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May 5 2022

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| COURT FILE NUMBER | 25-2565145 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE BANKRUPTCY OF GIANT GROSMONT PETROLEUMS LTD. |
| APPLICANT | BDO CANADA LIMITED |
| DOCUMENT | **BRIEF OF THE TRUSTEE, BDO CANADA LIMITED** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **BENNETT JONES LLP**<br>Barristers and Solicitors<br>4500 Bankers Hall East<br>855 2 Street SW<br>Calgary, Alberta T2P 4K7<br><br>Attention: Keely Cameron/Sam Denstedt<br>Telephone No.: 403.298.3324/7982<br>Fax No.: 403.265.7219<br>Client File No.: 068775.7 |

**Application Scheduled for May 5, 2022**
**before The Honourable Justice K.M. Horner**

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## I. INTRODUCTION

1. BDO Canada Limited in its capacity as Trustee (the "**Trustee**") of Giant Grosmont Petroleums Ltd. ("**Giant Grosmont**") seeks advice and direction from this Honourable Court as to whether the Trustee may proceed to pay final dividends in the usual course.

2. Giant Grosmont has a number of non-operated, contractual interests in oil and gas wells regulated by the Alberta Energy Regulator ("**AER**"). At least some of these oil and gas wells have outstanding environmental obligations.

3. Under the AER's legislation, the licensee of the wells has the obligation to address environmental obligations in the first instance, and non-operating partners, such as Giant Grosmont, have an obligation to pay their proportionate share of the costs incurred by the licensees to address end-of-life environmental obligations.

4. In addition to contractual remedies, if the non-operating partner does not pay its share, the Licensee may seek a cost order from the AER directing the defaulting non-operating partner to pay, and request reimbursement from the orphan fund for the defaulting non-operating partner share, however reimbursement from the orphan fund is discretionary. If a payment from the orphan fund is provided, the defaulting non-operating partner becomes indebted to the AER.

5. Whether arising under contract or via an AER cost order, such obligations to pay are financial obligations owed by the defaulting non-operating partner to the party that completes the work. This is clearly distinguishable from the regulatory obligations at issue in the Supreme Court of Canada's decision in *Orphan Well Association v Grant Thornton Ltd* ("***Redwater***").[1]

6. The Trustee seeks advice and direction from this Honourable Court as to whether it should use the funds in the estate to reimburse the approved claims, which primarily related to costs incurred prior to bankruptcy in relation to abandonment and reclamation work or whether the funds must be held to address future claims related to environmental work which has yet to occur.

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[1] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [*Redwater*].

## II. STATEMENT OF FACTS

7. Giant Grosmont is a holding company, incorporated in 1977 and based in Calgary, Alberta. Since incorporation, Giant Grosmont has held various non-operated and royalty interests in Alberta oil and gas assets.

8. Giant Grosmont does not now hold any AER licenses or approvals, authorizations, or permits. It does hold nominal non-operated interests as a working interest participant ("**WIP**") in 64 wells licensed to other parties and regulated by the AER, 50 of which are licensed to Cenovus Energy Inc. ("**Cenovus**").

9. Pursuant to its obligations under the *Oil and Gas Conservation Act* ("***OGCA***"),[2] Cenovus incurred costs meeting its environmental obligations on a number of the wells in which Giant Grosmont holds a nominal non-operated interest. Cenovus passed on a portion of the costs of this environmental work to Giant Grosmont proportionate to Giant Grosmont's working interests in the wells, pursuant to WIP agreements and as required under the *OGCA*.

10. As a result of these costs, on October 1, 2019, Giant Grosmont made an assignment into bankruptcy. Hardie & Kelly Inc., now BDO Canada Limited, was appointed the Trustee in bankruptcy. There are no inspectors.

11. The Trustee provided notice to known creditors of Giant Grosmont to file proofs of claim. Two proofs of claim were submitted:

(a) Canadian Natural Resources Limited, in the amount of $52.32; and

(b) Cenovus, in the amount of $303,101.73.

(hereinafter referred to as the "**Claimants**").

12. Both of the Claimants submitted claims arising from agreements with Giant Grosmont. The vast majority of the claims relate to abandonment and reclamation costs that were incurred by Cenovus as the licensee.

