate in referring to the existence and amount of this loan (which no other party contested).

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Tab 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Arrangement de MPECO Construction inc. | 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 C.B.R. (6th) 87 | (Que. Bktcy., Feb 4, 2019)

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
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Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency
Related Abridgment Classifications
Tax
I General principles
I.5 Priority of tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax
III.14 Collection and remittance
III.14.b GST held in trust
Headnote
Tax --- Goods and Services Tax — Collection and remittance — GST held in trust
Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute

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provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

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Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount

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collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer

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sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Table of Authorities

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), (sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny)* 2009 G.T.C. 2036 (Eng.), (sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny)* [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re)* 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

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ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19 C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City))* [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville))* 215 N.R. 81, (sub nom. *Doré v. Verdun (City))* 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — distinguished

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Gauntlet Energy Corp., Re (2003), 30 Alta. L.R. (4th) 192, 2003 ABQB 894, 2003 CarswellAlta 1735, [2003] G.S.T.C. 193, 49 C.B.R. (4th) 213, [2004] 10 W.W.R. 180, 352 A.R. 28 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Komunik Corp., Re (2010), 2010 CarswellQue 686, 2010 QCCA 183 (C.A. Que.) — referred to

Komunik Corp., Re (2009), 2009 QCCS 6332, 2009 CarswellQue 13962 (C.S. Que.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — considered

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) — referred to

Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Bourgeault, Re)* 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue))* 30 N.R. 24, (sub nom. *Bourgault, Re)* 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of))* [1980] 1 S.C.R. 35 (S.C.C.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) — referred to

Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

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United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by *Fish J.*:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City))* [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville))* 215 N.R. 81, (sub nom. *Doré v. Verdun (City))* 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, (sub nom. *Tele-Mobile Co. v. Ontario)* 372 N.R. 157, 55 C.R. (6th) 1, (sub nom. *Ontario v. Tele-Mobile Co.)* 229 C.C.C. (3d) 417, (sub nom. *Tele-Mobile Co. v. Ontario)* 235 O.A.C. 369, (sub nom. *Tele-Mobile Co. v. Ontario)* [2008] 1 S.C.R. 305, (sub nom. *R. v. Tele-Mobile Company (Telus Mobility))* 92 O.R. (3d) 478 (note), (sub nom. *Ontario v. Tele-Mobile Co.)* 291 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered by *Deschamps J.*:

Bank Act, S.C. 1991, c. 46

Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23(3) — referred to

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s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

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s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33

Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30

Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 67(2) — considered

s. 67(3) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

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s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to
Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered
Statutes considered *Abella J.* (dissenting):
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered
Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered
Interpretation Act, R.S.C. 1985, c. I-21
s. 2(1)"enactment" — considered

s. 44(f) — considered
Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

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from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

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58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

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64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA.* Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA.* The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

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Tab 4

Most Negative Treatment: Check subsequent history and related treatments.

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

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Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act

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XIX.3 Arrangements

XIX.3.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances,

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given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a

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continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple, un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune

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erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

Table of Authorities

Cases considered by *Wagner C.J.C., Moldaver J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — referred to

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — referred to

Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) (2018), 2018 QCCS 1040, 2018 CarswellQue 1923 (C.S. Que.) — referred to

BA Energy Inc., Re (2010), 2010 ABQB 507, 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.) — referred to

Blackburn Developments Ltd., Re (2011), 2011 BCSC 1671, 2011 CarswellBC 3291, 27 B.C.L.R. (5th) 199 (B.C. S.C.) — referred to

Boutiques San Francisco inc., Re (2003), 2003 CarswellQue 13882 (C.S. Que.) — referred to

Bridging Finance Inc. v. Béton Brunet 2001 inc. (2017), 2017 CarswellQue 328, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.) — referred to

Canada Trustco Mortgage Co. v. R. (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, (sub nom. *Canada Trustco Mortgage Co. v. Canada)* 2005 D.T.C. 5523 (Eng.), (sub nom. *Hypothèques Trustco Canada v. Canada)* 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, (sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.)* 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 61 B.C.L.R. (4th) 334, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 258 B.C.A.C. 187, 434 W.A.C. 187 (B.C. C.A.) — referred to

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Crystallex International Corp., Re (2012), 2012 ONSC 2125, 2012 CarswellOnt 4577, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

Crystallex International Corp., Re (2012), 2012 ONCA 404, 2012 CarswellOnt 7329, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — considered

Dugal v. Manulife Financial Corp. (2011), 2011 ONSC 1785, 2011 CarswellOnt 1889, 105 O.R. (3d) 364, 18 C.P.C. (7th) 105 (Ont. S.C.J.) — referred to

Edgewater Casino Inc., Re (2009), 2009 BCCA 40, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, 265 B.C.A.C. 274, 446 W.A.C. 274, (sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.)* 308 D.L.R. (4th) 339 (B.C. C.A.) — followed

Ernst & Young Inc. v. Essar Global Fund Limited (2017), 2017 ONCA 1014, 2017 CarswellOnt 20162, 54 C.B.R. (6th) 173, 139 O.R. (3d) 1, 420 D.L.R. (4th) 23, 76 B.L.R. (5th) 171 (Ont. C.A.) — referred to

Fracmaster Ltd., Re (1999), 1999 CarswellAlta 461, 245 A.R. 102, 11 C.B.R. (4th) 204, 1999 ABQB 379 (Alta. Q.B.) — referred to

Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 2015 ONCA 570, 2015 CarswellOnt 11970, 26 C.B.R. (6th) 218, 20 C.C.P.B. (2nd) 161, 387 D.L.R. (4th) 426, 9 E.T.R. (4th) 205, 2015 C.E.B. & P.G.R. 8139 (headnote only), 337 O.A.C. 237, 26 C.C.E.L. (4th) 176, 4 P.P.S.A.C. (4th) 358 (Ont. C.A.) — referred to

HSBC Bank Canada v. Bear Mountain Master Partnership (2010), 2010 BCSC 1563, 2010 CarswellBC 2962, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]) — referred to

Hayes v. Saint John (City) (2016), 2016 NBBR 125, 2016 NBQB 125, 2016 CarswellNB 253, 2016 CarswellNB 254 (N.B. Q.B.) — referred to

Houle v. St. Jude Medical Inc. (2017), 2017 ONSC 5129, 2017 CarswellOnt 13215, 9 C.P.C. (8th) 321 (Ont. S.C.J.) — referred to

Houle v. St. Jude Medical Inc. (2018), 2018 ONSC 6352, 2018 CarswellOnt 17713, 429 D.L.R. (4th) 739, 29 C.P.C. (8th) 409 (Ont. Div. Ct.) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — referred to

Langtry v. Dumoulin (1885), 7 O.R. 644 (Ont. Div. Ct.) — referred to

Laserworks Computer Services Inc., Re (1998), 1998 CarswellNS 38, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 165 N.S.R. (2d) 297, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 495 A.P.R. 297, 6 C.B.R. (4th) 69, 37 B.L.R. (2d) 226, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Marcotte c. Banque de Montréal (2015), 2015 QCCS 1915, 2015 CarswellQue 4055 (C.S. Que.) — referred to

McIntyre Estate v. Ontario (Attorney General) (2002), 2002 CarswellOnt 2880, 23 C.P.C. (5th) 59, 218 D.L.R. (4th) 193, 61 O.R. (3d) 257, 164 O.A.C. 37 (Ont. C.A.) — referred to

Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp. (2013), 2013 ONSC 4974, 2013 CarswellOnt 11197, 117 O.R. (3d) 150, 55 C.P.C. (7th) 437, 6 C.C.P.B. (2nd) 82 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 192, 2005 CarswellBC 705, 7 M.P.L.R. (4th) 153, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247 (B.C. C.A.) — referred to

Nortel Networks Corp., Re (2015), 2015 ONCA 681, 2015 CarswellOnt 15461, 391 D.L.R. (4th) 283, 127 O.R. (3d) 641, 340 O.A.C. 234, 32 C.B.R. (6th) 21 (Ont. C.A.) — referred to

North American Tungsten Corp. v. Global Tungsten and Powders Corp. (2015), 2015 BCCA 390, 2015 CarswellBC 2629, 76 C.P.C. (7th) 1, 377 B.C.A.C. 6, 648 W.A.C. 6, 32 C.B.R. (6th) 175 (B.C. C.A.) — referred to

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Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — referred to

Pole Lite ltée c. Banque Nationale du Canada (2006), 2006 CarswellQue 3438, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — referred to

Schenk v. Valeant Pharmaceuticals International Inc. (2015), 2015 ONSC 3215, 2015 CarswellOnt 8651, 74 C.P.C. (7th) 332 (Ont. S.C.J.) — referred to

Stanway v. Wyeth Canada Inc. (2013), 2013 BCSC 1585, 2013 CarswellBC 2630, 41 C.P.C. (7th) 209, [2014] 3 W.W.R. 808, 56 B.C.L.R. (5th) 192 (B.C. S.C.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — followed

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.) — referred to

1078385 Ontario Ltd., Re (2004), 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152, (sub nom. *1078385 Ontario Ltd. (Receivership), Re)* 206 O.A.C. 17 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 4.2 [en. 2019, c. 29, s. 133] — referred to

s. 43(7) — referred to

s. 50(1) — referred to

s. 54(3) — considered

s. 108(3) — referred to

s. 187(9) — considered

Champerty, Act respecting, R.S.O. 1897, c. 327

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 3(1) — referred to

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s. 4 — referred to

s. 5 — referred to

s. 6 — referred to

s. 6(1) — considered

s. 11 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(b) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(c) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

s. 11.8 [en. 1997, c. 12, s. 124] — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 22(1) — referred to

s. 22(2) — referred to

s. 22(3) — considered

s. 23(1)(d) — referred to

s. 23(1)(i) — referred to

ss. 23-25 — referred to

s. 36 — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

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s. 6(1) — referred to

APPEAL by debtor from judgment reported at *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), finding that debtor's scheme amounted to plan of arrangement and that funding request should be submitted to creditors for approval.

POURVOI formé par la débitrice à l'encontre d'une décision publiée à *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), ayant conclu que la proposition de la débitrice constituait un plan d'arrangement et que la demande de financement devrait être soumise aux créanciers pour approbation.

Wagner C.J.C., Moldaver J. **(Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring):**

I. Overview

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

2 Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

3 For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

5 In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

6 Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets

7 On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number

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33 First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Blackburn Developments Ltd., Re*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199 (B.C. S.C.), at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

34 Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

36 Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. Preliminary Considerations

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of CCAA Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving

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and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed,

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in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

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Tab 5

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC. | 2020 ONSC 3565, 2020 CarswellOnt 8331, 321 A.C.W.S. (3d) 414 | (Ont. S.C.J., Jun 17, 2020)

2009 CarswellOnt 4467
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4467, [2009] O.J. No. 3169, 179 A.C.W.S. (3d) 265, 55 C.B.R. (5th) 229

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: June 29, 2009
Written reasons: July 23, 2009
Docket: 09-CL-7950

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M. Starnino for Superintendent of Financial Services, Administrator of PBGF
S. Philpott for Former Employees
K. Zych for Noteholders
Pamela Huff, Craig Thorburn for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P., Matlin Patterson Opportunities Partners (Cayman) III L.P.
David Ward for UK Pension Protection Fund
Leanne Williams for Flextronics Inc.
Alex MacFarlane for Official Committee of Unsecured Creditors
Arthur O. Jacques, Tom McRae for Felske & Sylvain (de facto Continuing Employees' Committee)
Robin B. Schwill, Matthew P. Gottlieb for Nortel Networks UK Limited
A. Kauffman for Export Development Canada
D. Ullman for Verizon Communications Inc.
G. Benchetrit for IBM

Subject: Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate

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XIV.6 Sale of assets
XIV.6.f Jurisdiction of court to approve sale
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Table of Authorities

Cases considered by *Morawetz J.*:

Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership (2009), 2009 BCCA 319, 2009 CarswellBC 1738 (B.C. C.A.) — followed

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.) — referred to

Boutiques San Francisco Inc., Re (2004), 2004 CarswellQue 10918, 7 C.B.R. (5th) 189 (C.S. Que.) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co. (2008), 2008 CarswellOnt 4046, 45 C.B.R. (5th) 87 (Ont. S.C.J.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — distinguished

Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

PSINET Ltd., Re (2001), 28 C.B.R. (4th) 95, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]) — considered

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Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABQB 236, 2006 CarswellAlta 383, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 393 A.R. 340, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 4084, 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) — referred to

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — referred to

Winnipeg Motor Express Inc., Re (2008), 2008 CarswellMan 560, 2008 MBQB 297, 49 C.B.R. (5th) 302 (Man. Q.B.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

s. 363 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — referred to

s. 11(4) — considered

MOTION by company for approval of bidding procedures for sale of business and asset sale agreement.

***Morawetz J.*:**

Introduction

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business

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employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

Background

8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

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19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

Issues and Discussion

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial*, *supra*, at paras. 43-52.

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31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5 th) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3 rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, *Re PSINet*, *supra*, *Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra*, *Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

36 In *Re Consumers Packaging*, *supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> ...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, at paras. 43, 45.

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38 Similarly, in *PSINet Limited*, *supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited*, *supra*, at para. 3.

39 In *Re Stelco Inc*., *supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc*, *supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc., Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

46 At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34).

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> This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):
>
>> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]
>
> 25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...
>
> 26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

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51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

Disposition

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

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Motion granted.

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Tab 6

2016 ABQB 257
Alberta Court of Queen's Bench

Sanjel Corp., Re

2016 CarswellAlta 900, 2016 ABQB 257, [2016] A.W.L.D. 2474, 266 A.C.W.S. (3d) 542, 36 C.B.R. (6th) 239

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC

B.E. Romaine J.

Heard: April 28, 2016
Judgment: May 16, 2016
Docket: Calgary 1601-03143

Counsel: Chris Simard, Alexis Teasdale, for Sanjel Group

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Sale of assets — Debtor companies were severely impacted by economic downturn, and breached covenants under credit agreement with secured creditors — Debtors agreed with secured creditors to implement Sales and Investment Solicitation Process (SISP), which resulted in proposed asset sales that would provide no recovery for unsecured creditors — Debtors were granted Initial Order under Companies' Creditors Arrangement Act — Debtors brought application for order approving sales transactions generated through SISP — Trustee of bonds brought application for order dismissing debtors' application, and allowing bondholders to propose plan of arrangement, among other relief — Debtors' application granted; trustee's application dismissed — As result of enactment of s. 36 of Act, there was no jurisdictional impediment to sale of assets where such sales met requisite tests, even in absence of plan of arrangement — Fact that SISP occurred before seeking protection under Act did not amount to abuse of Act — Despite speed and economic environment, SISP was reasonable, competitive and robust, and generated range of bids significantly above liquidation value — Allegations of bad faith were not supported by evidence — Bondholders were aware of SISP and intention to obtain protection under Act, and were not improperly denied access to information — Factors in s. 36(3) of Act favoured approval of proposed sales — Further allegations raised after hearing were duly investigated by monitor and shown to be groundless.
Table of Authorities
Cases considered by *B.E. Romaine J.*:

AbitibiBowater inc., Re (2010), 2010 QCCS 1742, 2010 CarswellQue 4082, 71 C.B.R. (5th) 220 (C.S. Que.) — considered
Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — referred to
Bloom Lake, g.p.l., Re (2015), 2015 QCCS 1920, 2015 CarswellQue 4072, 27 C.B.R. (6th) 1 (C.S. Que.) — considered

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Nelson Education Ltd., Re (2015), 2015 ONSC 5557, 2015 CarswellOnt 13576, 29 C.B.R. (6th) 140 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

SemCanada Crude Co., Re (2009), 2009 ABQB 490, 2009 CarswellAlta 1269, 57 C.B.R. (5th) 205, 479 A.R. 318 (Alta. Q.B.) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — considered

Windsor Machine & Stamping Ltd., Re (2009), 2009 CarswellOnt 4471, 55 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

Chapter 15 — referred to

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 6 — considered

s. 36 — considered

s. 36(3) — considered

s. 36(4) — referred to

s. 36(5) — considered

APPLICATION by debtor companies for orders approving sales of assets generated through Sales and Investment Solicitation Process; APPLICATION by trustee of the bonds for order dismissing debtors' application, allowing bondholders to propose plan of arrangement, and other relief.

***B.E. Romaine J.*:**

I. Introduction

1 The Sanjel debtors seek orders approving certain sales of assets generated through a SISP that was conducted prior to the debtors filing under the *Companies' Creditors Arrangement Act.* The proceeds of the sales will be insufficient to fully payout the secured creditor, and will generate no return to unsecured creditors, including the holders of unsecured Bonds.

2 The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating CCAA in this situation. He alleged that the use of the CCAA to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the CCAA. He also alleged that bad faith and collusion tainted the integrity of the SISP.

3 After reviewing extensive evidence and hearing submissions from interested parties, I decided to allow the application to approve the sales, and dismiss the application of the Trustee. These are my reasons.

II. Facts

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III. Applicable Law

54 Section 36(3) of the CCAA sets out six non-exhaustive factors that must be considered in approving a sale by a CCAA debtor of assets outside the ordinary course of business. They are:

(a) whether the process leading to the proposed sale was reasonable in the circumstances;

(b) whether the Monitor approved the process leading to the proposed sale;

(c) whether the Monitor filed with the court a report stating that in its opinion the sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale on creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

55 In this case, the Monitor was not in place at the time of the process leading to the proposed sales, nor at the time the SISP was commenced. However, the Monitor has given an opinion on the process, which I will consider as part of my review.

56 Prior to the enactment of section 36, CCAA courts considered what are known as the Soundair principles in considering approval application, and they are still useful guidelines:

a) Was there a sufficient effort made to get the price at issue? Did the debtor company act improvidently?

b) Were the interests of all parties considered?

c) Are there any questions about the efficacy and integrity of the process by which offers were obtained?

d) Was there unfairness in the working out of the process?

Royal Bank v. Soundair Corp., 1991 CarswellOnt 205 (Ont. C.A.) at para 20.

57 Gascon, J. (as he then was) suggested in *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.) at paras 70-72 that a court should give due consideration to two further factors:

a) the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and

b) the weight to be given to the recommendation of the monitor.

58 As noted by Gascon, J., it is not desirable for a bidder to wait to the last minute, even up to a court approval stage, to submit its best offer. However, a court can consider such an offer, if it is evidence that the debtor company did not properly carry out its duty to obtain the best price for creditors.

IV. Analysis

59 The Trustee has raised a number of objections to the proposed sales, many of which relate to the factors and principles set out in section 36 of the CCAA, the Soundair principles and the AbitibiBowater factors:

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Tab 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
  VII.6 Conduct and liability of receiver
    VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.

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Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.
The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.
To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.
The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.
Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.
Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air

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Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

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10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it

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Tab 8

Most Negative Treatment: Check subsequent history and related treatments.