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[2] *Oil and Gas Conservation* Act, RSA 2000, c O-6 [*OGCA*].

13. The Trustee was intending to issue dividends to the Claimants in the usual course. However, in a December 15, 2021 letter, the AER informed the Trustee that it had concerns with such dividends (the "**AER Letter**"). The Trustee understands the AER's position to be that the funds must be held to address environmental work which has yet to occur.

14. As set out the Statement of Receipts and Disbursements appended to the Trustee's First Report, these funds are not all in relation to Giant Grosmont's non-operated interests.[3]

## III. DISCUSSION

### A. ***Redwater*** **Is Not Applicable**

15. *Redwater* is not applicable in the circumstances of this bankruptcy.

16. In *Redwater*, the AER and OWA sought to enforce regulatory obligations against the Receiver of Redwater Energy Corporation's ("**Redwater Energy**") estate pursuant to AER abandonment orders and requirements to post security in accordance with its license transfer requirements.[4] These regulatory powers were granted under AER legislation to ensure that companies that have been granted licences to operate, will abandon oil and gas assets at the end of their productive lives and reclaim their sites.[5]

17. The SCC found that the AER was not acting as a creditor in seeking to enforce these powers. Instead, it was acting in a *bona fide* regulatory capacity in seeking to enforce Redwater Energy's end-of-life obligations as a licensee; it did not stand to benefit financially and was, instead, enforcing a public duty.[6] Citing the Alberta Court of Appeal's decision in *PanAmericana de Bienes y Servicios v Northern Badger*,[7] the Court in *Redwater* emphasized that public obligations, such as those the AER sought to enforce, were not provable claims in bankruptcy; they were claims owed to the public at large.[8]

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[3] BDO Canada Limited, *First Report of the Trustee*, April 25, 2022.
[4] *Redwater*, *supra* note 1 at paras 24-28 ("At issue in this appeal is the applicability during bankruptcy of two powers conferred on the Regulator by the provincial legislation… The first power at issue in this appeal is the Regulator's power to order a licensee to abandon licensed assets…[and] enforcement of such orders… 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).")
[5] *Redwater*, *supra* note 1 at para 63.
[6] *Redwater*, *supra* note 1 at para 128.
[7] *PanAmericana de Bienes y Servicios v Northern Badger*, 1991 ABCA 181.
[8] *Redwater*, *supra* note 1 at paras 131 and 135.

18. The Trustee does not dispute these findings; rather, it is submitted they simply do not apply in the current circumstances.

19. The facts in Giant Grosmont's bankruptcy are fundamentally different. Unlike Redwater Energy in *Redwater*,[9] Giant Grosmont does not hold any licenses, it is not subject to abandonment orders, and it is not subject to security requirements.

20. In *Redwater*, upon application by ATB Financial, a receiver was appointed for Redwater Energy on May 12, 2015.[10] At this time, Redwater Energy was the licensee of a number of well sites, facilities, and pipelines.[11] Redwater Energy's receiver sought to renounce a number of the sites, and in response, the AER issued orders requiring immediate abandonment of these sites (the "**Abandonment Orders**").[12] The AER stated the sites were an environmental and safety hazard and that section 3.012(d) of the *Oil and Gas Conservation Rules* ("***OGCR***") required the licensee to abandon wells and facilities.[13]

21. Of note, "licensee" is defined in section 1(cc) of the *OGCA* and does not include working interest participants:

> **1(cc)** "licensee" means *the holder of a licence* according to the records of the Regulator and includes a receiver, receiver manager, trustee or liquidator of property *of a licensee* and, for greater certainty, includes a person who is a licensee for the purposes of this Act under section 3(3).[14]

22. Licensees are also subject to the Licensee Liability Rating Program, which assigns each licensee a Liability Management Rating ("**LMR**").[15] LMR's are calculated monthly, requiring a licensee's deemed asset value to at least equal its deemed liability value, failing which, the licensee may be required to pay a security deposit.[16] In addition, where a proposed transfer of a license causes the transferor's LMR to fall below the prescribed ratio, the AER also requires the licensee to either (1) perform abandonment, reclamation, or both, or (2) pay a security deposit.[17] In *Redwater*, Redwater Energy's receiver also sought a court order directing that the

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[9] *Redwater*, *supra* note 1 at paras 115-161.
[10] *Redwater*, *supra* note 1 at para 46.
[11] *Redwater*, *supra* note 1 at para 48.
[12] *Redwater*, *supra* note 1 at para 51.
[13] *Ibid*; see also *Oil and Gas Conservation Rules*, AR 151/1971, s 3.012(d).
[14] Section 3(3) speaks to license holders under the *Geothermal Resource Development Act* and is not relevant in this proceeding.
[15] See *Redwater*, *supra* note 1 at para 18.
[16] *Ibid.*
[17] *Redwater*, *supra* note 1 at para 28.