2012 ONSC 1750
Ontario Superior Court of Justice [Commercial List]

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

2012 CarswellOnt 3158, 2012 ONSC 1750, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74

CCM Master Qualified Fund, Ltd. (Applicant) and blutip Power Technologies Ltd. (Respondent)

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. Burr for Receiver, Duff & Phelps Canada Restructuring Inc.
A. Cobb, A. Lockhart for Applicant

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency

IV Receivers

IV.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Receivers — Miscellaneous

Receiver was appointed over debtor company — Debtor was in development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate — Receiver brought motion for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in Receiver's First Report — Motion granted — Receiver lacked access to sufficient funding to support debtor's operations during lengthy sales process — Quick sales process was required — Marketing, bid solicitation and bidding procedures proposed by Receiver would result in fair, transparent and commercially efficacious process, and were approved — Stalking horse agreement was approved for purposes requested by Receiver — Receiver was granted priority over existing perfected security interests and statutory encumbrances — Debtor did not maintain any pension plans — Activities in Receiver's First Report were approved.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Brainhunter Inc., Re (2009), 62 C.B.R. (5th) 41, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) — referred to

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — followed

Graceway Canada Co., Re (2011), 2011 ONSC 6403, 2011 CarswellOnt 11687, 85 C.B.R. (5th) 252 (Ont. S.C.J. [Commercial List]) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 4262, 79 C.C.P.B. 101 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 56 C.B.R. (5th) 74, 2009 CarswellOnt 4839 (Ont. S.C.J. [Commercial List]) — referred to

Parlay Entertainment Inc., Re (2011), 81 C.B.R. (5th) 58, 2011 ONSC 3492, 2011 CarswellOnt 5929 (Ont. S.C.J.) — referred to

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Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

White Birch Paper Holding Co., Re (2010), 2010 QCCS 4382, 2010 CarswellQue 9720 (C.S. Que.) — referred to

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 10954, 2010 QCCS 4915, 72 C.B.R. (5th) 49 (C.S. Que.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 243(6) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

MOTION by receiver for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in its First Report.

***D.M. Brown J.*:**

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

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5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7 The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[2] *BIA* proposals,[3] and *CCAA* proceedings.[4]

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

9 The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

10 Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid

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of $100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

11 The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

12 The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

13 The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid. [6]

C. Analysis

14 Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

15 In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

16 Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court. [7]

17 For those reasons I approved the bidding procedures recommended by the Receiver.

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IV. Priority of receiver's charges

18 Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

19 As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

20 Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

21 I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc., Re*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> . . .
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation. [8]

22 In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

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23 In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

24 The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

25 May I conclude by thanking Receiver's counsel for a most helpful factum.

Motion granted.

Footnotes

1 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

2 *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 2.

3 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 15.

4 *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), para. 13; *White Birch Paper Holding Co., Re*, 2010 QCCS 4382 (C.S. Que.), para. 3; *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), para. 2, and *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]); *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]).

5 Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding — Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

6 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 12; *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.), paras. 4 to 7; *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]), para. 12.

7 *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]), para. 7; *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 5; *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 58.

8 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) (CanLII).

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Tab 9

2009 CarswellOnt 8207
Ontario Superior Court of Justice [Commercial List]

Brainhunter Inc., Re

2009 CarswellOnt 8207, 183 A.C.W.S. (3d) 905, 62 C.B.R. (5th) 41

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC. (APPLICANTS)

Morawetz J.

Heard: December 11, 2009
Judgment: December 11, 2009
Written reasons: December 18, 2009
Docket: 09-8482-00CL

Counsel: Jay Swartz, Jim Bunting for Applicants
G. Moffat for Monitor, Deloitte & Touche Inc.
Joseph Bellissimo for Roynat Capital Inc.
Peter J. Osborne for R.N. Singh, Purchaser
Edmond Lamek for Toronto-Dominion Bank
D. Dowdall for Noteholders
D. Ullmann for Procom Consultants Group Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Applicants were protected under Companies' Creditors Arrangement Act — Applicants brought motion for extension of stay period, approval of bid process and approval of "Stalking Horse APA" — Motion granted — Motion was supported by special committee, advisors, key creditor groups and monitor — Opposition came from business competitor and party interested in possibly bidding on assets of applicants — Applicants established that sales transaction was warranted and that sale would benefit economic community — No creditor came forward to object sale of business — It was unnecessary for court to substitute its business judgment for that of applicants.
Table of Authorities
Cases considered by *Morawetz J.*:
Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered
Statutes considered:
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

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Generally — referred to

s. 36 — considered

MOTION by applicants for extension of stay and for approval of bid process and agreement.

***Morawetz J.*:**

1 At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

2 The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

3 The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

4 The Monitor recommends that the motion be granted.

5 The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

6 Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

7 Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

8 The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

9 Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

10 The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

11 It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

12 Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

13 The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(a) Is a sale transaction warranted at this time?

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(b) Will the sale benefit the whole "economic community"?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?

14 The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

15 Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

16 Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

17 I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

18 In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

19 In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

20 With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

21 For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

22 For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

23 The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

24 Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

25 An order shall issue to give effect to the foregoing.

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Motion granted.

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Tab 10

2010 ONSC 1846
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc., Re

2010 CarswellOnt 2445, 2010 ONSC 1846, 67 C.B.R. (5th) 258

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

C. Campbell J.

Heard: February 1, 8, 2010
Judgment: March 30, 2010
Docket: CV-09-8247-00CL

Counsel: Sean Dunphy, Kathy Mah for Monitor
Daniel Dowdall, Jane O'Dietrich for Applicants, Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP
Kevin McElcheran for Toronto-Dominion Bank, Agent for First Lien Lenders
Fred Myers, Joe Pasquariello for Bank of New York Mellon, Agent for SLL
Sheryl Seigel for Georgia-Pacific LLC
Richard Swan for Peter Grant Sr.
Aubrey Kauffman for Independent Directors of Grant Forest Products Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Applicants, being GFP Inc., its parent company, its Canadian subsidiaries, G U.S., and its related entities, obtained protection under Companies' Creditors Arrangement Act (CCAA) — Applicants had two levels of primary secured debt owed to FLL and SLL — GFP Inc. and G U.S. were in default under FLL agreement, and G U.S. was in default under SLL agreement — Applicants engaged financial advisor to advise on options to address debt position and locate investors or sell business, and marketing process was created — Bid of GP LLC, purchaser, was accepted and purchase and sale agreement was finalized — GFP Inc. et al. brought application to seek approval of sale and vesting order to complete transfer of control to purchaser — SLL opposed approval of transaction — Application granted — Once process put in place by Court Order for sale of assets of failing business, process should be honoured excepting extraordinary circumstances — Numerous parties participated over number

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of months in complex process designed to achieve not only maximum value of assets of business, but to ensure its survival as going concern for benefit of many stakeholders — To permit invitation to reopen process not only would have destroyed integrity of process, but likely would have doomed transaction that had been achieved.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Applicants, being GFP Inc., its parent company, its Canadian subsidiaries, and G U.S. and its related entities, obtained protection under Companies' Creditors Arrangement Act (CCAA) when stay of proceedings was granted — Applicants had two levels of primary secured debt owed to FLL and SLL — GFP Inc. and G U.S. were in default under FLL agreement, and G U.S. was in default under SLL agreement — Applicants engaged financial advisor to advise on options to address debt position and locate investors or sell business, marketing process was created — Bid of GP LLC was accepted and purchase and sale agreement was finalized — Transaction required that security granted in favour of FLL and SLL be released and discharged upon closing of transaction — FLL's position was that only way transaction could be accomplished at proposed price was by creating tax benefits arising from proposed structure that would include transfer of G U.S. interests as partnership interests, rather than direct transfer of assets of G U.S. — FLL brought motion to add additional applicants — Motion granted — SLL opposed motion to add applicants and approve sale on basis that such relief would have had effect of mandatory order against U.S. parties which would extinguish U.S. security over U.S. realty and personalty — Issues raised by SLL were inextricably linked to restructuring of applicants and completion of transaction and as such were appropriate for consideration by Court — Transaction would not have been possible without tax advantages that were available as result of transaction form — Submissions that entire transaction was flawed because it resulted in transfer of some assets in U.S. without sale process envisaged in U.S. Bankruptcy Code, would have been triumph of form over substance — Relief sought was not merely device to sell U.S. assets from Canada, it was unified transaction, each element of which was necessary and integral to its success, it was Canadian process.

Table of Authorities

Cases considered by *C. Campbell J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Metcalfe & Mansfield Alternative Investments, Re (January 5, 2010), Doc. 09-16709 (U.S. Bankr. S.D. N.Y.) — considered

Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — followed

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Generally — referred to

Chapter 11 — referred to

Chapter 15 — considered

s. 363 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

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APPLICATION by insolvent seeking approval to complete transfer of control to purchaser; MOTION by creditor to add applicants.

***C. Campbell J.*:**

Reasons for Decision

1 This Application seeks approval of the Sale transaction and a Vesting Order to complete the transfer of the control of the business of Grant Forest Products Inc. to the purchaser Georgia-Pacific. The transaction is the culmination of the marketing process under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended ("CCAA"), authorized by an order of this Court dated June 25, 2009.

2 Approval of the transaction is opposed by the Second Lien Lenders ("SLL") [1] under an Inter-Creditor Agreement (the "ICA") of which Grant Forest is a party, on the basis that this Court does not have jurisdiction to, in effect, convey real property assets located in the United States.

3 An adjournment of the approval motion sought by the largest shareholder of Grant Forest, seeking time for improvement of expressions of interest by others into bids, was not granted. Consideration of the issues raised on this motion requires analysis of the many similarities and few differences between the restructuring and insolvency processes in Canada and the United States in cross-border transactions.

4 For reasons that follow, I am satisfied that this Court does have jurisdiction and it is appropriate to approve this complicated transaction. In order to deal with the objections raised, it is necessary to outline the transaction in some detail, the particulars of which are summarized in the Sixth Report of the Monitor.

5 Grant Forest Products Inc. ("GFP"), an Ontario company, and certain of its subsidiaries are privately owned corporations carrying on an Oriented Strand Board manufacturing business from facilities located in Canada and the United States. The most common uses of the companies' products are sheathing in the walls, floors and roofs in the construction of buildings and residential housing.

6 Two GFP mills are located in Ontario, one in Alberta (50% with Footner Forest Products) and two in the counties of Allendale and Clarendon in South Carolina.

7 The U.S. mills are owned indirectly through one of the Applicants, being the Grant Partnership registered in the state of Delaware. At present, due to decreased demand, only one Ontario mill and the Allendale mill in South Carolina are operating.

8 The Applicants, being the parent GFP, its Canadian subsidiaries Grant Alberta Inc. and Grant Forest Product Sales Inc., together with Grant U.S. holdings GP ("Grant U.S. Partnership") and its related entities, obtained protection under the CCAA on June 25, 2009, when a stay of proceedings was granted and Ernst and Young Inc. ("E&Y") was appointed Monitor. The Order also approved the continuation of the engagement of a chief restructuring advisor.

9 The Applicants have two levels of primary secured debt. The total debt obligations are comprised of the following facilities:

First Lien Creditor Agreement

10 As at May 31, 2009, the First Lien Lenders ("FLL") [2] were owed the principal amount of $399 million plus accrued interest of approximately $5.3 million pursuant to a credit agreement dated October 26, 2005 and amended March 21, 2007. An additional $8.7 million was owed to one or more of the FLL pursuant to interest rate swap agreements the liability of which was secured to the FLL Agent.

Second Lien Creditor Agreement

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11 The bank of New York Mellon ("BNY") as successor is the Agent for the SLL, to whom as of May 31, 2009 was owed the principal amount of approximately $150 million plus accrued interest of approximately $42 million pursuant to a credit agreement dated as of March 21, 2007 as amended as of April 30, 2009. GFP and the Grant U.S. Partnership are the borrowers under the FLL Agreement with all related entities as guarantors of the FLL indebtedness. The Grant U.S. Partnership is the borrower under the SLL Agreement with all related entities as guarantors of the SLL debt.

12 GFP and the Grant U.S. Partnership are in default under the FLL Agreement and the Grant U.S. Partnership is in default under the SLL Agreement. Both the FLL and SLL Agents hold various security in Canada over each of their respective property and assets.

Inter-Creditor Agreement

13 The Applicants together with the entities related to the Grant U.S. Partnership, the FLL and SLL are parties to an Agreement dated March 21, 2007, which among other things deals with the relationship between the FLL security and the SLL security. Both the FLL and the SLL rely on this Agreement in respect of the issue as between them, which affects priority over assets.

The Marketing Process

14 Prior to the filing that gave rise to the initial order, the Applicants had engaged a financial advisor and an investment banking firm to advise on capital and strategic options to address the Applicants' debt position and liquidity needs and to locate investors or sell the business. While this process did not result in a transaction that could be implemented, the Applicants were of the view that the business could be sold as a going concern or they could sponsor a plan of arrangement to be consummated in CCAA proceedings. The Initial Order, which has not been objected to since being granted on June 25, 2009, contained a six page elaborate "Investment Offering Protocol" to provide interested parties with the opportunity to offer to purchase the business and operations in whole or in part as a going concern or to offer to sponsor a plan of arrangement of the Applicants or any of them.

15 The three phases of the marketing process are described in detail in paragraphs 35 to 47 of the Sixth Report of the Monitor. The process, which commenced in July 2009, involved contact with 91 potentially interested parties, narrowed to 13 who responded with expressions of interest, with eight parties invited to phase Two to conduct further due diligence.

16 At this phase, the interested parties were provided access to the Applicants' facilities, advised of the bid process and had until August 30, 2009 to submit revised proposals. This was subsequently extended to September 11, 2009 in order to accommodate due diligence requirements, plant tour schedules and management meetings with the eight interested parties who were to submit revised proposals on or before September 11, 2009.

17 As reported by the Monitor, two of the bids were inferior by their terms or consideration and three were within a similar range. As a result of due diligence items and closing conditions which risked the completion of the transaction, revised bids were extended to October 2, 2009 for the three interested parties.

18 As of October 16, 2009, 66 2/3% of the FLL debt and the Independent Directors Committee voted in favour of the selection of the Georgia-Pacific bid, one of the world's leading manufacturers and marketers of tissue, packaging, paper pulp and building products, to proceed to Phase Three.

19 As reported in the Fifth Report of the Monitor dated November 26, 2009, SLL who were prepared to agree to certain confidentiality provisions were apprised on October 15 of the status of the marketing process.

20 An exclusivity agreement was reached with Georgia-Pacific on October 20, 2009, which required the Applicants to refrain from seeking bids, responding to or negotiating with any party other than Georgia-Pacific with respect to the items included in the bid of Georgia-Pacific during a period of exclusivity which extended through a series of extensions to January 8, 2010, when the parties finalized a purchase and sale agreement that is in the material filed with the Court.

21 I accept the conclusion of the Monitor as set out in paragraph 56 of the Sixth Report:

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56. It is the Monitor's view that the Marketing Process included a structured, fair, wide and effective canvassing of the market as demonstrated by the following:

a. contact by the Investment Offering Advisor of 91 interested parties comprising both financial and strategic parties located in North America, South America, Europe and Asia;

b. the execution of 32 NDAs by interested parties who were then granted access to review the Data Room and the subsequent submission of 13 EOIs at the end of *Phase 1*;

c. the EOIs of eight interested parties that were invited to participate in *Phase II* provided a value range which was market derived and tested, and as such, supported the conclusion that the consideration included in Georgia Pacific's bid reflected fair value;

d. of the eight interested parties that were invited to *Phase II*, five submitted improved bids in respect of consideration and/or closing conditions at the close of *Phase II* and of the three interested parties that were invited through to *Phase IIb*, each party again improved its bid in terms of consideration and/or closing conditions at the end of *Phase IIb*.

e. the selection of Georgia Pacific to negotiate a PSA was based on a thorough analysis of all of the financial and commercial terms presented in all of the bids, was recommended by the Monitor and the CRA and was approved by the First Lien Lenders Steering Committee and the Independent Directors Committee; and

f. the Second Lien Lenders were consulted, and their views and questions were taken into account in the final selection of Georgia Pacific.

22 This approval motion was originally returnable on February 1, 2010; it was adjourned to allow the parties to respond to two additional motions. The first, brought on behalf of the FLL, seeks to add as "Additional Applicants" the U.S. entities directly related to the Grant U.S. Partnership, "Grant NewCo LLC" and various Georgia-Pacific Canadian and U.S. entities.

23 The second motion, on behalf of the SLL, was to adjourn or dismiss the Approval Vesting motion on the basis that this Court did not have jurisdiction to deal with the assets in the United States that are the subject of the transaction and such assets would have to be dealt with under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

24 On February 1 and on the adjourned date of February 8, counsel for Peter Grant Senior sought a further adjournment to enable consideration of a recently received "offer." In its Seventh Report the Monitor reported on receipt of a letter which expressed interest in the Applicants' assets by a new "bidder." In its Report, the Monitor advised that in its opinion, the expression of interest could be considered as no more than that and reported that it did not comply with the Investment Offering Protocol.

25 Counsel for the SLL sought and was granted access to the correspondence but Mr. Grant was not, due to his involvement in a bid as per the terms of the Investment Offering Protocol.

26 On February 5, with knowledge of the position taken by the SLL and the specifics of the Georgia-Pacific agreement, another expression of interest was received by the Monitor and brought to the attention of the Court. This expression of interest from a previous "bidder" whose bid was rejected, sought to amend its previous position to accommodate the concern that the SLL had with respect to the Georgia-Pacific agreement.

27 The Court ruled that both of these expressions were no more than invitations to negotiate. In neither case by their terms were they intended to create binding obligations until definitive agreements were reached.

28 The Applicants and those parties supporting the Georgia-Pacific agreement urged that the integrity of the process would be compromised if further consideration were given to nothing more than expressions of interest.

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29 It is now well established in insolvency law in Canada that once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances.

30 In *Tiger Brand Knitting Co., Re*, [2005] O.J. No. 1259 (Ont. S.C.J.), I noted at para. 31 that integrity of "process is integral to the administration of statutes such as the BIA and CCAA."

31 The leading case in Ontario, which confirms the importance of integrity of process, is *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), a decision of the Court of Appeal for Ontario. At issue was the power of the Court to review a decision of a receiver to approve one offer over another for the sale of an airline as a going concern. In reinforcing the importance of integrity of process, the Court quoted from Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at p. 92 adopted the following:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

32 In this case, numerous parties participated over a number of months in a complex process designed to achieve not only maximum value of the assets of the business, but to ensure its survival as a going concern for the benefit of many of the stakeholders.

33 I am satisfied that to permit an "invitation" to reopen that process not only would destroy the integrity of the process, but would likely doom the transaction that has been achieved.