AER could not prevent the transfer of licenses for sites that were not renounced on the basis of, among others, the LMR requirements or its failure to comply with the Abandonment Orders.[18]

23. Simply put, arising from its status *as the licensee*, Redwater Energy in *Redwater* had obligations to abandon the sites pursuant to the Abandonment Orders and section 3.012(d) of the *OGCR*, had obligations to provide security or abandon or reclaim any sites which it sought to transfer the relevant licenses under the LMR program, and had obligations to pay a security deposit respecting abandonment and reclamation work when its LMR fell below the prescribed ratio.

24. Giant Grosmont, on the other hand, is a WIP not a licensee.

25. To the Trustee's knowledge no abandonment orders have been issued requiring Giant Grosmont to carry out work, and it bears noting that Giant Grosmont has no obligation to provide security to the AER under the LMR program, which does not apply to Giant Grosmont. While the bankruptcy of Giant Grosmont may impede the ability of parties to seek reimbursement from Giant Grosmont with respect to future abandonment and reclamation work, it in no way impedes the AER's ability to regulate.

26. *Redwater* is not applicable in the current circumstances.

## B. The Legislative Framework for WIPs Creates a Debt Not a Regulatory Obligation Where Licensees Are Viable

27. The AER does not regulate WIPs other than the licensee in the usual course, in fact as discussed below, it does not even keep an up to date record of WIPs. The AER's primary involvement with non-operating WIPs is to issue costs orders or pursue debts when the WIP does not pay its share of costs or to issue an order to the WIP where the licensee does not fulfil certain obligations.

28. The AER looks first to licensees and their regulated assets to satisfy regulatory obligations. This is reflected not only by the language of the *OGCA*,[19] but by the AER's own

[18] *Redwater*, *supra* note 1 at para 52.
[19] *OGCA*, *supra* note 2, s 27(1).

liability regime.[20] A regime which requires Licensees to go through a rigorous assessment process to even hold licenses, in an effort to ensure that they can meet their regulatory and liability obligations throughout the energy development lifecycle.[21]

29. Section 26.2(1) of the *OGCA* requires licensees to provide reasonable care and measures to prevent impairment to wells, facilities, well sites, or facilities sites. Section 26.2(2) states that "[i]f…a licensee or approval holder has failed or is unable to provide reasonable care and measures," only if ordered are WIPs required to provide same. Section 27 is structured in the same manner, with the licensee bearing the obligation in first instance and WIPs only being regulated where licensees are unable to meet their obligations. Section 137 of the *Environmental Protection and Enhancement Act,* which applies to remediation is structured similarly, but provides at section 134 for a larger category of parties to be considered "operator" and potentially be directed to carry out remediation work.[22]

30. There is no evidence in the current circumstances to suggest the licensees of the sites in which Giant Grosmont holds working interests will not fulfill their regulatory obligations.

31. In the AER Letter, the AER states "under the [*OGCA*] S.30 Giant Grosmont is responsible for their proportionate share of the suspension costs, abandonment costs, remediation costs and reclamation costs for a well and well site or facility and facility site where they hold a working interest."

32. Section 30(1) of the *OGCA* dictates that the cost of suspension, abandonment, remediation, or reclamation shall be borne by each WIP, in proportion to their share in the well or facility. Section 30(2) empowers the AER to determine such costs in certain limited circumstances. The AER can only determine such costs under section 30(2) on the application of the party who performed the work, or by the AER's own motion where the AER authorized some other person to carry out the work.

33. The proportionate costs owed by WIPs are described in the *OGCA* as a *debt* payable to the licensee or whomever carries out the work; any such AER determined costs under section

[20] Alberta Energy Regulator, *Directive 006: Licensee Liability Rating (LLR) Program*, December 2021.
[21] Alberta Energy Regulator, *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licenses and Approvals*, April 2021.
[22] *Environmental Enhancement and Protection Act*, RSA 2000, c E-12.