Motion to Add Applicants

34 The motion brought by the FLL Agent to add additional applicants was supported by the original Applicants, the purchasers and the Monitor, and opposed by the SLL as part of the objection to jurisdiction of this Court. The purpose of adding Additional Applicants was said to be necessary to make the transaction effective.

35 The transaction with Georgia-Pacific contemplates the transfer of certain assets that are on terms as set out in the Agreement between GFP and related Canadian entities, and to the Canadian purchaser (a Georgia-Pacific subsidiary) with the claims of any person against such transferred assets attaching to the net proceeds received from the sale of such transferred assets.

36 Additionally, the transaction contemplates that the partnership interests in Grant U.S. Partnership will be surrendered and cancelled. Grant U.S. Partnership will issue new partnership interests to the Georgia-Pacific U.S. purchaser vehicle and the additional purchaser.

37 The aggregate consideration being paid by the Canadian purchaser for the transferred assets and the U.S. purchasers for the Grant U.S. Partnership interests is $403 million, subject to adjustment.

38 Through the U.S. purchasers' acquisition of the purchasers' partnership interests, the U.S. purchasers will acquire Grant U.S. Partnership, Southeast, Clarendon, Allendale, U.S. Sales, Newco. It is urged that through this structure the Applicants will maximize the value of their assets.

39 The agreement and transaction require that the security previously granted by the applicable U.S. applicants (the "Additional Applicants") in favour of the FLL and SLL and the indebtedness and liability of the applicable Additional Applicants to them and the Lenders under the FLL Agreement and the SLL Agreement be released and discharged upon closing of the transaction.

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40 The position of the FLL, supported by the Applicants and the Monitor, is that the only way in which the transaction can be accomplished with the price that the FLL and the Applicants are prepared to accept is with the proposed structure that would include a transfer of the Grant U.S. Partnership interests as partnership interests, rather than a direct transfer of the assets of Grant U.S. Partnership.

41 The FLL, the Applicant and the Purchasers urge that without the tax benefit that arises from the proposed structure, the Agreement of Purchase and Sale with Georgia-Pacific would not have been completed.

Position of SLL

42 The position of the SLL, both in opposing the motion to add Additional Applicants and opposing Approval of the Sale, is that the relief sought is overly broad, inappropriate and would have the effect of mandatory orders against U.S. parties which would extinguish U.S. security over U.S. realty and personalty. The effect of the extinguishment is to absolve FLL of all forms of liability when it is neither a CCAA debtor nor an officer of this Court.

43 It is urged that there is no jurisdiction on which the FLL can seek an unlimited judicial release. The FLL cannot add the SLL as a party for any purpose that is to seek avoiding prior scrutiny in the U.S. courts of the merits of its actions and of the U.S. affiliates of the Original Applicants and the SLL. [3]

44 The SLL Agent asserts that the effect of the Application is to ask this Court, in the guise of a motion in a CCAA proceeding concerning Canadian debtors, to allow it on behalf of U.S. FLL to sue U.S. defendants for a final declaration of right and a mandatory injunction under the Inter-Creditor Agreement that is governed by U.S. law and U.S. choice of forum.

45 This is said to occur without delivering any originating process or meeting tests for the exercise of jurisdiction of this Court over U.S. parties concerning U.S. property. SLL submits that the FLL failed to provide any of the legal and procedural safeguards required by the Rules of Civil Procedure to any foreign or proposed defendant.

46 It is further urged that the ICA specifically provides the FLL with rights only upon the sale of assets under section 363 of the U.S. bankruptcy code. Therefore, it is submitted, a motion in a CCAA proceeding by the Original Applicants is not an appropriate forum for the resolution of the interpretation of a contract between the U.S. non-parties that is to be decided under U.S. law.

47 The SLL also complain that engaging the term "center of main interest" with respect to the U.S. affiliates is not a relevant question for this Court. Rather, it is a transparent attempt to pre-empt a U.S. court from making a determination required under the U.S. Bankruptcy Code, which may affect the standard of review afforded by the U.S. court upon any recognition proceedings that the original Applicants may choose to bring before the U.S. court in the future.

48 Finally, it is suggested that what the FLL Agent seeks is contrary to the principles of comity and the common law principle that a court should decide only matters properly before it and necessary to its own decision.

49 The evidence before the Court is that on completion of the transaction, there will be a shortfall to the FLL on their debt and likely no recovery by the SLL on their debt. The SLL suggest that a separate auction sale of the U.S. mills might achieve a better price for these assets. There is no evidence before the Court to back up this assertion.

Inter-Creditor Agreement

50 The ICA, which was entered into as of March 21, 2007, binds the GFP group of companies, including Grant U.S. Partnership as well as the FLL and the SLL. The FLL and the SLL rely on the Agreement in support of their respective positions.

51 The stated purpose of the Agreement was to induce the FLL to consent to GFP incurring the second lien obligations and to induce the FLL to extend credit for the benefit of GFP.

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52 By its terms and the definition of "bankruptcy code" in the ICA, the parties recognized that the Canadian statutes, being the CCAA and the BIA, as well as the U.S. Bankruptcy Code, might apply.

53 Counsel for the SLL relies on clause 9.10 of the ICA definition of "Applicable Law," which provides: "this agreement and the rights and obligations of the parties hereunder shall be governed by, and shall be construed and enforced in accordance with, the laws of the state of New York."

54 Accordingly, it is argued on behalf of the SLL that this Court should not have regard to any issues as between the FLL and SLL, but rather leave those to be litigated as between those parties in the State of New York.

55 The position of the FLL is that a Court having jurisdiction over insolvency of a Canadian entity might well be required to have regard to the ICA in dealing with legitimate and appropriate insolvency remedies in Canada. In this regard, counsel notes that clause 9.7 of the ICA identifies New York as a "non-exclusive" venue for disputes involving the Agreement.

56 The position of the Applicants and those supporting the ICA is that this Court is being asked to consider and approve a restructuring transaction in a process that has been overseen by this Court, and which includes, *inter alia*, a comprehensive marketing process involving an Ontario Court-appointed officer. This process has always expressly included the Applicants and their subsidiaries and the business that the integrated corporate group operated in North America from headquarters situated in Ontario.

57 The Applicants submit it is appropriate for this Court to deal with issues raised under the ICA between the FLL and SLL, where that is incidental to approval of this Canadian restructuring transaction.

58 I am satisfied that the issues raised by the SLL are inextricably linked to the restructuring of the Applicants and the completion of the transaction and as such are appropriate for consideration by this Court.

59 I am satisfied that, by operation of the Credit Agreement and ICA, the FLL are entitled to exercise their remedies, which they propose to do in this motion by adding the Additional Applicants as CCAA Applicants. They may then release their security over the assets to be transferred in connection with the exercise of their remedies and by doing so, the security of the SLL over the Transferred Assets is automatically and simultaneously released.

60 I am satisfied that the transaction, whereby Canadian assets are transferred to a Canadian Georgia-Pacific subsidiary and the assets of the essentially GFP-owned partnership interests in Grant U.S. Partnership are transferred to a newly created U.S. partnership by Georgia-Pacific, would not have been possible without the tax advantages that are available as a result of the form of this transaction.

61 To suggest, as does the submission of the SLL, that the entire transaction is flawed because the effect is a transfer of some assets in the United States without the sale process envisaged in section 363 of the U.S. Bankruptcy Code, would be a triumph of form over substance.

62 I accept that the effect of the transaction may indirectly be a transfer of U.S. real property assets and the release of a security over them of the SLL. The effect of the transaction is such that the claims of local creditors of the business of the U.S. mills remain unaffected. The Court was not apprised of any ordinary creditor other than the SLL that would be so affected.

Comity and U.S. Chapter 15

63 Counsel for the SLL Agent objected to the use by the Applicants of the term COMI (being Center Of Main Interest) in respect of this CCAA Application.

64 I accept that the term COMI has only been formally recognized in amendments to the CCAA, which came into effect in September 2009 after the filing of this Application. The term has gained recognition in the last few years as cross-border insolvencies have increased, particularly with the use of flexibility of the CCAA.

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65 Comity, as expressed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* [4], is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Comity balances "international duty and convenience" with "the rights of (a nation's) own citizens... who are under the protection of its laws." [5]

66 Without in any way intending to intrude on the law of another jurisdiction, it is appropriate to have a look at the plain wording of the ICA.

67 It is to be noted that there is no evidence put forward by the SLL Agent to suggest that the position of the FLL in respect of the ICA is incorrect. The only response from the SLL Agent is that the matter is not for this Court.

68 The suggestion by the SLL is that the effect of the Order sought is to vest title in U.S. assets. The FLL assert that all that is being done is the enforcement of their secured creditor remedies and release of their security, which under the ICA has the effect of releasing the security of the SLL.

69 The FLL submit that Section 3.1 of the ICA recognizes the broad remedies available to the FLL to enforce their security, using all the remedies of a secured creditor under the Bankruptcy Laws of the U.S. including the CCAA, without consultation with the SLL. The submission is further that the SLL are bound by any determination made by the FLL to release its security. The SLL is to provide written confirmation on the FLL becomes the agent of the SLL for that purpose.

70 The relevant sections of the ICA are set out in Appendix A hereto. As noted above, the position of the FLL is that they are exercising contractual remedies under the ICA.

71 For the SLL, the argument is that this Court should not interfere with the obligation of the FLL to commence proceedings in the appropriate jurisdiction (New York) to enforce its obligations against the SLL. Neither the SLL nor the FLL has commenced New York actions.

72 I am satisfied that this Court does have jurisdiction to provide the relief requested, which is the product of the marketing process that was not only approved by this Court, but not objected to by any party when it was initiated. [6]

73 I do not accept the submission on behalf of the SLL that "the proposed CCAA proceedings for the U.S. Affiliates are not proper CCAA proceedings at all, but are merely proposed as a mechanism for Canadian vesting of U.S. assets."

74 The relief sought is not merely a device to sell U.S. assets from Canada. This is a unified transaction, each element of which is necessary and integral to its success. It is properly a Canadian process.

75 There are many instances in which Canadian courts have granted vesting orders in relation to assets situated in the United States. Some of the orders are referred to in the factum of the FLL, including *Re Maax Corporation et al.*, [7] *Re Madill Equipment Canada*, [8] *Re ROL Manufacturing (Canada) Ltd.*, [9] *Re Biltrite Rubber Inc.* [10] and *Re Pope and Talbot, Inc. et. al.* [11]

76 Decisions on both sides of the border have recognized that the United States and Canada have a special relationship that allows bankruptcy and insolvency matters to proceed with relative ease when assets lie in both territories. As the U.S. Bankruptcy Court for the Southern District of New York acknowledged in ABCP's *Metcalfe & Mansfield Alternative Investments, Re* [, Doc. 09-16709 (U.S. Bankr. S.D. N.Y. January 5, 2010)] [12] both systems are rooted in the common law and share similar principles and procedures. Bankruptcy proceedings in the United States acknowledge international proceedings and work alongside, rather than over, foreign matters. Chapter 15 of the U.S. Bankruptcy Code exemplifies this in its foreign bankruptcy proceedings: "the court should be guided by principles of comity and cooperation with foreign courts." [13]

77 In the cross-border case of *Muscletech Research & Development Inc., Re*, [14] COMI was found to be in Canada despite factors indicating the U.S. would also be a suitable jurisdiction. Particularly, most of the creditors were located in the U.S., as was the revenue stream. Most of the major decisions regarding the company were made in Canada, its directors and officers

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were located in Ontario, banking was done in Ontario, etc. Justice Farley noted the positive relationship between Canada and the U.S. and credited this relationship to the adherence to comity and common principles. Judge Rakoff, presiding over the Chapter 15 proceedings, agreed with Farley J.'s endorsement, specifically noting that the factors outlined in the Canadian endorsement persuaded him over the factors in favour of U.S. COMI. Farley J. noted at paragraph 4 of his endorsement, and Judge Rankoff implicitly agreed, that "the courts of Canada and the U.S. have long enjoyed a firm and ongoing relationship based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency."

78 As noted by counsel for the SLL at paragraph 44 of their factum:

> Courts routinely enforce Canadian judgments in banluptcy, respecting our similar common law traditions including our respect for comity and restraint. In enforcing the decision of this Honourable Court in Metcalfe & Mansfield Alternative Investments et al., ("ABCP") the US Bankruptcy Court for the Southern District of New York, wrote:
>
>> The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportnity to be heard in a manner consistent with standards of U.S. due process. u.s. federal courts have repeatedly granted comity to Canadian proceedings. United Feature Syndicate, *Inc. v. Miler Features Syndicate*, Inc., 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada-a sister common law jurisdiction with procedures akin to our own-are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); Tradewell, *Inc. v. American Sensors Elecs*., Inc., No. 96 Civ. 2474(DAB), 1997 WL 423075, at *l n.3 (S.D.N.Y. 1997) ("It is well-settled in actions commenced in New York that judgments of the Canadian courts are to be given effect under principles of comity.") (internal quotation marks and citation omitted); Cornjeldv. Investors Overseas Servs., Ltd., 47*l* F. Supp. 1255, l259 (S.D.N.V. 1979) ("The fact that the foreign country involved is Canada is significant. It is wellsettled in New York that the judgments of the Canadian courts are to be given effect under principles of comity. Trustees in bankruptcy appointed by Canadian courts have been recognized in actions commenced in the United States. More importantly, Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings.") (internal quotation marks and citations omitted) [15]

79 *MAAX Corporation* (*MAAX*) provides some assistance on the U.S. treatment to CCAA proceedings in asset sales. The salient elements in *MAAX* included the fact that the sale was conducted prior to entering CCAA protection, only the Canadian entity ultimately sought protection under the Act and no concurrent U.S. proceedings were initiated at first. The MAAX companies operated extensively in the U.S. and internationally, and were eventually brought into the U.S. via Chapter 15. The Canadian court approved the move into the U.S. and granted the sale. While there were some operating companies based almost solely in the U.S. (opening bank accounts to qualify under the CCAA, as was done in the present case), the U.S. Bankruptcy Court looked at the entity as a whole and granted the petition. [16] The American court approved of a flexible approach to the U.S. asset sale, allowing it to go forward without a competitive bidding process, stalking horse or auction.

80 One of the essential features of the orders sought is the requirement that recognition be sought and obtained in the U.S. Bankruptcy Court, pursuant to Chapter 15 of that Code, of the Orders sought in this Court, including the adding of Additional Applicants.

81 I am satisfied that if there is a valid objection by the SLL, it is appropriately made in the U.S. Bankruptcy Court at a hearing to recognize this Order. I do not accept the proposition that this Court, by making the Order sought, would usurp a determinative review by the U.S. Court should it be found necessary.

82 Given the purpose and flexibility of the CCAA process, it is consistent with the jurisdiction of this Court to add the Additional Applicants for the appropriate purpose of facilitating and implementing the entire transaction, which is approved.

Conclusion

83 For the foregoing reasons, I am satisfied:

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1. That it is not appropriate to re-open the Marketing Process;

2. That this Court does have jurisdiction to consider a sale transaction that incidentally does affect assets of a Canadian company in the United States;

3. That in all the circumstances it is appropriate to approve the proposed transaction.

Appendix A

Applicable Provisions of the Inter-Creditor Agreement

Section 3.1

Until the Discharge of First Lien Obligations has occurred, whether or not any Insolvency or Liquidation Proceeding has been commenced by or against the Company or any other Grantor, subject to Section 3.1(a)(1), the First Lien Collateral Agent and the other First Lien Claimholders shall have the right to enforce rights, exercise remedies (including set-off and the right to credit bid their debt) and make determinations regarding the release, disposition, or restrictions with respect to the Collateral without any consultation with or the consent of the Second Lien Collateral Agent or any other Second Lien Claimholder...

Section 5.1 (a)

If in connection with the exercise of the First Lien Collateral Agent's remedies in respect of the Collateral provided for in Section 3.1, the First Lien Collateral Agent, for itself or on behalf of any of the other First Lien Claimholders, releases any of its Liens on any part of the Collateral or releases any Grantor from its obligations under its guaranty of the First Lien Obligations in connection with the sale of the stock, or substantially all the assets, of such Grantor, then the Liens, if any, of the Second Lien Collateral Agent, for itself or for the benefit of the Second Lien Claimholders, on such Collateral, and the obligations of such Grantor under its guaranty of the Second Lien Obligations, shall be automatically, unconditionally and simultaneously released...

...The Second Lien Collateral Agent, for itself or on behalf of any such Second Lien Claimholders, promptly shall execute and deliver to the First Lien Collateral Agent or such Grantor such termination statements, releases and other documents as the First Lien Collateral Agent or such Grantor may request to effectively confirm such release.

Section 5.1 (c)

Until the Discharge of First Lien Obligations occurs, the Second Lien Collateral Agent, for itself and on behalf of the Second Lien Claimholders, hereby irrevocably constitutes and appoints the First Lien Collateral Agent and any officer or agent of the First Lien Collateral Agent, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Second Lien Collateral Agent or such holder or in the First Lien Collateral Agent's own name, from time to time in the First Lien Collateral Agent's discretion, for the purpose of carrying out the terms of this Section 5.1, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary to accomplish the purposes of this Section 5.1 , including any endorsements or other instruments of transfer or release.

Order accordingly.

Footnotes

1 The appearing party on this motion is the Agent for the Second Lien Lenders, also referred to in the materials as Second Lien Creditors, hereinafter SLL.

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2 Like the Second Lien Lenders, the First Lien Lenders appeared formally by their Agent, were sometimes referred to as the First Lien Creditors and will be hereinafter referred to as the FLL.

3 It is to be noted that there is no existing U.S. action of which the Court was made aware by either the SLL or the FLL.

4 [1990] 3 S.C.R. 1077 (S.C.C.) at 1096

5 Ibid.

6 Supplemental Initial Order, at paragraphs 8 and 24, Motion Record of the First Lien Lenders' Agent, at pages 10 and 18

7 *Re Maax Corporation*, unreported, Orders of the Superior Court of Quebec, TD Supplementary Brief of Authorities, Tabs 1a-c; Order by the US Bankruptcy Court for the District of Delaware Granting Recognition and Related Relief, TD Supplementary Brief of Authorities, Tab 1d.

8 *Re Madill Equipment Canada*, Case No. 08-41426, Distribution and Vesting Orders of the Supreme Court of British Columbia; Order of the US Bankruptcy Court (Western District of Washington at Tacoma) Granting Motion Authorizing Sale of Assets, TD Supplementary Brief of Authorities, Tab 2.

9 *Re. ROL Manufacturing (Canada) Ltd., et al.*, unreported, Order of the Quebec Superior Court (Commercial Division) Approving the Sale of the PSH Division, TD Supplementary Brief of Authorities, Tab 3a; Order of the US Bankruptcy Court, Southwestern District of Ohio, Authorizing and Approving Sale of PSH Division, TD Supplemental Brief of Authorities, Tab 3c.

10 *Re Biltrite Rubber Inc.*, Case No. 09-31423 (MAW), Sale Approval and Vesting Order and Distribution Order of the Ontario Superior Court of Justice, TD Supplemental Brief of Authorities, Tabs 4a-b; Order of the US Bankruptcy Court for the Northern District of Ohio Western Division Enforcing the Orders of the Ontario Court, TD Supplementary Brief of Authorities, Tab 4c.

11 *Re. Pope and Talbot, Inc. et al*., Case No. 08-11933 (CSS), Orders of the US Bankruptcy Court for the District of Delaware, TD Supplementary Brief of Authorities, Tab 5.

12 United States Bankruptcy Court, Case No. 09-16709, January 5, 2010, Martin Glenn J.

13 *Metcalfe* at 18

14 (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) (*Muscletech*), titled *Re RSM Richter Inc. v. Aguilar*, 2006 U.S. Dist. LEXIS 57595 (S.D.N.Y.) (*Re RSM Richter*)

15 See footnote 12, *supra*.

16 *In re MAAX Corp., et al.*, No. 08-11443 (Bankr. D. Del. Aug. 6, 2008)

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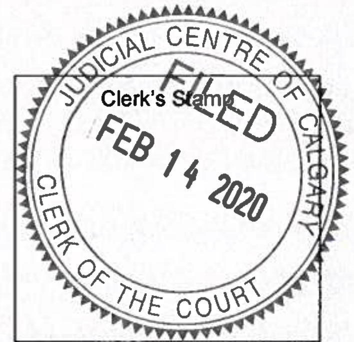
Tab 11



COURT FILE NUMBER	1901-16844
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ATB FINANCIAL (FORMERLY ALBERTA TREASURY BRANCHES
RESPONDENT	TRAVERSE ENERGY LTD.
DOCUMENT	**ORDER (SISP and Stalking Horse APA Approval)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, Alberta T2P 4K9 Attention: Sean Collins / Pantelis Kyriakakis Tel: 403-260-3531 / 3536 Fax: 403-260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca

DATE ON WHICH ORDER WAS PRONOUNCED: **February 14, 2020**

NAME OF JUDGE WHO MADE THIS ORDER: **Justice P.R. Jeffrey**

LOCATION OF HEARING: **Calgary, Alberta**

UPON the application (the "**Application**") of Ernst & Young Inc. (the "**Receiver**"), in its capacity as the receiver and manager of the current and future undertakings, property, and assets (collectively, the "**Property**") of Traverse Energy Ltd. (the "**Debtor**") pursuant to the receivership order issued by the Honourable Justice A.D. Macleod on December 6, 2019 (the "**Receivership Order**"), in the within proceedings (the "**Receivership Proceedings**"); **AND UPON** having read the First Report of the Receiver, dated February 5, 2020 (the "**First Receiver's Report**"), filed; **AND UPON** having read the Confidential Supplement to the First Report of the Receiver, dated February 5, 2020 (the "**Confidential Supplement**"), unfiled; **AND UPON** having read the Affidavit of Service of Katie Doran, sworn on February 10, 2020, filed; **AND UPON** hearing counsel for the Receiver and any other persons present;

I hereby certify this to be a true copy of
the original Order
Dated this 14 day of February 2020
P. Petrova
for Clerk of the Court

027052/527703
MT DOCS 20097234v2

IT IS HEREBY ORDERED AND DECLARED THAT:

DEFINED TERMS

1. Any and all capitalized terms used herein and not otherwise defined shall have the meaning ascribed to such terms in the Sale and Investment Solicitation Process attached as Schedule "**A**" hereto (the "**SISP**").

SISP AND STALKING HORSE APA APPROVAL

2. The Receiver is hereby authorized and empowered to retain Sayer Energy Advisors (the "**Sales Agent**") as the Debtor's sales and marketing agent under and in connection with the SISP.

3. The SISP is hereby approved and the Receiver is hereby authorized and empowered to proceed, carry out, and implement the SISP and all corresponding sales, marketing, or tendering processes, including any and all actions related thereto, substantially in accordance with the SISP and, furthermore, the Debtor, by and through the Receiver, is hereby authorized to enter into any resulting agreement(s) or transaction(s) (collectively, the "**SISP Agreements**") which may arise in connection thereto, as the Receiver determines are necessary or advisable in connection with or in order to complete any or all of the various steps, as contemplated by the SISP.

4. The Receiver is hereby authorized and empowered to amend, extend, shorten, or modify any of the requirements, milestones, or deadlines set forth in the SISP, if the Receiver determines, in the Receiver's sole discretion and based on its reasonable business judgment, that such an extension or modification will generally benefit the Debtor's creditors and other stakeholders.

5. The Receiver, the Debtor, and the Sales Agent are hereby authorized and permitted to use any and all information prepared by the Debtor, on or before the date of the Receivership Order, without having to affix any Association of Professional Engineers and Geoscientists of Alberta ("**APEGA**") stamp to such documents, instruments, or records, as may be used in connection with the SISP.

6. Any transaction involving the Debtor or the Property arising from or out of the SISP will be on an "as is, where is" basis and without surviving representations, warranties, covenants, or indemnities, of any kind, nature, or description, including, but in no way limited to, any liability or undertaking as a result of any documents utilized as part of the SISP (without or without an APEGA stamp), by the Receiver, the Debtor, the Sales Agent, or any of their estates, agents,

advisors, professionals, or otherwise, except to the extent expressly set forth in any relevant agreement between the Debtor and any person participating in the SISP.

7. The Receiver is hereby authorized and empowered to enter into the Asset Purchase Agreement, dated February 5, 2020, between the Debtor, by and through the Receiver, as the vendor, and Barrel Oil Corp., as the purchaser, attached as Appendix "A" to the First Receiver's Report (the "**Stalking Horse APA**"), as part of and in the manner contemplated by the SISP.

8. Nothing herein shall act as authorization or approval of the transfer or vesting of any or all of the Debtor's Property under any SISP Agreements, the Stalking Horse APA, or otherwise. Such transfer and vesting shall be dealt with and will be subject to further Order of this Honourable Court.

MISCELLANEOUS MATTERS

9. The Receiver and any interested person is hereby authorized and empowered to apply to this Honourable Court to amend, vary, or seek any advice, directions, or the approval or vesting of any transactions, in connection with the SISP.

10. Service of this Order shall be deemed good and sufficient by:

(a) Serving the same on:

(i) the persons listed on the service list created in these proceedings;

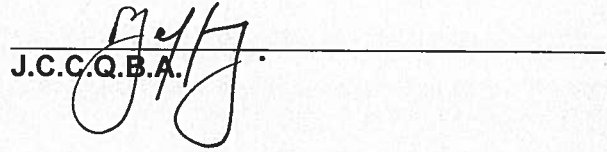
(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and,

(b) Posting a copy of this Order on the Receiver's website at: https://documentcentre.eycan.com/Pages/Main.aspx?SID=1475

and service on any other person is hereby dispensed with.

11. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.



J.C.C.Q.B.A.

027052/527703
MT DOCS 20097234v2

SCHEDULE "A" TO THE SISP AND STALKING HORSE APA APPROVAL ORDER
SISP

SALE AND INVESTMENT SOLICITATION PROCESS

Preamble

1. This Sale and Investment Solicitation Process (the "**SISP**") will be implemented as part of the receivership proceedings (the "**Receivership Proceedings**") commenced pursuant to the Receivership Order issued by the Court of Queen's Bench of Alberta (the "**Court**") on December 6, 2019 (the "**Receivership Order**"), pursuant to which Ernst & Young Inc. (the "**Receiver**") was appointed as receiver and manager of all of the assets, properties, and undertakings (collectively, the "**Property**") of Traverse Energy Ltd. (the "**Debtor**"). This SISP was approved by an order granted by the Court on February 14, 2020 (the "**SISP Approval Order**").

2. The SISP Approval Order, *inter alia*, approved this SISP together with the entering into of a purchase and sale agreement (the "**Stalking Horse APA**") between the Debtor, by and through the Receiver, as vendor, and Barrel Oil Corp. (the "**Stalking Horse Purchaser**"), as purchaser, pursuant to which the Stalking Horse Purchaser made an offer to purchase certain Property of the Debtor (the "**Assets**").

3. The SISP Approval Order, the procedures in respect of the SISP as contained herein (the "**SISP Procedures**"), and any subsequent order issued by the Court pertaining to the SISP or the SISP Procedures shall exclusively govern the process for soliciting and selecting offers and bids for the sale of the Property of the Debtor, or any refinancing, reorganization, recapitalization, restructuring, joint-venture, merger, or other business transaction involving the Debtor or the Property, or any combination thereof.

Stalking Horse APA

4. The Stalking Horse APA provides that the purchase price (the "**Stalking Horse Purchase Price**") for the acquisition of the Assets will be paid in cash.

5. The Stalking Horse Purchase Price is approximately $3,250,000 (CDN).

6. The purpose of these SISP Procedures is to determine whether a higher and better offer than the Stalking Horse APA may be obtained by the Receiver in a formal Court supervised marketing process, undertaken as part of these Receivership Proceedings and approved by the Court.

7. For the purposes of the SISP Procedures, a "**Superior Offer**" shall mean:

   (a) a credible, reasonably certain, and financially viable offer made by a Qualified Bidder (as defined herein) to acquire the Property (or any part thereof) or shares in the Debtor, or any refinancing, recapitalization, joint-venture, merger or other business transaction involving the Debtor or some combination thereof, the terms of which are no less favourable and no more burdensome or conditional than the terms contained in the Stalking Horse APA;

   (b) an offer that provides for consideration that, in the reasonable business judgment of the Receiver, is at least $50,000 in excess of the value of the consideration payable pursuant to the Stalking Horse APA plus the Break Fee (as defined below); and,

(c) an offer which is accompanied by a deposit (the "**Deposit**" which includes the Deposit paid under the Stalking Horse APA) paid by way of certified cheque or bank draft payable to the Receiver, in trust, that is equal to (10%) percent of the purchase price or consideration to be paid under the corresponding offer.

Conduct of SISP Procedures

8. The Receiver shall conduct the SISP Procedures as outlined herein. In the event that there is a disagreement or clarification required as to the interpretation or application of the SISP or the SISP Procedures or the responsibilities of any person hereunder, the Court will have the jurisdiction to hear such matter and provide advice and directions upon application of the Receiver, the Stalking Horse Purchaser, or any other interested person.

"As Is, Where Is"

9. Any transaction involving the Debtor, the shares of the Debtor, or the Property of the Debtor, will be on an "**as is, where is**" basis and without any surviving representations, warranties, covenants, or indemnities of any kind, nature, or description by the Debtor, the Receiver, or any of their agents, estates, advisors, professionals, or otherwise, except to the extent set forth in a written agreement with the person who is a counterparty to such a transaction.

Free of Any and All Claims and Interests

10. All of the right, title, and interest of the Debtor in and to any assets sold or transferred within the Receivership Proceedings will, at the time of such sale or transfer, be sold or transferred free and clear of any security, charge, or other restriction (collectively, the "**Claims and Interests**") pursuant to approval and vesting orders made by the Court except for any security, charge, or other restriction expressly contemplated in the Stalking Horse APA, as part of any Superior Offer, or any corresponding purchase and sale agreements, or listed as a "permitted encumbrance" in any corresponding sale approval and vesting orders, as the case may be.

SISP Commencement

11. The Receiver may commence the SISP and the SISP Procedures immediately following the SISP Approval Order (the "**SISP Commencement Date**") by preparing, in consultation with Sayer Energy Advisors (the "**Sales Agent**"), a list of potential bidders (the "**Known Potential Bidders**") and generally marketing the Debtor's Property in an open, fair, and public manner. Additionally, the list of Known Potential Bidders shall include both strategic and financial parties who, in the reasonable business judgment of the Receiver and the Sales Agent, may be interested in and have the financial capacity to make a Superior Offer.

12. The Receiver or the Sales Agent will give notice of these SISP Procedures to Known Potential Bidders (including the Participation Requirements as specified below) shortly after the SISP Commencement Date. In addition, the Sales Agent will continue to publicly market and advertise the Debtor's Property.

Participation Requirements

13. Unless otherwise ordered by the Court, any person (including any Known Potential Bidders) who wishes to participate in this SISP must deliver the following to the Receiver or the Sales Agent:

    (a) an executed form of confidentiality agreement that is satisfactory to the Receiver, acting reasonably, and which shall enure to the benefit of any person who completes a transaction with the Receiver (the "**Confidentiality Agreement**"); and,

    (b) a specific indication of the anticipated sources of capital and / or credit for such person and satisfactory evidence of the availability of such capital and / or credit so as to demonstrate that such person has the financial capacity to complete a transaction which constitutes a Superior Offer,

    (collectively, the "**Participation Requirements**").

14. If, in the opinion of the Receiver, a person has complied with each of the requirements described in Section 13 herein, such person shall be deemed a "**Potential Bidder**" hereunder.

15. The Sales Agent will provide each Potential Bidder with access to an electronic data room containing due diligence materials and financial, tax, and other information relating to the shares, the Property, and the business of the Debtor, as soon as practicable after the determination that such person is a Potential Bidder.

16. Neither the Receiver, the Debtor, nor the Sales Agent is responsible for, and such parties will have no liability with respect to, any information obtained by or provided to any Potential Bidder(s). The Receiver, the Debtor, the Sales Agent, and their advisors do not make any representations or warranties whatsoever as to the information or the materials provided.

Phase 1 – Bid Deadline

17. A Potential Bidder will be deemed a "**Qualified Bidder**" if such Potential Bidder submits a non-binding letter of intent to the Receiver (a "**Qualified LOI**") on or before 5:00 pm (Calgary Time time) on March 26, 2020 (the "**Phase 1 Bid Deadline**"). Subject to Section 18 of these SISP Procedures, a non-binding indication of interest will only qualify as a Qualified LOI in the event that it contains, meets, or includes all of the following:

    (a) it is received by the Receiver on or before the Phase 1 Bid Deadline;

    (b) it includes a summary of:

        (i) the type and amount of consideration to be paid by the Qualified Bidder;

        (ii) the Property subject to the proposed transaction;

(iii) the structure and financing of the transaction (including, but not limited to, the sources of financing and evidence of the availability of such financing);

(iv) any anticipated corporate, shareholder, internal or regulatory approvals required to close the transaction and the anticipated time frame and any anticipated impediments for obtaining such approvals;

(v) any additional due diligence required or desired to be conducted prior to the commencement of the Auction (as defined herein), if any;

(vi) any conditions to closing that the Qualified Bidder may wish to impose; and;

(vii) any other terms or conditions of the transaction which the Qualified Bidder believes are material to the transaction;

(c) it provides for the completion of the transactions contemplated therein on or before April 30, 2020 (the "**Completion Date**");

(d) such other information reasonably requested by the Receiver.

18. The Receiver, acting reasonably, may waive non-compliance with any one or more of the requirements specified in paragraph 17 of these SISP Procedures and deem any non-compliant letter of intent to be a Qualified LOI.

19. If a Qualified LOI, which also constitutes a Superior Offer, is received, these SISP Procedures shall proceed to the next phase. If no Qualified LOI, which constitutes a Superior Offer, is received by the Phase I Bid Deadline:

(a) these SISP Procedures shall immediately terminate; and,

(b) the Receiver shall, within five (5) Business Days of the termination of these SISP Procedures, confirm that the Receiver has scheduled an application with the Court seeking approval, after notice and hearings, to implement the Stalking Horse APA.

Phase 2 - Auction

20. If a Superior Offer is received as determined by the Receiver, the Receiver shall proceed to conduct an auction, at a date/time to be determined by the Receiver (the "**Auction**"), but within ten (10) days following the Phase 1 Bid Deadline. The Auction will include the following procedures:

(a) each party that submitted a Superior Offer and the Stalking Horse Purchaser will receive a copy of the highest Superior Offer which will be used as the starting bid (the "**Starting Bid**");

(b) each party that submitted a Superior Offer and the Stalking Horse Purchaser must inform the Receiver whether such party intends to participate in the

Auction, by a date/time to be determined by the Receiver. Those parties that elect to participate in the Auction are referred to as "**Auction Bidders**";

(c) the Receiver, the Auction Bidders, and such other persons permitted by the Receiver are the only parties able to attend the Auction;

(d) bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one bid (a "**Subsequent Bid**") is submitted by an Auction Bidder that the Receiver determines is:

(i) for the first round, a higher or otherwise better offer than the Starting Bid; and,

(ii) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (defined below),

(e) after the first round of bidding, and in between each subsequent round of bidding, the Receiver shall announce the bid (including the value and material terms thereof) that it believes to be the highest or otherwise best offer (the "**Leading Bid**"). A round of bidding will conclude after each Auction Bidder has had the opportunity to submit a Subsequent Bid with full knowledge of the previous round's Leading Bid or the Starting Bid, as applicable;

(f) each Subsequent Bid shall provide an incremental cash value of at least $50,000 over the Starting Bid or the Leading Bid, as applicable;

(g) the Stalking Horse Purchaser shall be permitted, in its sole discretion, to submit Subsequent Bids, provided, however, that each Subsequent Bid must be made in the same manner as all Subsequent Bids are made by other Auction Bidders; and,

(h) if, in any round of bidding, no new Subsequent Bid is made which is determined to be better than the previous round's Leading Bid, the Auction shall be closed.

21. At the end of the Auction, the Receiver shall select the winning Leading Bid (the "**Winning Bid**"). Once a definitive agreement has been negotiated and settled in respect of the Winning Bid, as selected by the Receiver, in its sole and unfettered discretion, the Winning Bid shall be considered the "**Successful Bid**" and the person(s) who made the Successful Bid shall be the "**Successful Bidder**".

22. If the Successful Bidder is a party other than the Stalking Horse Purchaser, the Receiver shall pay the Stalking Horse Purchaser a break fee equal to three percent (3.0%) of the Stalking Horse Purchase Price (the "**Break Fee**") from the proceeds of the Successful Bid, within five (5) business days following the completion and the closing of all transaction(s) contemplated by the Successful Bid.

Deposits

23. All Deposits shall be retained by the Receiver and invested in an interest bearing trust account in a Schedule I Bank in Canada or ATB Financial. With respect to the Winning Bid, the corresponding Deposit (plus accrued interest) paid by the person making such Winning Bid shall be applied to the consideration to be paid by such person upon the closing of the transactions constituting the Successful Bid.

24. The Deposit(s) (plus applicable interest) of all persons who did not make the Winning Bid shall be returned to such persons within five (5) Business Days following the date that the Court approves the Successful Bid.

25. If the Successful Bidder breaches or defaults on its obligation to close the transaction in respect of such Successful Bid it shall forfeit its Deposit to the Receiver for and on behalf of the Debtor; provided however that the forfeit of such Deposit shall be in addition to, and not in lieu of, any other rights in law or equity that the Debtor has in respect of such breach or default.