30 are a financial obligation owed to the party who performed the work, making that entity merely a creditor in the usual course. Section 30(4) provides:

> **30(4)** Where a well, facility, well site or facility site is suspended, abandoned, remediated or reclaimed by a licensee, approval holder, working interest participant or agent, the costs as determined under subsection (2), together with any penalty prescribed by the Regulator under subsection (3), *constitute a debt payable to the licensee, approval holder, working interest participant or agent who carried out the suspension, abandonment, remediation or reclamation*. [emphasis added]

34. Section 30 of the OGCA, provides a debt collection mechanism with respect to costs incurred for work completed, it does not elevate a future financial obligation into a regulatory obligation that must be addressed by the Trustee of Giant Grosmont.

35. While the AER could have a future claim, should a Licensee submit a claim to the orphan fund for Giant Grosmont's share of incurred abandonment and reclamation costs, such a claim would be as a creditor not as a regulator.[23]

36. For a claim to be advanced by the AER or a Licensee with respect to future abandonment and reclamation costs, it would have needed to advance a contingent claim in Giant Grosmont's bankruptcy. Following the 30 day notice period to advance a claim, only two parties filed proofs of claim. Any other creditors are now barred by function of section 124 of the *Bankruptcy and Insolvency Act*[24] ("***BIA***"), which states:

> **Creditors shall prove claims**
>
> 124 (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

37. Section 121 of the *BIA* discusses contingent or unliquidated claims.

38. The Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.*,[25] set out the test for determining whether a contingent claim is a claim provable in bankruptcy. It states:

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[23] *OGCA*, *supra* note 2, s 70-72.
[24] *Bankruptcy and Insolvency Act*, RSC 1985 c B-3.
[25] *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 [*Abitibi*].

> 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.[26] [emphasis in original]

39. All three parts of the test are arguably satisfied with respect to the Licensees that have Giant Grosmont as a partner. Giant Grosmont's obligation, is to pay its proportionate share of the suspension, abandonment, remediation, and reclamation costs. This obligation amounts to a debt owed to a creditor. The obligation was incurred when Giant Grosmont became a WIP[27] and it is possible to attach a monetary value to the debt, as demonstrated by the correspondence from the AER, though the reliability of such amounts is unknown.

40. With respect to the AER's potential claim on behalf of the orphan fund, such a claim would be too remote as it would require either a party to carry out the work and submit a claim to the orphan fund that was approved or it would require the Licensee and any other WIPs to fail to carry out necessary work and the Orphan Well Association to carry out the work. There is no evidence that either scenario will occur.

41. The Trustee is aware of no regulatory obligation which must be satisfied by Giant Grosmont ahead of its obligations to creditors. The future obligations related to outstanding environmental obligations will ripen into an obligation to pay amounts to the Licensees or any other party that carries out the environmental work, such obligations constitute contingent claims provable in bankruptcy.[28]

## C. <u>The AER's Records Should Not be Relied Upon</u>

42. Finally, even if this Honourable Court found that the funds in the estate must be used to address future environmental obligations, the AER is relying on records that are incorrect.

43. In its discussions with the AER, the Trustee was provided with a list of Giant Grosmont's alleged working interests (the "**AER Well List**"). However, upon review, it became clear to Giant Grosmont that the AER Well List does not align with Giant Grosmont's actual WIP holdings. When notified of these discrepancies by the Trustee, the AER declined

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[26] *Abitibi*, *supra* note 25 at para 26.
[27] *SemCanada Crude Company (Celtic Exploration Ltd. #2)*, 2012 ABQB 489 at para 24; *Repsol Canada Energy Partnership v. Delphi Energy Corp.*, 2020 ABCA 364 at para 20; *Arrangement relatif à Métaux Kitco Inc.*, 2017 QCCA 268 at paras 77-78.
[28] *Redwater*, *supra* notes 1 at para 140.

to update the AER Well List in cases where there are solvent licensees involved. The AER indicated that only the licensees themselves are able to update WIP holdings in the AER's records, and that Giant Grosmont must work with these licensees to have the AER's records updated.