Notice

26. The addresses used for delivering documents as prescribed by the terms and conditions of these SISP Procedures are set out in Schedule "**A**" hereto. A bid and all associated documentation shall be delivered to the Receiver by electronic mail, personal delivery, or courier. Persons requesting information about these SISP Procedures should contact the Receiver or the Sales Agent at the contact information contained in Schedule "**A**".

Vesting Order

27. In the event that the Debtor or the Receiver enters into any agreement with a Successful Bidder (which, for certainty includes the Stalking Horse APA, in the event that no Superior Offer is received during the course of the SISP Procedures) concerning a transaction involving the purchase and sale of the Property, the Receiver shall subsequently apply for an Order from the Court approving such transaction and vesting title in the Property, subject to such Successful Bid and in accordance with the corresponding agreement for purchase and sale.

Advice & Directions

28. At any time during these SISP Procedures, the Receiver, the Sales Agent, or the Stalking Horse Purchaser may apply to the Court for advice and directions with respect to the discharge of their powers and duties hereunder.

Schedule "A"

Address for Notices and Deliveries

To the Receiver:

Ernst & Young Inc.
2200, 215 – 2nd Street SW
Calgary, AB T2P 1M4

Attention: Dylan Holwell
Email: dylan.holwell@ca.ey.com

To the Sales Agent:

Sayer Energy Advisors
166620, 540 – 5th Avenue SW
Calgary, AB T2P 0M2

Attention: Tom Pavic
Email: TPavic@sayeradvisors.com

Tab 12

Ernst & Young Inc.
Calgary City Centre
2200 – 215 2nd Street SW
Calgary, AB T2P 1M4

Tel: +1 403 290 4100
Fax: +1 403 290 4265
ey.com

TRAVERSE ENERGY LTD.
NOTICE AND STATEMENT OF RECEIVER
(Subsections 245(1) and 246(1) of the Bankruptcy & Insolvency Act)

In the Matter of the Court Appointed Receivership of the Property of Traverse Energy Ltd. ("Traverse" or the "Corporation")

1. Please be advised that on Friday, December 6, 2019, Ernst & Young Inc. (the "Receiver") was appointed by an Order of the Honorable Justice A.D. Macleod of the Court of Queen's Bench of Alberta (the "Order") as receiver and manager of the Corporation, an insolvent person that is described below:

	Net Book Value[1] as at June 30, 2019 (CAD$)
Trade and other receivables	388,651
Prepaid expenses and deposits	218,253
Exploration and evaluation assets	2,775,393
Property and equipment	18,185,370
Right-of-use asset	233,680
Total	**21,801,347**

[1]Net book value is based on unaudited books and records of the Corporation as at June 30, 2019 and may not represent fair market value of the Property. Funds are in Canadian dollars.

2. To the extent permitted under the Order, the Receiver took possession and control of the Property on December 6, 2019.

3. The following information relates to the receivership:
   a. Principal address of the insolvent person: **839 5 AVE SW Calgary, AB T2P 3C8**
   b. Principal line of business: **Oil and gas production**
   c. Location of the business: **Head Office – Calgary, AB**

4. Amounts owed by the Corporation are as follows:

Liabilities	CAD$
Secured creditors – see attached Appendix A	6,621,111
Unsecured creditors - see attached Appendix A	596,062
Total	**7,217,173**

5. The intended action plan for the Receiver is to realize upon the assets through an orderly sales process.

A member firm of Ernst & Young Global Limited
Ernst & Young Inc. is a corporate Licensed Insolvency Trustee

6. The Receiver contact is:

Ernst & Young Inc.
Calgary City Centre, 2200, 215 – 2nd Street SW
Calgary, AB T2P 1M4

Attention:	**Jessica Murray**
Telephone:	**(403) 206-5394**
Facsimile:	**(403) 206-5075**
Website:	https://ey.com/ca/traverse

Dated at Calgary, Alberta this 12th day of December 2019

Ernst & Young Inc.
In its capacity as Court appointed
Receiver of Traverse Energy Ltd.

Peter Chisholm, CPA, CA, CIRP, LIT
Senior Vice-President

EY
Building a better working world

Appendix A

Creditor listing as of December 6, 2019

Disclaimer: The claims identified in this schedule are per Traverse's books and records as at December 6, 2019 and are being provided for illustrative purposes only. This Claims listing does not in any way represent a complete or final determination of creditor's claims against Traverse.

Secured Creditors	Amount (CAD$)
ALBERTA TREASURY BRANCHES (ATB)	6,509,136
SPECIAL AREAS BOARD – MUNICIPALITY OF HANNA, AB	80,000
GOVERNMENT OF CANADA – RECEIVER GENERAL	31,975
Total Secured Creditors	**6,621,111**

Unsecured Creditors	Amount (CAD$)
2COM CONSULTING INC.	231
3D PATCH WORK LTD.	698
ALBERTA ENERGY REGULATOR	12,690
AGAT LABRATORIES	535
ALBERTA ONE CALL CORPORATION	25
ALPHABOW ENERGY LTD.	7,359
ALTUS GROUP LIMITED	3,169
AMPED ENERGY SERVICES LTD.	14,075
BAR E CONTRACTING LTD.	1,349
BARON OILFIELD SUPPLY	2,476
BOS SCAPES INC.	2,079
BOW CITY DELIVERY (1989) LTD.	7
CALRANCH RESOURCES INC	1,911
CAMPUS ENERGY PARTNERS INFRASTRUCTURE LP	31,845
CARNWOOD WIRELINE SERVICE LTD.	683
CHRIS PAGE & ASSOCIATES LTD.	5,798
CANADIAN NATURAL RESOURCES LIMITED	25,845
SCREO CALGARY OFFICE LP	20,982
COMPUTERSHARE	1,859
CREATIVE ELEMENTS CONSULTING INC.	263
CRITICAL CONTROL ENERGY SERVICES INC.	4,761
DAVID L.A. FREED	3,100
DECCA CONSULTING LTD.	13,300
DEFINITIVE OPTIMIZATION LTD.	126
DNOW CANADA ULC	4,904
DRUMHELLER OILFIELD SERVICES LTD.	8,374
EASTSIDE VENTURES INC.	4,159
EMBER RESOURCES INC.	1,532
ENVIROEX OILFIELD RENTALS & SALES LTD.	515
GALLAGHER ENERGY RISK SERVICES INC	68,741
GANGSTER ENTERPRISES LTD.	525

GAS PRO COMPRESSION CORP.	8,265
GREEN BEAN CATERING	164
GREENSLADES DISPOSAL LTD.	2,231
HANDHILLS HUTTERIAN BRETHREN	0
HERITAGE FREEHOLD SPECIALISTS & CO. LTD.	490
HXC ENERGY CANADA ULC	3,072
IHS MARKIT CANADA ULC	39,474
INPHASE ELECTRIC INC.	1,631
IRON MOUNTAIN CANADA CORPORATION	66
IVAN GRAUMANN	4,300
KING'S ENERGY SERVICES LTD.	2,958
KONICA MINOLTA BUSINESS SOLUTIONS (CANADA) LTD.	287
LOCKHART FARMS LTD.	4,100
LO-COST PROPANE	1,862
LONE WORKER SAFETY SOLUTIONS INC.	712
LTC ENERGY CANADA ULC	3,072
G.B. MCKAY FARMS LTD	6,600
MIDWEST PROPANE	4,137
MILLENNIUM ENERGY SERVICES	1,255
MINISTER OF FINANCE, PROVINCE OF ALBERTA	121
NAVIGATION COMMUNICATION SOLUTIONS INC.	444
NELSON BROS OILFIELD SERVICES (1997) LTD.	4,689
NETAGO INTERNET	134
NEXT COMPRESSION CORP	11,424
OSLER, HOSKIN & HARCOURT LLP	3,239
P2 ENERGY SOLUTIONS ALBERTA ULC	2,079
PANDELL TECHNOLOGY CORPORATION	4,379
PETRONET SYSTEMS LP	1,200
PINE RIDGE SUPPLY LTD.	3,816
PITNEY BOWES	12
PLAINS MIDSTREAM CANADA ULC	7,997
POLYCORE TUBULAR LININGS	1,099
POWER SERV ENGINE & COMPRESSOR REPAIR 1998 LTD	6,493
PRAIRIE PROVIDENT RESOURCES CANADA LTD	871
PURE CHEM SERVICES	70,013
PUROLATOR COURIER LTD.	199
QUASCHNICK VEGETATION MANAGEMENT INC.	1,546
QUIKWAY AIR SERVICES INC.	378
Q2 ARTIFICIAL LIFT SERVICES ULC	20,245
RAISE PRODUCTION INC	26,767
RICHARDSON'S BULK SALES LTD.	6,567
RODDY'S OILFIELD SERVICE, SALES & REPAIRS	1,733
ROY DAY LENFESTY	5,000
SARGE'S OILFIELD SERVICES	27,393
SAVANNA WELL SERVICING INC.	17,452
SOURCE CORROSION	3,548
STARBOARD RESOURCES INC.	12

STIMTECH TUBING INSPECTION LTD.	5,678
STREAMLINE ENERGY GROUP	3,990
SUPERIOR PROPANE	2,035
TANK 77 PRESSURE TRUCK SERVICES INC.	1,350
TERROCO OILFIELD SERVICES	3,481
TERVITA CORPORATION	4,215
TNT ELECTRIC AND CONTROLS INC.	443
TRIDENT EXPLORATION	108
TUFF STEAMING & PRESSURE WASHING	499
TWH OILFIELD SERVICES LTD.	4,305
VELA SOFTWARE INTERNATIONAL D.B.A	6,930
NADINE TRISKA, EXECUTRIX FOR WALTER WANDZILAK	3,600
WORKERS' COMPENSATION BOARD - ALBERTA	403
WEST CANADA HOLDINGS ULC	315
WOLF COULEE RESOURCES INC.	1,268
Total Unsecured Liabilities	**596,062**
Total Liabilities (Secured & Unsecured)	**7,217,173**

Tab 13

Clerk's Stamp:

COURT FILE NUMBER	1901-05089
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended
	IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9, as amended
	AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF STRATEGIC OIL & GAS LTD. and STRATEGIC TRANSMISSION LTD.
APPLICANTS	STRATEGIC OIL & GAS LTD. and STRATEGIC TRANSMISSION LTD.
DOCUMENT	**ORDER (APPROVAL OF SISP, STALKING HORSE and STAY EXTENSION)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DENTONS CANADA LLP Bankers Court 15th Floor, 850 - 2nd Street S.W. Calgary, Alberta T2P 0R8 Attention: David W. Mann and Afshan Naveed Ph. (403) 268-7097 / 403-268-7015 Fx. (403) 268-3100 File No.: 575553-3
DATE ON WHICH ORDER WAS PRONOUNCED:	May 9, 2019
LOCATION WHERE ORDER WAS PRONOUNCED:	Calgary, Alberta
NAME OF JUDGE WHO MADE THIS ORDER:	The Honourable Madam Justice M.H. Hollins

I hereby certify this to be a true copy of the original order dated this 10 day of May 2019

for Clerk of the Court

UPON the application of Strategic Oil & Gas Ltd. ("**Strategic**") and Strategic Transmission Ltd. (collectively the "**Applicants**"); **AND UPON** having read the Application, the Affidavit of Remi Anthony (Tony) Berthelet, sworn April 29, 2019 (the "**Second Berthelet Affidavit**"), the First Report of KPMG Inc., dated April 29, 2019 (the "**First Report**"), the Court-appointed Monitor of the Applicants (the "**Monitor**"), the First Supplemental Report of the Monitor, dated May 3, 2019 (the "**First Supplemental Report**"), which report sets out in detail in Appendix "B" to that report, a stalking horse bid (the "**Stalking Horse**

Bid"), the Second Supplemental Report of the Monitor, dated May 9, 2019 (the "**Second Supplemental Report**") which report sets out in detail in Appendix "A" to that report, a revised Sale and Investment Solicitation Process (the "**SISP**"), the Affidavit of Service of Terry Trojanoski, sworn May 2, 2019, the Affidavit of Service of Terry Trojanoski, sworn May 6, 2019 and the Affidavit of Service of Terry Trojanoski, sworn May 9, 2019, all filed; **AND UPON** hearing from counsel for the Applicants, counsel for the Monitor, counsel for GMT Capital (as defined in the First Berthelet Affidavit), and counsel for other interested parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

General

1. Service of this application and supporting materials is hereby deemed good and sufficient, the time for notice is hereby abridged to the time provided, and no other person is required to have been served with notice of this application.

2. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the SISP.

Stay

3. The Stay Period as ordered and defined in paragraph 13 of the Initial Order granted herein on April 10, 2019 and thereafter extended pursuant to an Order granted May 3, 2019, is hereby further extended until and including September 30, 2019.

Sales Process

4. The SISP, as attached hereto as **Schedule "B"**, is hereby approved.

5. Strategic and the Monitor are hereby authorized and directed to proceed with the procedure outlined in the SISP and do all things as are reasonably necessary to carry out their respective obligations thereunder and give full effect to the SISP.

6. The Monitor may amend the SISP in any non-substantive manner if, in the Monitor's discretion, such amendment would be in the best interest of Strategic and its stakeholders.

7. Each of the Applicants and the Monitor and their respective affiliates, partners, directors, employees, agents and advisors shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of the Applicants or the Monitor, as applicable, in performing their respective obligations under the SISP.

Approval of the Stalking Horse Bid

8. The Stalking Horse Bid, including the Break Free, is hereby authorized, ratified and approved, with such minor amendments as Strategic may deem necessary, with the approval of the Monitor.

9. Strategic and the Monitor are hereby authorized and directed to take all such steps, perform, consummate, implement, execute and deliver all such conveyance documents, bills of sale, assignments, conveyances, transfers, deeds, representations, indicia of title, tax elections, documents and instruments of whatsoever nature or kind as may be reasonably necessary or desirable for the completion of the Transaction and for the conveyance of the Assets (each as defined in the Stalking Horse Bid) to the Stalking Horse Bidder in accordance with the terms of the Stalking Horse Bid, including, without limitation, making such amendments to the Stalking Horse Bid as Strategic, the Monitor and the Stalking Horse Bidder may approve in writing and which do not materially alter the Stalking Horse Bid.

10. The Stalking Horse Bidder shall be entitled to the benefit of and is hereby granted a charge (the "**Stalking Horse Charge**") on the Assets and any proceeds from the sale thereof as security for payment by Strategic to the Stalking Horse Bidder of the Deposit, Accrued Interest and the Break Fee (each as defined in the Stalking Horse Bid), and shall be exempt from any claim of, or regulatory obligation imposed by, the AER that is unrelated to the Assets and their proceeds.

11. Paragraph 37 of the Initial Order granted in these proceedings on April 10, 2019 (the "**Initial Order**") is hereby amended to reflect that the Stalking Horse Charge ranks as the first charge against the Assets and their proceeds, and the Stalking Horse Charge shall be included in each of paragraphs 38 through 42 of the Initial Order and each of those provisions apply, *mutatis mutandis*, to the Stalking Horse Charge.

Vesting in favour of the Stalking Horse Bidder

12. In the event that either: (a) there is no Superior Proposal, or (b) the ROFR is exercised, then the parties to the Stalking Horse Bid and the Monitor are hereby authorized and directed to close the Stalking Horse Bid in accordance with terms thereof and the within Order.

13. Upon delivery of a Monitor's certificate to the Stalking Horse Bidder substantially in the form set out in **Schedule "A"** hereto (the "**Monitor's Closing Certificate**"), all of Strategic's right, title and interest in and to the Assets (the "**Purchased Assets**") shall vest absolutely in the name of the Stalking Horse Bidder, free and clear of and from any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgments, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual,

statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, "**Claims**") including, without limiting the generality of the foregoing:

(a) any encumbrances or charges created by the Initial Order;

(b) any charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta) or any other personal property registry system; and

(c) any liens or claims of lien under the *Builders' Lien Act* (Alberta),

(all of which are collectively referred to as the "**Encumbrances**", which term shall not include the Permitted Encumbrances (as defined in the Stalking Horse Bid) and for greater certainty, this Court orders that all Claims including Encumbrances other than Permitted Encumbrances, affecting or relating to the Purchased Assets are hereby expunged, discharged and terminated as against the Purchased Assets.

14. Upon delivery of the Monitor's Closing Certificate, and upon filing of a certified copy of this Order, together with any applicable registration fees, all governmental authorities including those referred to below in this paragraph (collectively, "**Governmental Authorities**") are hereby authorized, requested and directed to accept delivery of such Monitor's Closing Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required to convey to the Stalking Horse Bidder clear title to the Purchased Assets subject only to Permitted Encumbrances. Without limiting the foregoing:

(a) Alberta Energy ("**Energy Ministry**") shall and is hereby authorized, requested and directed to forthwith:

(i) cancel and discharge those Claims including builders' liens, security notices, assignments under section 426 (formerly section 177) of the *Bank Act* (Canada) and other Encumbrances (but excluding Permitted Encumbrances) registered (whether before or after the date of this Order) against the estate or interest of Strategic in and to any of the Purchased Assets located in the Province of Alberta; and

(ii) transfer all working interest in Crown leases listed in the Stalking Horse Bid standing in the name of Strategic, to the Stalking Horse Bidder free and clear of all Claims including Encumbrances but excluding Permitted Encumbrances;

15. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the Stalking Horse Bid. Presentment of this Order and the Monitor's Closing Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations against any of the Purchased Assets of any Claims including Encumbrances but excluding Permitted Encumbrances.

16. No authorization, approval or other action by and no notice to or filing with any governmental authority or regulatory body exercising jurisdiction over the Purchased Assets is required for the due execution, delivery and performance by the Monitor of the Stalking Horse Bid.

17. Except as expressly provided for in the Stalking Horse Bid or by section 5 of the Alberta *Employment Standards Code*, the Stalking Horse Bidder shall not, by completion of the Transaction, have liability of any kind whatsoever in respect of any Claims against Strategic.

18. Upon completion of the Transaction (as defined in the Stalking Horse Bid), Strategic and all persons who claim by, through or under Strategic in respect of the Purchased Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Purchased Assets, save and except for persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped and foreclosed from and permanently enjoined from pursuing, asserting or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption or other Claim whatsoever in respect of or to the Purchased Assets, and to the extent that any such persons or entities remain in the possession or control of any of the Purchased Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate, or interest in and to the Purchased Assets, they shall forthwith deliver possession thereof to Stalking Horse Bidder.

19. The Stalking Horse Bidder shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit without any interference of or by Strategic, or any person claiming by, through or against Strategic.

20. Immediately upon closing of the transaction, holders of Permitted Encumbrances shall have no claim whatsoever against Strategic or the Monitor.

21. The Monitor is directed to file with the Court a copy of the Monitor's Closing Certificate forthwith after delivery thereof to the Stalking Horse Bidder.

22. Notwithstanding:

    (a) the pendency of these proceedings and any declaration of insolvency made herein;

(b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "**BIA**"), in respect of Strategic, and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of Strategic; and

(d) the provisions of any federal or provincial statute:

the vesting of the Purchased Assets in the Stalking Horse Bidder pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of Strategic and shall not be void or voidable by creditors of Strategic, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

23. The Monitor, the Stalking Horse Bidder and any other interested party, shall be at liberty to apply for further advice, assistance and direction as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction (as defined in the Stalking Horse Bid).

24. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

Service

25. Service of this Order shall be deemed good and sufficient by:

(a) Serving the same on:

(i) the persons listed on the service list created in these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order;

(iv) the Stalking Horse Bidder or it's solicitors; and

(b) Posting a copy of this Order on the Monitor's website, established for these proceedings

and service on any other person is hereby dispensed with.

26. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A"

Form of Monitor's Certificate

COURT FILE NUMBER		Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE		
APPLICANTS		
DEFENDANT		
DOCUMENT	**MONITOR'S CERTIFICATE**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT		

RECITALS

A. Pursuant to an Order of the Honourable Justice K.M. Horner of the Court of Queen's Bench of Alberta, Judicial District of Calgary (the "**Court**") dated April 10, 2019, KPMG Inc. was appointed as the Monitor (the "**Monitor**") of Strategic Oil & Gas Ltd. ("**Strategic**").

B. Pursuant to an Order of the Court dated May __, 2019 (the "**Approval Order**"), the Court approved the Stalking Horse Bid (the "**Sale Agreement**") between the Monitor and GMT Exploration Zama Inc. (the "**Stalking Horse Bidder**") and provided for the vesting in the Stalking Horse Bidder of Strategic's right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to the Stalking Horse Bidder of a certificate confirming (i) that an event in paragraph 12 of the Approval Order had occurred, (ii) that the conditions to Closing as set out in Article 5 of the Sale Agreement have been satisfied or waived by Strategic and the Stalking Horse Bidder; and (iii) the Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, capitalized terms have the meanings set out in the Sale Agreement.

THE MONITOR CERTIFIES the following:

1. An event in paragraph 12 of the Approval Order, namely *, has occurred.

2. The conditions to Closing as set out in Article 5 of the Sale Agreement have been satisfied or waived by Strategic and the Stalking Horse Bidder.

3. The Transaction has been completed to the satisfaction of the Monitor.

4. This Certificate was delivered by the Monitor at **[Time]** on **[Date]**.

KPMG Inc., in its capacity as Monitor of Strategic Oil & Gas Ltd., and not in its personal capacity.

Per;____________________________

Name:

Title:

SCHEDULE "B"

Sale and Investment Solicitation Package

Strategic Oil & Gas Ltd.
Strategic Transmission Ltd.

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ARTICLE 1
INTRODUCTION

1.1 **Background**. On April 10, 2019, Strategic Oil & Gas Ltd. and Strategic Transmission Ltd. ("**STL**", together with Strategic Oil & Gas Ltd., "**Strategic**"), obtained protection from the Alberta Court of Queen's Bench (the "**Court**") under the provisions of the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") pursuant to the provisions of an Initial Order (the "**Initial Order**").

1.2 **SISP**. On May 9, 2019, the Court approved Strategic advancing a sale and investor solicitation process in accordance with the terms and conditions set forth herein (the "**SISP**").

1.3 **SISP Process Generally**. This SISP describes, among other things, the process by which the SISP will be conducted, the criteria to become a Qualified Bidder, accessing due diligence information, the requirements to make a Qualified Bid, and the review, acceptance and approval process that then follows.

ARTICLE 2
INTERPRETATION

2.1 **Defined Terms**. Capitalized terms used herein shall have the meanings ascribed to such terms, including the following:

"**AER**" means Alberta Energy Regulator;

"**AER Regulatory Requirements**" means the legislative acts, regulations, and rules governing energy development in Alberta that the AER administers, including without limitation the transfer provisions under the OGCA, the Pipeline Act, Directive 067 and Directive 006;

"**Bid Deadline**" means July 26, 2019;

"**Business**" means the business being carried on by Strategic;

"**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are open for business in the City of Calgary;

"**Confidentiality Agreement**" means a confidentiality agreement in form and substance satisfactory to Strategic, providing generally that all information is proprietary and confidential for the benefit of Strategic, subject to certain exceptions including the ability of the signatory to communicate with the Monitor and the Lender;

"**Directive 006**" means "Directive 006, Licensee Liability Rating (LLR) Program and License Transfer Process", approved by the AER on December 17, 2016, as amended;

"**Directive 67**" means "Directive 067, Eligibility Requirements for Acquiring and Holding Energy Licenses and Approvals", approved by the AER on December 6, 2017, as amended;

"**Lender**" means, GMT Capital Corp., as agent for and on behalf of the holders of the outstanding 12% Senior Secured Notes due May 27, 2020 of Strategic Oil & Gas Ltd.;

"**Monitor**" means KPMG Inc., in its capacity as monitor appointed pursuant to the Initial Order;

"**Notice**" means a summary of the Teaser suitable for publication in print media and on-mediums;

"**OCGA**" means the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, as amended;

"**Offer**" means a credible, reasonably certain and financially viable offer for acquisition of all or any part of the Property or for an investment into the Business or alternative transaction (including, without limitation, a restructuring or recapitalization proposal in respect of the Strategic);

"**Pipeline Act**" means the *Pipeline Act*, R.S.A. 2000, c. P-15, as amended;

"**Property**" means the undertakings, property and assets of Strategic or any portion thereof;

"**ROFR**" means the right of first refusal that the Stalking Horse Bidder may exercise in respect of any Competing Bid in respect of the Zama Parcel;

"**Sale**" means the acquisition of all or any part of the Property;

"**Stalking Horse Bid**" means the offer to purchase the Zama Parcel by the Stalking Horse Bidder pursuant to the terms and conditions of a purchase and sale agreement between Strategic Oil & Gas Ltd., and the Stalking Horse Bidder dated as of May 3, 2019;

"**Stalking Horse Bidder**" means GMT Exploration Zama Inc., a corporation incorporated under the laws of the Province of British Columbia and extra-provincially registered to do business in the Province of Alberta, and who is related to the Lender;

"**Teaser**" means a notice describing this SISP, and containing such other relevant information which Strategic and the Monitor consider relevant, including a summary description of this purchase/investment opportunity and an invitation for interested parties to submit bids/proposal in accordance with the terms hereof;

"**Ultimate Closing Date**" means September 6, 2019; and

"**Zama Parcel**" means the "Assets", as described in the Stalking Horse Bid.

ARTICLE 3
SISP PROCESS

3.1 **Notice and Teaser**. As soon as reasonably practicable after Court approval of this SISP, and in any event within 3 Business Days following such approval, Strategic, with the assistance of the Monitor, shall cause the Notice to be published in the Globe & Mail. Strategic and the Monitor shall also be at liberty to publish the Notice in such other print and social media outlets as they deem appropriate. Strategic, with the assistance of the Monitor, shall also circulate the Teaser to such parties as they reasonably believe may be interested in participating in the SISP.

3.2 **Qualifying as a Potential Bidder**. In order to participate in the SISP and ultimately be considered for qualification as a Qualified Bidder pursuant to Article 5, below, an interested party must deliver to Strategic at the address specified in Schedule "A" hereto (by delivery or email), the following material:

(a) a duly executed Confidentiality Agreement;

(b) a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder, full disclosure of the direct and indirect owners of the Potential Bidder and their principals; and

(c) a written acknowledgement of receipt of a copy of the Court order approving the SISP (including this SISP) and agreeing to accept and be bound by all of the provisions of this SISP.

3.3 **Potential Bidder**. Once an interested party has satisfied all of the requirements described in the previous subsection they will be deemed to be a "**Potential Bidder**", and will be promptly notified of such classification by the Monitor.

ARTICLE 4
DUE DILIGENCE

4.1 **Access**. Forthwith upon being designated as a Potential Bidder, Strategic and the Monitor shall provide the Potential Bidder with access to an electronic data room maintained by Strategic in this regard. Both Strategic and the Monitor shall provide Potential Bidders with further access to such due diligence materials and information relating to the Business and the Property as is reasonably practicable.

4.2 **No Representation or Warranties**. Neither Strategic nor the Monitor makes any representation or warranty as to the information contained in the Teaser or the information to be provided through the due diligence process or otherwise, except to the extent otherwise contemplated under any definitive sale or investment agreement with a Successful Bidder executed and delivered by Strategic.

4.3 **No Additional Information**. Neither Strategic nor the Monitor shall be required to produce any abstract of title, title deeds or documents, or copies thereof or any evidence as to title, other than what is already in Strategic's possession.

ARTICLE 5
BIDDING

5.1 **Requirement for a Qualified Bid**. Except in respect of an Offer regarding the Zama Parcel, which is governed by Article VIII hereof, an Offer submitted by a Potential Bidder will be considered a "**Qualified Bid**" only if the Offer complies with all of the following:

(a) it includes a letter stating that the Offer is irrevocable until the earlier of (i) the closing of a transaction with a Successful Bidder (as defined below), and (ii) 20 Business Days following the Bid Deadline; provided, however, that if such Offer is selected as a Successful Bid (as defined below), it shall remain irrevocable until the closing of the Successful Bid or Successful Bids, as the case may be;

(b) it includes a duly authorized and executed:

(i) in the case of an Offer involving an acquisition of Property, a purchase and sale agreement specifying the purchase price, expressed in Canadian dollars (the "**Purchase Price**") in as close a form as practicable to the form of purchase and sale agreement attached hereto as marked as Schedule "B" (accompanied by a blackline demonstrating the changes to the form attached hereto);

(ii) in the case of an Offer involving an investment into the Business or alternative transaction (including, without limitation, a restructuring or recapitalization proposal in respect of the Strategic), an agreement setting forth the terms and conditions of such investment or alternative transaction, and

(iii) and in the case of either (i) or (ii) above, such ancillary agreements as may be required by the Potential Bidder together with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such ancillary agreements) and the proposed forms of order(s) for Court approval thereof;

(c) it includes evidence sufficient to allow Strategic and the Monitor to make a reasonable determination as to the Potential Bidder's financial and other capabilities to consummate the transaction contemplated by the Offer, which evidence could include but is not limited to evidence of a commitment for all required funding and/or financing from a creditworthy bank or financial institution and/or its direct and indirect owners' or principals (in which case information regarding such owners' and principals' financial and other capability shall be included);

(d) it is not conditioned on (i) the outcome of unperformed due diligence by the Potential Bidder and/or (ii) obtaining any financing of any kind and includes an acknowledgement and representation that the Potential Bidder has had an opportunity to conduct any and all required due diligence prior to making its Offer;

(e) it fully discloses the identity of each entity that is bidding or otherwise that will be sponsoring or participating in the Offer, including information regarding the Potential Bidder's direct and indirect owners and their principals, and the terms of any such participation;

(f) it includes an acknowledgement and representation that the Potential Bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its Offer; (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the assets to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, including by Strategic or the Monitor, or any of their respective advisors, except as expressly stated in the Offer; (iii) is a sophisticated party capable of making its own assessments in respect of making its Offer; and (iv) has had the benefit of independent legal advice in connection with its Offer;

(g) the Offer is on an "as is, where is", "without recourse" basis and without surviving representations, warranties, covenants or indemnities of any kind, nature, or description

by either Strategic or the Monitor, or any of their respective agents, except to the extent specifically set forth therein;

(h) it includes evidence, in form and substance reasonably satisfactory to Strategic and the Monitor, of authorization and approval from the Potential Bidder's board of directors (or comparable governing body) with respect to the Offer;

(i) in the case of an Offer involving an acquisition of Property, it provides for a refundable deposit (the "**Deposit**"), to be made in the form of a wire transfer (to a trust account maintained by Strategic's counsel, Dentons Canada LLP ("**Dentons**")), in an amount equal to 10% of the proposed gross purchase price, to be held and dealt with in accordance with this SISP;

(j) it provides for closing of the Offer by no later than the Ultimate Closing Date;

(k) if the Potential Bidder is an entity newly formed for the purpose of the transaction, the Offer shall include an equity or debt commitment letter from the parent entity or sponsor, which is satisfactory to Strategic and the Monitor;

(l) it includes evidence, in form and substance reasonably satisfactory to Strategic and the Monitor, of compliance or anticipated compliance with any and all applicable Canadian and any foreign regulatory approvals (including, if applicable, anti-trust regulatory approval and any approvals with respect to the grant or transfer of any permits or licenses), the anticipated time frame for such compliance and any anticipated impediments for obtaining such approvals;

(m) it contains responses to the AER Regulatory Requirements;

(n) it is otherwise compliant with, and not contrary to, the rules set forth in this SISP;

(o) it contains other information reasonably requested by Strategic or the Monitor; and

(p) it is received by no later than the Bid Deadline.

5.2 **Qualified Bids.** Any Offer submitted by a Potential Bidder that complies with each and every requirement of subsection 5.1 of this SISP shall hereinafter be referred to as a "**Qualified Bid**" (and all such bids, the "**Qualified Bids**") and each Potential Bidder who has submitted a Qualified Bid shall hereinafter be referred to as a "**Qualified Bidder**".

5.3 **Deemed Qualified Bids.** Notwithstanding subsection 5.1 and 5.2 hereof, either Strategic or the Lender, with the consent of Monitor, may waive compliance with any one or more of the Qualified Bid requirements specified herein, and deem such non-compliant bids to be Qualified Bids.

5.4 **Restructuring or Recapitalization Proposals.** Potential Bidders in respect of any restructuring or recapitalization proposal shall be encouraged to discuss indicative particulars thereof with Strategic and the Monitor early in the process to facilitate the likelihood of an Offer therefor becoming a Qualified Bid.

5.5 **AER Review.** Potential Bidders will require AER review. In this regard, Potential Bidders:

5.5.1 are encouraged to speak with the AER as soon as practicable after they become Potential Bidders,

5.5.2 should be prepared to provide the AER with the following:

(a) information about: (A) its corporate structure and associated directors, officers and shareholders, (B) its corporate relationship to Strategic and Strategic's lenders, and (C) its compliance history with the AER,

(b) annual and most recent stub period financial statements (balance sheet, income statements, cash flows, and accompanying notes), and

(c) the plan in outline to address end of life obligations related to assets within the proposed Offer;

5.5.3 must either have current eligibility to hold licenses under Directive 067 or demonstrate to the AER's satisfaction how they will achieve Directive 067 licensee eligibility and a related Business Associate code;

5.5.4 should be aware that transfer applications will be more favourably regarded if the following principles are addressed:

(a) an *en bloc* sale is preferred (but not required),

(b) area acquisitions should be "white-mapped",

(c) the transaction is LMR neutral or better,

(d) additionally, and depending upon how the foregoing principles are observed, Potential Bidders should propose how end of life obligations will be addressed in respect of the interests being acquired, which may require proposing appropriate closure plan for AER's approval or potentially posting of security.

Notwithstanding anything in this subparagraph 5.5 and subparagraph 6.5 below, the AER retains its discretion to approve the transfer of any applicable licences, permits and approval pursuant to section 24 of the OGCA and section 18 of the Pipeline Act. Accordingly, nothing in this SISP shall fetter that discretion or constitute any "pre-approval" of any transfers required under AER Regulatory Requirements.

5.6 **NWT Regulatory Requirements**. In respect of any Offers related to Property located in the Northwest Territories ("**NWT**"), Potential Bidders should be aware:

5.6.1 of the requirements of the *Oil and Gas Operations Act*, S.N.W.T. 2014, c.14 and the role of the Regulator thereunder; of the *Waters Act*, S.N.W.T. 2014, c.18, the *Mackenzie Valley Resource Management Act*, S.C. 1998, c.25 and regulations made under such statutes, and of the role of the Mackenzie Valley Land and Water Board thereunder, regarding the right to conduct work or operations on any such Property;

5.6.2 that the Government of the Northwest Territories will regard an Offer more favourably if:

(a) the Offer involves an *en bloc* sale;

(b) area acquisitions are "white-mapped"; and

(c) Potential Bidders propose how end of life obligations will be addressed in respect of the interests being acquired; and

5.6.3 Notwithstanding anything in this subparagraph 5.6 and subparagraph 6.4, the Government of the Northwest Territories and the relevant regulators in the NWT retain their discretion to approve the issuance or transfer of any applicable authorisations, licences, permits and approvals. Accordingly, nothing in this SISP shall fetter that discretion or constitute any "pre-approval" of the foregoing.

ARTICLE 6
SELECTION OF THE SUCCESSFUL BID OR SUCCESSFUL BIDS

6.1 **Review of Qualified Bids**. Immediately following the Bid Deadline, Strategic, the Lender, and the Monitor will assess all Qualified Bids received, if any, and will determine whether it is likely that the transactions contemplated by such Qualified Bids are likely to be consummated and whether proceeding with this SISP is in the best interests of Strategic. Such assessments will be made as promptly as practicable after the Bid Deadline.

6.2 **No Qualified Bids.** In the event that either: (a) no Qualified Bid was received, or (b) none of the Qualified Bids received were likely, in the view of Strategic or the Monitor, acting reasonably, to be consummated, this SISP shall be deemed to be immediately terminated and Strategic shall apply to the Court for advice and direction.

6.3 **AER.** Immediately following the Bid Deadline, Strategic will provide all Qualified Bids not eliminated under clause 6.2(b) of this SISP to the AER for AER's review. AER will provide Strategic and the Monitor with any deficiencies or concerns surrounding each Qualified Bid response to AER Regulatory Requirements within 2 weeks of AER's receipt of such Qualified Bid.

6.4 **NWT.** Immediately following the Bid Deadline, Strategic will provide all Qualified Bids not eliminated under 6.2(b) of this SISP to the Government of the Northwest Territories if such Qualified Bids relate to Property located in the NWT, or to Property (wherever located) adjacent to or otherwise connected to Property located in the NWT. The Government of the Northwest Territories will provide Strategic and the Monitor with any deficiencies or concerns surrounding each Qualified Bid as soon as is reasonably practicable after receipt of such Qualified Bid.

6.5 **Further Negotiations**. Immediately following the Bid Deadline Strategic and the Lender, with the assistance of the Monitor, may select Qualified Bids for further negotiation and/or clarification of any terms or conditions of such Qualified Bids, including the amounts offered, before identifying the highest or otherwise best Qualified Bid(s) (the "**Successful Bid(s)**") received, as the case may be.

6.6 **Determining Successful Bid(s)**. Upon completion of the AER's review pursuant to subsection 6.3, above, and any further negotiations or clarifications that may be conducted pursuant to subsection 6.4 above, Strategic and the Lender, with the consent of the Monitor, will identify the Successful Bid(s). Any Qualified Bidder who made a Successful Bid is a "**Successful Bidder**". Strategic will notify any such Qualified Bidder that it is a Successful Bidder.