44. Despite the Trustee's efforts to date to have the licensees update the WIP holdings on their licensed wells, only one licensee has even responded. This licensee updated their WIP holdings for the one well in the AER's records in which Giant Grosmont is shown to hold an interest.

45. The Trustee has done everything in its power to address the inaccuracies in the AER's records, at the expense of Giant Grosmont's creditors and is not aware of any further steps that it can take to correct same. Given these efforts, the AER Well list should not be used to Giant Grosmont's detriment nor should the Trustee be required to take any further steps to have the records corrected.

## IV. RELIEF SOUGHT

46. The Trustee seeks advice and direction from this Honourable Court as to whether it may proceed to pay final dividends to the Claimants in the usual course.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 25th day of April, 2022.

Calgary, Alberta
April 25, 2022

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Estimated Time for
Argument: 35

BENNETT JONES LLP

Per: Keely Cameron

Keely Cameron/Sam Denstedt
Counsel for the Applicant,
BDO Canada Limited

## V. TABLE OF AUTHORITIES

TAB

# TAB 1

**Orphan Well Association and Alberta Energy Regulator** *Appellants*

*v.*

**Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury 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*

**Orphan Well Association et Alberta Energy Regulator** *Appelants*

*c.*

**Grant Thornton Limited et ATB Financial (auparavant connue sous le nom d'Alberta Treasury Branches)** *Intimées*

et

**Procureure générale de l'Ontario, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Ecojustice Canada Society, Association canadienne des producteurs pétroliers, Greenpeace Canada, Action Surface Rights Association, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens** *Intervenants*

**INDEXED AS: ORPHAN WELL ASSOCIATION *v.* GRANT THORNTON LTD.**

**2019 SCC 5**

File No.: 37627.

2018: February 15; 2019: January 31.

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

**RÉPERTORIÉ : ORPHAN WELL ASSOCIATION *c.* GRANT THORNTON LTD.**

**2019 CSC 5**

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté et Brown.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities*

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

*Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Droit de l'environnement — Pétrole et gaz — Sociétés pétrolières et gazières de l'Alberta tenues par le régime provincial complet de délivrance de permis d'assumer des responsabilités de fin de vie à l'égard de puits de pétrole, de pipelines et d'installations — Organisme de réglementation provincial administrant le régime d'octroi de permis et assurant le respect des obligations de fin de vie en vertu des pouvoirs que lui confère la loi — Syndic de faillite d'une société pétrolière et gazière refusant d'assumer la*

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,

la « stabilisation, l'établissement des courbes de niveau, l'entretien, le conditionnement ou la reconstruction de la surface du terrain » (*EPEA*, al. 1(ddd)). Une autre obligation qui incombe à ceux qui œuvrent dans l'industrie pétrolière et gazière de l'Alberta est celle de la décontamination, qui prend naissance lorsqu'une substance nocive ou potentiellement nocive a été rejetée dans l'environnement (*EPEA*, art. 112 à 122). Puisque l'on ne connaît pas l'étendue des obligations de décontamination, s'il en est, qui peuvent être associées aux biens de Redwater, je ne traiterai pas la décontamination séparément de la remise en état, sauf indication contraire. Comme cela a été fait tout au long du présent litige, je qualifierai conjointement l'abandon et la remise en état d'obligations de fin de vie.

[17] Le titulaire de permis doit abandonner un puits ou une installation lorsque l'organisme de réglementation le lui ordonne, ou lorsque les règles ou les règlements l'exigent. L'organisme de réglementation peut ordonner l'abandon lorsqu'il [TRADUCTION] « l'estime nécessaire pour protéger le public ou l'environnement » (*OGCA*, par. 27(3)). Selon les règles, le titulaire de permis est tenu d'abandonner un puits ou une installation, notamment, à la résiliation du bail d'exploitation minière, du bail de surface ou de l'accès aux terres, lorsque l'organisme de réglementation annule ou suspend le permis, ou lorsqu'il avise le titulaire de permis que le puits ou l'installation peut constituer un danger pour l'environnement ou la sécurité (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, art. 3.012). L'article 23 de la *Pipeline Act* oblige les titulaires de permis à abandonner des pipelines dans des situations semblables. L'obligation de remise en état est prévue par l'art. 137 de l'*EPEA*. Cette obligation s'impose à un « exploitant », terme plus large qui englobe le titulaire d'un permis délivré par l'organisme de réglementation (*EPEA*, al. 134(b)). La remise en état est régie par les exigences procédurales fixées dans le règlement (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

[18] Le Programme d'évaluation de la responsabilité du titulaire de permis, qui était, au moment de l'insolvabilité de Redwater, établi dans la *Directive 006 : Licensee Liability Rating (LLR) Program and*

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.

*License Transfer Process* (12 mars 2013) (« Directive 006 ») constitue un moyen par lequel l'organisme de réglementation vise à s'assurer que les titulaires de permis rempliront les obligations de fin de vie, au lieu que celles-ci soient en fin de compte assumées par le public albertain. Dans le cadre de ce programme, l'organisme de réglementation attribue à chaque société une cote de gestion de la responsabilité (« CGR »), qui représente le rapport entre la valeur totale attribuée par l'organisme de réglementation aux biens d'une société qui sont visés par des permis et la responsabilité totale que l'organisme de réglementation attribue aux coûts éventuels de l'abandon et de la remise en état de ces biens. Pour les besoins du calcul de la CGR, tous les permis détenus par une société donnée sont traités comme un tout, sans isolement ou morcellement des biens. La CGR d'un titulaire de permis est calculée sur une base mensuelle et, lorsqu'elle tombe sous le ratio prescrit (1,0 à l'époque de l'insolvabilité de Redwater), le titulaire de permis est tenu de verser un dépôt de garantie. Le dépôt de garantie est ajouté aux [TRADUCTION] « biens réputés » du titulaire de permis, qui doit ramener sa CGR au ratio prescrit par l'organisme de réglementation. Si le dépôt de garantie requis n'est pas payé, l'organisme de réglementation peut annuler ou suspendre les permis de la société (*OGCA*, art. 25). Comme solution de rechange au versement d'une garantie, le titulaire de permis peut exécuter les obligations de fin de vie ou transférer des permis (avec approbation), afin de ramener sa CGR au niveau prescrit.

[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

[19] Les permis ne peuvent être transférés qu'avec l'approbation de l'organisme de réglementation. Ce dernier utilise le Programme d'évaluation de la responsabilité du titulaire de permis pour éviter que les transferts de permis aient un effet néfaste sur les obligations de fin de vie. À la réception d'une demande de transfert d'un ou de plusieurs permis, l'organisme de réglementation évalue la façon dont le transfert, s'il est approuvé, influerait sur la CGR du cédant et du cessionnaire. À l'époque de l'insolvabilité de Redwater, si le cédant et le cessionnaire devaient avoir, après le transfert, des CGR égales ou supérieures à 1,0, l'organisme de réglementation approuverait le transfert en l'absence d'autres préoccupations. Après la décision du juge siégeant en cabinet dans

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.

*Fund Delegated Administration Regulation*, Alta. Reg. 45/2001), un organisme sans but lucratif supervisé par un conseil d'administration indépendant. Cette entité est presque entièrement financée par la redevance décrite ci-dessus qui a été établie dans toute l'industrie, et la totalité de cette redevance est remise à l'OWA par l'organisme de réglementation. L'OWA n'a pas le pouvoir de demander le remboursement de ses frais. Toutefois, une fois ses travaux environnementaux terminés, l'OWA peut être remboursée jusqu'à concurrence de la valeur du dépôt de garantie détenu, le cas échéant, par l'organisme de réglementation au profit du titulaire de permis associé au puits orphelin. Au cours des dernières années, le nombre de puits orphelins a augmenté rapidement en Alberta. Par exemple, le nombre de nouveaux puits orphelins est passé de 80 en 2013-2014 à 591 en 2014-2015.

[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.

[24] Ce qui est en cause dans le présent pourvoi, c'est l'applicabilité, durant la faillite, de deux pouvoirs conférés à l'organisme de réglementation par la législation provinciale. Les deux sont conçus pour garantir que les titulaires de permis remplissent les obligations de fin de vie qui leur incombent.

[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).

[25] Le premier pouvoir en cause dans le présent pourvoi est celui dont dispose l'organisme de réglementation d'ordonner à un titulaire de permis d'abandonner des biens visés par des permis, auquel s'ajoutent les pouvoirs que la loi confère pour faire exécuter de telles ordonnances. Lorsqu'il y a eu délaissement d'un puits ou d'une installation sans que le processus d'abandon ait été effectué conformément aux directives de l'organisme de réglementation, ou aux règles et règlements, l'organisme peut autoriser toute personne à effectuer ce processus à l'égard du puits ou de l'installation, ou s'en charger lui-même (*OGCA*, art. 28). Quand l'organisme de réglementation ou la personne qu'il a désignée procède à l'abandon, les frais liés à cette opération constituent une dette payable à l'organisme de réglementation. Une ordonnance de l'organisme de réglementation indiquant ces frais peut être déposée à la Cour du Banc de la Reine de l'Alberta, inscrite comme un jugement de cette cour, puis exécutée conformément à la procédure ordinaire d'exécution des jugements de cette cour (*OGCA*, par. 30(6)). Un régime semblable s'applique aux pipelines (*Pipeline Act*, art. 23 à 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, 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).

[26] Le titulaire de permis qui contrevient ou ne se conforme pas à une ordonnance de l'organisme de réglementation, ou qui a une dette impayée envers ce dernier relativement aux frais d'abandon ou de remise en état, est assujetti à un certain nombre de mesures d'exécution potentielles. L'organisme de réglementation peut suspendre les activités, refuser d'étudier des demandes de permis ou de transfert de permis (*OGCA*, al. 106(3)(a), (b) et (c)), ou exiger le paiement des dépôts de garantie, de façon générale ou comme condition à l'octroi d'autres permis, approbations ou transferts (*OGCA*, al. 106(3)(d) et (e)). Lorsqu'un titulaire de permis contrevient à la Loi, aux règlements ou aux règles, à toute ordonnance ou directive de l'organisme de réglementation ou à toute condition d'un permis, l'organisme de réglementation peut intenter une poursuite contre le titulaire de permis pour infraction réglementaire, et ce dernier est passible d'une amende en guise de pénalité, bien qu'il puisse invoquer la défense de diligence raisonnable (*OGCA*, art. 108 et 110). Un régime semblable s'applique aux pipelines (*Pipeline Act*, art. 51 à 54). L'*EPEA* contient elle aussi des dispositions similaires relatives à la création de dettes et afférentes aux ordonnances de protection de l'environnement, en plus de prévoir la poursuite d'infractions réglementaires en cas d'inobservation, avec la possibilité d'invoquer une défense de diligence raisonnable. Toutefois, comme il a été mentionné, la responsabilité du syndic en ce qui concerne les ordonnances de protection de l'environnement se limite aux éléments de l'actif, sauf s'il est responsable de négligence flagrante ou d'inconduite délibérée (*EPEA*, art. 227 à 230, 240 et 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

[27] Le second pouvoir en cause dans le présent pourvoi est celui que possède l'organisme de réglementation d'imposer des conditions au transfert, par un titulaire, d'un ou de plusieurs de ses permis. Tout comme au moment où il octroie un permis au départ, l'organisme de réglementation jouit de vastes pouvoirs pour consentir au transfert d'un permis sous réserve de conditions, restrictions et stipulations, ou pour rejeter le transfert (*OGCA*, par. 24(2)). Suivant la Directive 006 et le texte qui l'a remplacée en 2016, l'organisme peut rejeter un transfert, même si les deux parties auraient la CGR requise après le transfert, ou même quand un dépôt de garantie

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. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, 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

peut être versé conformément aux exigences relatives à la CGR. Plus particulièrement, l'organisme de réglementation peut décider qu'il n'est pas dans l'intérêt public d'approuver le transfert de permis compte tenu des antécédents de conformité de l'une des parties, ou des deux, ou de leurs administrateurs, dirigeants ou détenteurs de titres, ou encore du risque que présenterait le transfert à l'égard du fonds pour les puits orphelins.

[28] Lorsqu'une transaction proposée entraînerait une détérioration de la CGR du cédant en deçà de 1,0 (ou simplement une détérioration dans le cas d'un cédant insolvable), l'organisme de réglementation insiste sur le respect d'une des conditions suivantes avant d'approuver la transaction : (i) que le cédant effectue les processus d'abandon et/ou de remise en état, réduisant ainsi ses passifs réputés; (