ARTICLE 7
APPROVAL HEARING

7.1 **Finalization of Successful Bids.** Forthwith upon notifying a Qualified Bidder that it is a Successful Bidder, Strategic and the Successful Bidder will promptly finalize the definitive agreements in respect of any Successful Bidder, conditional upon approval of the Court (the "**Definitive Agreements**").

7.2 **Court Approval**. Strategic shall apply to the Court as soon as practicable after completion of the Definitive Agreements for: (i) an order approving the Successful Bid(s) and authorizing Strategic to enter into any and all necessary agreements with respect to the Successful Bid; and (ii) any order that may be required vesting title to Property in the name of a Successful Bidder (the "**Approval Hearing**").

7.3 **Closing**. Closing(s) shall occur as soon as practicable after the Successful Bid(s) are approved by the Court.

7.4 **Rejection of unsuccessful Bids**. All Qualified Bids (other than any Successful Bid(s)) shall be deemed rejected on and as of the date of closing of the Successful Bid or Successful Bids, as the case may be.

ARTICLE 8
STALKING HORSE PROCEDURE

8.1 **Capitalized Terms**. All capitalized terms used in this Article 8 not otherwise defined in this SISP shall have the meaning ascribed to such terms in the Stalking Horse Bid.

8.2 **Stalking Horse Bid**. The Stalking Horse Bid shall be utilized by Strategic and the Vendor as a "stalking horse bid" to elicit a superior offer for the Zama Parcel. The Stalking Horse Bid may be utilized by the Strategic and the Monitor in conjunction with their continuing efforts to sell the Zama Parcel on terms and conditions that are (a) no less favourable, (b) no more burdensome or conditional, and (c) except for purchase consideration greater than the Purchase Price, substantially similar to the Stalking Horse Bid.

8.3 **Inclusion in this SISP**. The Stalking Horse Bid shall be included in this SISP insofar as Articles III and IV are concerned.

8.4 **Competing Bids**. A potential purchaser ("**Competing Bidder**") who wishes to acquire the Zama Parcel shall submit its offer – in the form of an executed purchase and sale agreement in substance substantially similar to the Stalking Horse Bid – to the Monitor no later than noon, Calgary time, on Friday, June 21, 2019, which offer shall provide:

(a) a deposit payable by certified cheque, bank draft or wire transfer of not less than 25% of the competing bid's total consideration,

(b) a closing time of not later than 5 Business Days following the Court granting a vesting order contemplated in subsection 8.10 hereof,

(c) a period of time to remain available for acceptance (and be irrevocable) until the Monitor has determined the Superior Proposal (as defined below), and

(d) a cash purchase price in excess of the Purchase Price ($1,500,000) by an amount equal to at least the sum of the Break Fee and $150,000;

whereupon it shall be considered a "**Competing Bid**" under Article 8 of this SISP.

8.5 **Blackline Copy**. The Competing Bid must be accompanied by a blacklined copy of the Competing Bid as against the Stalking Horse Bid, showing any and all variations between the Competing Bid and the Stalking Horse Bid.

8.6 **Financial Wherewithal**. The Competing Bid must be made by one or more bidders who can demonstrate, in the aggregate, the financial ability to consummate the transactions contemplated by the Competing Bid on the terms specified therein to the satisfaction of Strategic and the Monitor.

8.7 **Superior Proposal**. The Competing Bid that offers the highest consideration for the Zama Parcel, and is otherwise acceptable to Strategic and the Monitor, shall be deemed to be the "Superior Proposal" for the purposes of Article 8 of this SISP.

8.8 **ROFR**. Forthwith upon determining the Superior Proposal the Monitor shall forthwith submit such proposal to the Stalking Horse Bidder to determine whether the Stalking Horse Bidder will exercise its ROFR: The Stalking Horse Bidder will advise Strategic and the Monitor within 5 Business Days whether it intends to exercise the ROFR.

8.9 **AER Review**. In the event that the Stalking Horse Bidder does not exercise the ROFR, then the Superior Proposal shall be submitted to the AER for its review and the AER will advise Strategic and the Monitor within 10 Business Days whether the Superior Proposal is acceptable or, if not, what conditions would be required to render it acceptable. Strategic and the Monitor will work with the Competing Bidder under the Superior Proposal, who will have 5 Business Days to satisfy the conditions set forth by the AER.

8.10 **Court Approval**. Forthwith upon a Superior Proposal obtaining approval from the AER as contemplated under the previous subsection, Strategic shall bring an application for approval of the Court to close the Superior Proposal. The Superior Proposal shall close forthwith after Court Approval and the proceeds of sale, to the extent necessary to repay the Deposit, Accrued Interest, and the Break Fee, shall be directed to the Stalking Horse Bidder to discharge the obligations secured by the Stalking Horse Charge.

8.11 **Closing of the Stalking Horse Bid**. In the event that either: (a) there is no Superior Proposal, or (b) the ROFR is exercised, then Strategic, the Monitor, and the Stalking Horse Bidder shall close the Stalking Horse Bid as soon as is practicable after such event and the Zama Parcel will vest in the Stalking Horse Bidder in accordance with the terms of the Order approving this SISP.

ARTICLE 9
GENERAL PROVISIONS

9.1 **Deposits**. All Deposits shall be retained by Dentons and invested in an interest-bearing trust account. If there is a Successful Bid, the Deposit (plus accrued interest) paid by the Successful Bidder whose bid is approved at the Approval Hearing shall be applied to the purchase price to be paid by the Successful Bidder upon closing of the approved transaction and will be non-refundable. If a Successful Bidder fails to comply with any provision contained in its Successful

Bid, the Deposit and all other payments made in connection with the Purchase Price shall be forfeited as liquidated damages. The Deposits (plus applicable interest) of Qualified Bidders not selected as a Successful Bidder shall be returned to such bidders within ten Business Days after the date on which Qualified Bids are deemed rejected in accordance with subsection 7.4. If there is no Successful Bid, all Deposits shall be returned to the bidders within 10 Business Days of the date upon which the SISP is terminated in accordance with these procedures.

9.2 **Right to Reject Offers**. The highest or any Offer will not necessarily be accepted. Neither Strategic nor the Monitor has any obligation to conclude a sale arising out of this process and they reserve the right and unfettered discretion to reject any Offer received.

9.3 **Taxes**. All applicable federal and provincial taxes are payable by the Qualified Bidder (unless an exemption certificate is produced), not Strategic.

9.4 **No Assignment**. No Qualified Bid or Successful Bid may be assigned by the Qualified Bidder to any third party without the prior written consent of Strategic and the Lender, and such consent may be unreasonably withheld.

9.5 **Time of the Essence**. All stipulations as to time in this SISP are strictly of the essence.

9.6 **No Commissions**. Neither Strategic nor the Monitor shall be required to pay any finder's fees, commissions, expenses or other compensation to any agents, consultants, advisors, or other intermediaries in respect of any Qualified Bid or Successful Bid, unless expressly agreed to separately and in writing and consented to by the Lender.

9.7 **Applicable Law**. The laws of the Province of Alberta shall govern this SISP. Strategic and each Qualified Bidder agree that the Court shall have the exclusive jurisdiction to determine any and all disputes under this SISP and any transaction contemplated hereunder hereby attorn to the jurisdiction of the Court.

ARTICLE 10
ADDITIONAL APPROVALS

10.1 **Additional Approvals**. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the applicable law in order to implement a Successful Bid.

ARTICLE 11
ONGOING SUPERVISION

11.1 **Standing**. At any time during the SISP, Strategic, the Monitor, or the Lender may apply to the Court for advice and directions with respect to the terms and condition of the SISP.

SCHEDULE "A"

Address of Strategic

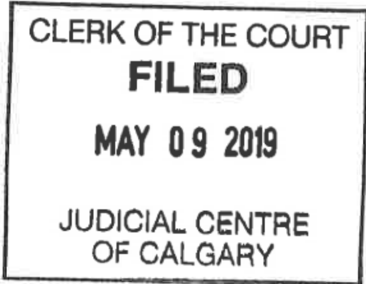
Strategic Oil & Gas Ltd.
1100, 645 - 7th Avenue S.W.
Calgary, AB T2P 4G8
Attention: Tony Berthelet

E-mail: tberthelet@sogoil.com

SCHEDULE "B"

Form of PSA:

Tab 14



COURT FILE NUMBER	**1901-05089**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**CALGARY**
APPLICANTS	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED** **AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF STRATEGIC OIL & GAS LTD. AND STRATEGIC TRANSMISSION LTD.**
DOCUMENT	**SECOND SUPPLEMENTAL REPORT OF THE MONITOR** **MAY 9, 2019**
ADDRESS FOR SERVICE AND CONTRACT INFORMATION OF PARTY FILING THIS DOCUMENT	**MONITOR** KPMG Inc. Suite 3100, Bow Valley Square II 205 - 5th Ave SW Calgary, Alberta T2P 4B9 Neil Honess/Cameron Browning Tel: (403) 691-8014/(403) 691-8413 neilhoness@kpmg.ca cbrowning@kpmg.ca **COUNSEL** Torys LLP 525 8th Avenue SW 46th Floor - Eighth Avenue Place East Calgary, Alberta T2P 1G1 Kyle Kashuba Tel: (403) 776-3744 kkashuba@torys.com

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1. INTRODUCTION AND PURPOSE OF REPORT

1. On April 10, 2019, Strategic Oil & Gas Ltd. and Strategic Transmission Ltd. (together, "**Strategic**" or the "**Company**") sought and obtained protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**") pursuant to an order granted by this Honourable Court (the "**Initial Order**").

2. The Initial Order granted, *inter alia*, a stay of proceedings against Strategic until and including May 6, 2019 (the "**Initial Stay Period**") and appointed KPMG Inc. as Monitor (the "**Monitor**"). The proceedings commenced by the Company under the CCAA will be referred to herein as the "**CCAA Proceedings**".

3. In addition to the stay of proceedings, the Initial Order granted various relief including, among other things, (i) the KERP Charge, (ii) the Administration Charge, (iii) the Directors' Charge, and (iv) Interim Lender's Charge (collectively, the "**Charges**").

4. On May 6, 2019, the Company obtained an order extending the stay of proceedings until and including June 5, 2019, and this Honourable Court further authorized and directed that the Company proceed with payment of the first installment payment to various employees pursuant to the terms of the Key Employee Retention Plan that was approved by the Court.

5. Further background on the CCAA Proceedings, including a summary of the activities of the Company and the Monitor since granting the Initial Order was previously provided in the Monitor's first report dated April 29, 2019 (the "**First Report**") and Monitor's first supplemental report dated May 3, 2019 (the "**First Supplemental Report**").

6. This is the Monitor's second supplemental report (the "**Second Supplemental Report**") to the Court and should be read in conjunction with the First Report and the First Supplemental Report. The Second Supplemental Report has been filed to advise this Honourable Court and provide the Monitor's summary and comments with respect to:

   a) The valuation of the Stalking Horse Bid in respect of the Zama Parcel.

7. Further background and information regarding the Company and these CCAA Proceedings can be found on the Monitor's website at http://home.kpmg/ca/strategic (the "**Monitor's Website**").

8. In preparing this Second Supplemental Report and making the comments herein, the Monitor has been provided with, and has relied upon certain unaudited, draft and/or internal financial information, Company records, Company prepared financial information and projections, discussions with management (the "**Management**") and employees, and information from other third party sources (collectively, the "**Information**").

9. The Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards ("**CAS**") pursuant to the *Chartered Professional Accountants Handbook*, and accordingly the Monitor expresses no opinion or other form of assurance in respect of the Information.

10. Some of the information referred to in this this Second Supplemental Report consists of forecasts and projections, which were prepared based on Management's estimates and assumptions. Such estimates and assumptions are, by their nature, not ascertainable and as a consequence no assurance can be provided regarding the forecasted or projected results. Indeed, the reader is cautioned that the actual results will likely vary from the forecasts or projections, even if the assumptions materialize, and the variations could be significant.

11. The information contained in this Second Supplemental Report is not intended to be relied upon by any prospective purchaser or investor in any transaction with the Company.

12. Capitalized terms not otherwise defined herein are as defined in the Company's application materials, including the First Affidavit of Remi Anthony (Tony) Berthelet sworn April 9, 2019 (the "**First Berthelet Affidavit**") and the Second Affidavit of Remi Anthony (Tony) Berthelet (the "**Second Berthelet Affidavit**") sworn April 29, 2019. The Second Supplemental Report should be read in conjunction with the First Report, the First Supplemental Report and the First and the Second Berthelet Affidavits, as certain information has not been included herein to avoid unnecessary duplication.

13. Unless otherwise stated, all monetary amounts noted herein are expressed in Canadian dollars.

2. SISP

14. The Monitor understands that the AER, the Company, and GMT have concluded discussions in respect of a final version of the SISP and have made minor additions as detailed in the finalized SISP attached hereto as **Appendix "A"**.

15. Further to the above and the comments thereto in the First Supplemental Report, the Monitor supports the SISP as currently drafted.

3. VALUATION OF THE STALKING HORSE BID

16. The Monitor was also asked to elaborate on certain aspects of the Stalking Horse Bid; further comments on the Stalking Horse Bid are below:

    a) The Zama Parcel is a non-core asset in Alberta and unlikely to be of significant interest to parties interested in the remaining Core Assets;

    b) The Zama Parcel contains no wells or infrastructure other than a recent first quarter 2019 appraisal well, is geographically remote, is not completed or tied in and is of unproven productivity and therefore has limited commercial opportunity without significant additional spend;

    c) The Monitor is advised by the Company that the sale values of land in the vicinity of the Zama Parcel in recent land auctions was between $28 and $58 per acre. Even assuming the highest value of $58 per acre and a total land area in the Zama Parcel of approximately 65,000 gross acres, the land value of the Company's 10% non-operated working interest is approximately $377,000;

    d) The Zama Parcel was previously marketed by the Company in a strategic alternatives process conducted by Royal Bank of Canada Capital Markets from September to November 2018 and attracted no bids;

    e) The Stalking Horse Bidder holds the remainder of the working interest in the Zama Parcel;

    f) The Stalking Horse Bidder is in possession of a ROFR on the Zama Parcel pursuant to Joint Venture Letter Agreement dated March 9, 2018 (the "**JVLA**"); and

    g) While there is in approximately $2 million of estimated carry remaining on the Zama Parcel's original spend, the likely costs to production far exceed this amount.

4. CONCLUSIONS AND RECOMMENDATIONS

17. Based on the foregoing and as advised in the First Supplemental Report, the Monitor respectfully recommends that this Honourable Court make an order approving:

    a) The Company's SISP; and

    b) The Stalking Horse Bid and the corresponding Stalking Horse Charge.

This Report is respectfully submitted this 9th day of May, 2019.

KPMG Inc.

In its capacity as Monitor of
Strategic Oil & Gas Ltd. and Strategic Transmission Ltd.
and not in its personal or corporate capacity.

Per: Neil Honess
Senior Vice President

APPENDIX "A"

SALE AND INVESTMENT SOLICITATION PROCESS

Sale and Investment Solicitation Package

Strategic Oil & Gas Ltd.
Strategic Transmission Ltd.

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ARTICLE 1
INTRODUCTION

1.1 **Background**. On April 10, 2019, Strategic Oil & Gas Ltd. and Strategic Transmission Ltd. ("**STL**", together with Strategic Oil & Gas Ltd., "**Strategic**"), obtained protection from the Alberta Court of Queen's Bench (the "**Court**") under the provisions of the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") pursuant to the provisions of an Initial Order (the "**Initial Order**").

1.2 **SISP**. On May 9, 2019, the Court approved Strategic advancing a sale and investor solicitation process in accordance with the terms and conditions set forth herein (the "**SISP**").

1.3 **SISP Process Generally**. This SISP describes, among other things, the process by which the SISP will be conducted, the criteria to become a Qualified Bidder, accessing due diligence information, the requirements to make a Qualified Bid, and the review, acceptance and approval process that then follows.

ARTICLE 2
INTERPRETATION

2.1 **Defined Terms**. Capitalized terms used herein shall have the meanings ascribed to such terms, including the following:

"**AER**" means Alberta Energy Regulator;

"**AER Regulatory Requirements**" means the legislative acts, regulations, and rules governing energy development in Alberta that the AER administers, including without limitation the transfer provisions under the OGCA, the Pipeline Act, Directive 067 and Directive 006;

"**Bid Deadline**" means July 26, 2019;

"**Business**" means the business being carried on by Strategic;

"**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are open for business in the City of Calgary;

"**Confidentiality Agreement**" means a confidentiality agreement in form and substance satisfactory to Strategic, providing generally that all information is proprietary and confidential for the benefit of Strategic, subject to certain exceptions including the ability of the signatory to communicate with the Monitor and the Lender;

"**Directive 006**" means "Directive 006, Licensee Liability Rating (LLR) Program and License Transfer Process", approved by the AER on December 17, 2016, as amended;

"**Directive 67**" means "Directive 067, Eligibility Requirements for Acquiring and Holding Energy Licenses and Approvals", approved by the AER on December 6, 2017, as amended;

"**Lender**" means, GMT Capital Corp., as agent for and on behalf of the holders of the outstanding 12% Senior Secured Notes due May 27, 2020 of Strategic Oil & Gas Ltd.;

"**Monitor**" means KPMG Inc., in its capacity as monitor appointed pursuant to the Initial Order;

"**Notice**" means a summary of the Teaser suitable for publication in print media and on-mediums;

"**OCGA**" means the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, as amended;

"**Offer**" means a credible, reasonably certain and financially viable offer for acquisition of all or any part of the Property or for an investment into the Business or alternative transaction (including, without limitation, a restructuring or recapitalization proposal in respect of the Strategic);

"**Pipeline Act**" means the *Pipeline Act*, R.S.A. 2000, c. P-15, as amended;

"**Property**" means the undertakings, property and assets of Strategic or any portion thereof;

"**Regulatory Requirements**" means the terms, conditions, and other requirements as may be stipulated by the AER from time to time;

"**ROFR**" means the right of first refusal that the Stalking Horse Bidder may exercise in respect of any Competing Bid in respect of the Zama Parcel;

"**Sale**" means the acquisition of all or any part of the Property;

"**Stalking Horse Bid**" means the offer to purchase the Zama Parcel by the Stalking Horse Bidder pursuant to the terms and conditions of a purchase and sale agreement between Strategic Oil & Gas Ltd., and the Stalking Horse Bidder dated as of May 3, 2019;

"**Stalking Horse Bidder**" means GMT Exploration Zama Inc., a corporation incorporated under the laws of the Province of British Columbia and extra-provincially registered to do business in the Province of Alberta, and who is related to the Lender;

"**Teaser**" means a notice describing this SISP, and containing such other relevant information which Strategic and the Monitor consider relevant, including a summary description of this purchase/investment opportunity and an invitation for interested parties to submit bids/proposal in accordance with the terms hereof;

"**Ultimate Closing Date**" means September 6, 2019; and

"**Zama Parcel**" means the "Assets", as described in the Stalking Horse Bid.

ARTICLE 3
SISP PROCESS

3.1 **Notice and Teaser**. As soon as reasonably practicable after Court approval of this SISP, and in any event within 3 Business Days following such approval, Strategic, with the assistance of the Monitor, shall cause the Notice to be published in the Globe & Mail. Strategic and the Monitor

shall also be at liberty to publish the Notice in such other print and social media outlets as they deem appropriate. Strategic, with the assistance of the Monitor, shall also circulate the Teaser to such parties as they reasonably believe may be interested in participating in the SISP.

3.2 **Qualifying as a Potential Bidder**. In order to participate in the SISP and ultimately be considered for qualification as a Qualified Bidder pursuant to Article 5, below, an interested party must deliver to Strategic at the address specified in Schedule "A" hereto (by delivery or email), the following material:

(a) a duly executed Confidentiality Agreement;

(b) a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder, full disclosure of the direct and indirect owners of the Potential Bidder and their principals; and

(c) a written acknowledgement of receipt of a copy of the Court order approving the SISP (including this SISP) and agreeing to accept and be bound by all of the provisions of this SISP.

3.3 **Potential Bidder**. Once an interested party has satisfied all of the requirements described in the previous subsection they will be deemed to be a "**Potential Bidder**", and will be promptly notified of such classification by the Monitor.

ARTICLE 4
DUE DILIGENCE

4.1 **Access**. Forthwith upon being designated as a Potential Bidder, Strategic and the Monitor shall provide the Potential Bidder with access to an electronic data room maintained by Strategic in this regard. Both Strategic and the Monitor shall provide Potential Bidders with further access to such due diligence materials and information relating to the Business and the Property as is reasonably practicable.

4.2 **No Representation or Warranties**. Neither Strategic nor the Monitor makes any representation or warranty as to the information contained in the Teaser or the information to be provided through the due diligence process or otherwise, except to the extent otherwise contemplated under any definitive sale or investment agreement with a Successful Bidder executed and delivered by Strategic.

4.3 **No Additional Information**. Neither Strategic nor the Monitor shall be required to produce any abstract of title, title deeds or documents, or copies thereof or any evidence as to title, other than what is already in Strategic's possession.

ARTICLE 5
BIDDING

5.1 **Requirement for a Qualified Bid**. Except in respect of an Offer regarding the Zama Parcel, which is governed by Article VIII hereof, an Offer submitted by a Potential Bidder will be considered a "**Qualified Bid**" only if the Offer complies with all of the following:

(a) it includes a letter stating that the Offer is irrevocable until the earlier of (i) the closing of a transaction with a Successful Bidder (as defined below), and (ii) 20 Business Days following the Bid Deadline; provided, however, that if such Offer is selected as a Successful Bid (as defined below), it shall remain irrevocable until the closing of the Successful Bid or Successful Bids, as the case may be;

(b) it includes a duly authorized and executed:

  (i) in the case of an Offer involving an acquisition of Property, a purchase and sale agreement specifying the purchase price, expressed in Canadian dollars (the "**Purchase Price**") in as close a form as practicable to the form of purchase and sale agreement attached hereto as marked as Schedule "B" (accompanied by a blackline demonstrating the changes to the form attached hereto);

  (ii) in the case of an Offer involving an investment into the Business or alternative transaction (including, without limitation, a restructuring or recapitalization proposal in respect of the Strategic), an agreement setting forth the terms and conditions of such investment or alternative transaction, and

  (iii) and in the case of either (i) or (ii) above, such ancillary agreements as may be required by the Potential Bidder together with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such ancillary agreements) and the proposed forms of order(s) for Court approval thereof;

(c) it includes evidence sufficient to allow Strategic and the Monitor to make a reasonable determination as to the Potential Bidder's financial and other capabilities to consummate the transaction contemplated by the Offer, which evidence could include but is not limited to evidence of a commitment for all required funding and/or financing from a creditworthy bank or financial institution and/or its direct and indirect owners' or principals (in which case information regarding such owners' and principals' financial and other capability shall be included);

(d) it is not conditioned on (i) the outcome of unperformed due diligence by the Potential Bidder and/or (ii) obtaining any financing of any kind and includes an acknowledgement and representation that the Potential Bidder has had an opportunity to conduct any and all required due diligence prior to making its Offer;

(e) it fully discloses the identity of each entity that is bidding or otherwise that will be sponsoring or participating in the Offer, including information regarding the Potential Bidder's direct and indirect owners and their principals, and the terms of any such participation;

(f) it includes an acknowledgement and representation that the Potential Bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its Offer; (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the assets to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, including by Strategic or the Monitor, or any of their respective advisors, except as expressly stated in the Offer; (iii) is a sophisticated party capable of making its own assessments in respect of making

its Offer; and (iv) has had the benefit of independent legal advice in connection with its Offer;

(g) the Offer is on an "as is, where is", "without recourse" basis and without surviving representations, warranties, covenants or indemnities of any kind, nature, or description by either Strategic or the Monitor, or any of their respective agents, except to the extent specifically set forth therein;

(h) it includes evidence, in form and substance reasonably satisfactory to Strategic and the Monitor, of authorization and approval from the Potential Bidder's board of directors (or comparable governing body) with respect to the Offer;

(i) in the case of an Offer involving an acquisition of Property, it provides for a refundable deposit (the "**Deposit**"), to be made in the form of a wire transfer (to a trust account maintained by Strategic's counsel, Dentons Canada LLP ("**Dentons**")), in an amount equal to 10% of the proposed gross purchase price, to be held and dealt with in accordance with this SISP;

(j) it provides for closing of the Offer by no later than the Ultimate Closing Date;

(k) if the Potential Bidder is an entity newly formed for the purpose of the transaction, the Offer shall include an equity or debt commitment letter from the parent entity or sponsor, which is satisfactory to Strategic and the Monitor;

(l) it includes evidence, in form and substance reasonably satisfactory to Strategic and the Monitor, of compliance or anticipated compliance with any and all applicable Canadian and any foreign regulatory approvals (including, if applicable, anti-trust regulatory approval and any approvals with respect to the grant or transfer of any permits or licenses), the anticipated time frame for such compliance and any anticipated impediments for obtaining such approvals;

(m) it contains responses to the AER Regulatory Requirements;

(n) it is otherwise compliant with, and not contrary to, the rules set forth in this SISP;

(o) it contains other information reasonably requested by Strategic or the Monitor; and

(p) it is received by no later than the Bid Deadline.

5.2 **Qualified Bids.** Any Offer submitted by a Potential Bidder that complies with each and every requirement of subsection 5.1 of this SISP shall hereinafter be referred to as a "**Qualified Bid**" (and all such bids, the "**Qualified Bids**") and each Potential Bidder who has submitted a Qualified Bid shall hereinafter be referred to as a "**Qualified Bidder**".

5.3 **Deemed Qualified Bids.** Notwithstanding subsection 5.1 and 5.2 hereof, either Strategic or the Lender, with the consent of Monitor, may waive compliance with any one or more of the Qualified Bid requirements specified herein, and deem such non-compliant bids to be Qualified Bids.

5.4 **Restructuring or Recapitalization Proposals.** Potential Bidders in respect of any restructuring or recapitalization proposal shall be encouraged to discuss indicative particulars thereof with

Strategic and the Monitor early in the process to facilitate the likelihood of an Offer therefor becoming a Qualified Bid.

5.5 **AER Review.** Potential Bidders will require AER review. In this regard, Potential Bidders:

5.5.1 are encouraged to speak with the AER as soon as practicable after they become Potential Bidders,

5.5.2 should be prepared to provide the AER with the following:

(a) information about: (A) its corporate structure and associated directors, officers and shareholders, (B) its corporate relationship to Strategic and Strategic's lenders, and (C) its compliance history with the AER,

(b) annual and most recent stub period financial statements (balance sheet, income statements, cash flows, and accompanying notes), and

(c) the plan in outline to address end of life obligations related to assets within the proposed Offer;

5.5.3 must either have current eligibility to hold licenses under Directive 067 or demonstrate to the AER's satisfaction how they will achieve Directive 067 licensee eligibility and a related Business Associate code;

5.5.4 should be aware that transfer applications will be more favourably regarded if the following principles are addressed:

(a) an *en bloc* sale is preferred (but not required),

(b) area acquisitions should be "white-mapped",

(c) the transaction is LMR neutral or better,

(d) additionally, and depending upon how the foregoing principles are observed, Potential Bidders should propose how end of life obligations will be addressed in respect of the interests being acquired, which may require proposing appropriate closure plan for AER's approval or potentially posting of security.

Notwithstanding anything in this subparagraph 5.5 and subparagraph 6.5 below, the AER retains its discretion to approve the transfer of any applicable licences, permits and approval pursuant to section 24 of the OGCA and section 18 of the Pipeline Act. Accordingly, nothing in this SISP shall fetter that discretion or constitute any "pre-approval" of any transfers required under AER Regulatory Requirements.

5.6 **NWT Regulatory Requirements**. In respect of any Offers related to Property located in the Northwest Territories ("**NWT**"), the provisions of subsection 5.5 here apply, *mutatis mutandis,* to such Property and the regulatory authorities of the NWT having jurisdiction over such Property.

ARTICLE 6
SELECTION OF THE SUCCESSFUL BID OR SUCCESSFUL BIDS

6.1 **Review of Qualified Bids**. Immediately following the Bid Deadline, Strategic, the Lender, and the Monitor will assess all Qualified Bids received, if any, and will determine whether it is likely that the transactions contemplated by such Qualified Bids are likely to be consummated and whether proceeding with this SISP is in the best interests of Strategic. Such assessments will be made as promptly as practicable after the Bid Deadline.

6.2 **No Qualified Bids.** In the event that either: (a) no Qualified Bid was received, or (b) none of the Qualified Bids received were likely, in the view of Strategic or the Monitor, acting reasonably, to be consummated, this SISP shall be deemed to be immediately terminated and Strategic shall apply to the Court for advice and direction.

6.3 **AER.** Immediately following the Bid Deadline, Strategic will provide all Qualified Bids not eliminated under clause 6.2 (b) of this SISP to the AER for AER's review. AER will provide Strategic and the Monitor with any deficiencies or concerns surrounding each Qualified Bids response to Regulatory Requirements within 2 weeks of AER's receipt of such Qualified Bid.

6.4 **Further Negotiations**. Immediately following the Bid Deadline Strategic, and the Lender with the assistance of the Monitor, may select Qualified Bids for further negotiation and/or clarification of any terms or conditions of such Qualified Bids, including the amounts offered, before identifying the highest or otherwise best Qualified Bid(s) (the "**Successful Bid(s)**") received, as the case may be.

6.5 **Determining Successful Bid(s)**. Upon completion of the AER's review pursuant to subsection 6.3, above, and any further negotiations or clarifications that may be conducted pursuant to subsection 6.4 above, Strategic, and the Lender with the consent of the Monitor, will identify the Successful Bid(s). Any Qualified Bidder who made a Successful Bid is a "**Successful Bidder**". Strategic will notify any such Qualified Bidder that it is a Successful Bidder.

ARTICLE 7
APPROVAL HEARING

7.1 **Finalization of Successful Bids.** Forthwith upon notifying a Qualified Bidder that it is a Successful Bidder, Strategic and the Successful Bidder will promptly finalize the definitive agreements in respect of any Successful Bidder, conditional upon approval of the Court (the "**Definitive Agreements**").

7.2 **Court Approval**. Strategic shall apply to the Court as soon as practicable after completion of the Definitive Agreements for: (i) an order approving the Successful Bid(s) and authorizing Strategic to enter into any and all necessary agreements with respect to the Successful Bid; and (ii) any order that may be required vesting title to Property in the name of a Successful Bidder (the "**Approval Hearing**").

7.3 **Closing**. Closing(s) shall occur as soon as practicable after the Successful Bid(s) are approved by the Court.

7.4 **Rejection of unsuccessful Bids**. All Qualified Bids (other than any Successful Bid(s)) shall be deemed rejected on and as of the date of closing of the Successful Bid or Successful Bids, as the case may be.

ARTICLE 8
STALKING HORSE PROCEDURE

8.1 **Capitalized Terms**. All capitalized terms used in this Article 8 not otherwise defined in this SISP shall have the meaning ascribed to such terms in the Stalking Horse Bid.

8.2 **Stalking Horse Bid**. The Stalking Horse Bid shall be utilized by Strategic and the Vendor as a "stalking horse bid" to elicit a superior offer for the Zama Parcel. The Stalking Horse Bid may be utilized by the Strategic and the Monitor in conjunction with their continuing efforts to sell the Zama Parcel on terms and conditions that are (a) no less favourable, (b) no more burdensome or conditional, and (c) except for purchase consideration greater than the Purchase Price, substantially similar to the Stalking Horse Bid.

8.3 **Inclusion in this SISP**. The Stalking Horse Bid shall be included in this SISP insofar as Articles III and IV are concerned.

8.4 **Competing Bids**. A potential purchaser ("**Competing Bidder**") who wishes to acquire the Zama Parcel shall submit its offer – in the form of an executed purchase and sale agreement in substance substantially similar to the Stalking Horse Bid – to the Monitor no later than noon, Calgary time, on Friday, June 21, 2019, which offer shall provide:

(a) a deposit payable by certified cheque, bank draft or wire transfer of not less than 25% of the competing bid's total consideration,

(b) a closing time of not later than 5 Business Days following the Court granting a vesting order contemplated in subsection 8.10 hereof,

(c) a period of time to remain available for acceptance (and be irrevocable) until the Monitor has determined the Superior Proposal (as defined below), and

(d) a cash purchase price in excess of the Purchase Price ($1,500,000) by an amount equal to at least the sum of the Break Fee and $150,000;

whereupon it shall be considered a "**Competing Bid**" under Article 8 of this SISP.

8.5 **Blackline Copy**. The Competing Bid must be accompanied by a blacklined copy of the Competing Bid as against the Stalking Horse Bid, showing any and all variations between the Competing Bid and the Stalking Horse Bid.

8.6 **Financial Wherewithal**. The Competing Bid must be made by one or more bidders who can demonstrate, in the aggregate, the financial ability to consummate the transactions contemplated by the Competing Bid on the terms specified therein to the satisfaction of Strategic and the Monitor.

8.7 **Superior Proposal**. The Competing Bid that offers the highest consideration for the Zama Parcel, and is otherwise acceptable to Strategic and the Monitor, shall be deemed to be the "Superior Proposal" for the purposes of Article 8 of this SISP.

8.8 **ROFR**. Forthwith upon determining the Superior Proposal the Monitor shall forthwith submit such proposal to the Stalking Horse Bidder to determine whether the Stalking Horse Bidder will exercise its ROFR: The Stalking Horse Bidder will advise Strategic and the Monitor within 5 Business Days whether it intends to exercise the ROFR.

8.9 **AER Review**. In the event that the Stalking Horse Bidder does not exercise the ROFR, then the Superior Proposal shall be submitted to the AER for its review and the AER will advise Strategic and the Monitor within 10 Business Days whether the Superior Proposal is acceptable or, if not, what conditions would be required to render it acceptable. Strategic and the Monitor will work with the Competing Bidder under the Superior Proposal, who will have 5 Business Days to satisfy the conditions set forth by the AER.

8.10 **Court Approval**. Forthwith upon a Superior Proposal obtaining approval from the AER as contemplated under the previous subsection, Strategic shall bring an application for approval of the Court to close the Superior Proposal. The Superior Proposal shall close forthwith after Court Approval and the proceeds of sale, to the extent necessary to repay the Deposit, Accrued Interest, and the Break Fee, shall be directed to the Stalking Horse Bidder to discharge the obligations secured by the Stalking Horse Charge.

8.11 **Closing of the Stalking Horse Bid**. In the event that either: (a) there is no Superior Proposal, or (b) the ROFR is exercised, then Strategic, the Monitor, and the Stalking Horse Bidder shall close the Stalking Horse Bid as soon as is practicable after such event and the Zama Parcel will vest in the Stalking Horse Bidder in accordance with the terms of the Order approving this SISP.

ARTICLE 9
GENERAL PROVISIONS

9.1 **Deposits**. All Deposits shall be retained by Dentons and invested in an interest-bearing trust account. If there is a Successful Bid, the Deposit (plus accrued interest) paid by the Successful Bidder whose bid is approved at the Approval Hearing shall be applied to the purchase price to be paid by the Successful Bidder upon closing of the approved transaction and will be non-refundable. If a Successful Bidder fails to comply with any provision contained in its Successful Bid, the Deposit and all other payments made in connection with the Purchase Price shall be forfeited as liquidated damages The Deposits (plus applicable interest) of Qualified Bidders not selected as a Successful Bidder shall be returned to such bidders within ten Business Days after the date on which Qualified Bids are deemed rejected in accordance with subsection 7.4. If there is no Successful Bid, all Deposits shall be returned to the bidders within 10 Business Days of the date upon which the SISP is terminated in accordance with these procedures.

9.2 **Right to Reject Offers**. The highest or any Offer will not necessarily be accepted. Neither Strategic nor the Monitor has any obligation to conclude a sale arising out of this process and they reserve the right and unfettered discretion to reject any Offer received.

9.3 **Taxes**. All applicable federal and provincial taxes are payable by the Qualified Bidder (unless an exemption certificate is produced), not Strategic.

9.4 **No Assignment**. No Qualified Bid or Successful Bid may be assigned by the Qualified Bidder to any third party without the prior written consent of Strategic and the Lender, and such consent may be unreasonably withheld.

9.5 **Time of the Essence**. All stipulations as to time in this SISP are strictly of the essence.

9.6 **No Commissions**. Neither Strategic nor the Monitor shall be required to pay any finder's fees, commissions, expenses or other compensation to any agents, consultants, advisors, or other intermediaries in respect of any Qualified Bid or Successful Bid, unless expressly agreed to separately and in writing and consented to by the Lender.

9.7 **Applicable Law**. The laws of the Province of Alberta shall govern this SISP. Strategic and each Qualified Bidder agree that the Court shall have the exclusive jurisdiction to determine any and all disputes under this SISP and any transaction contemplated hereunder hereby attorn to the jurisdiction of the Court.

ARTICLE 10
ADDITIONAL APPROVALS

10.1 **Additional Approvals**. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the applicable law in order to implement a Successful Bid.

ARTICLE 11
ONGOING SUPERVISION

11.1 **Standing**. At any time during the SISP, Strategic, the Monitor, or the Lender may apply to the Court for advice and directions with respect to the terms and condition of the SISP.

SCHEDULE "A"

Address of Strategic

Strategic Oil & Gas Ltd.
1100, 645 - 7th Avenue S.W.
Calgary, AB T2P 4G8
Attention: Tony Berthelet

E-mail: tberthelet@sogoil.com

SCHEDULE "B"

Form of PSA: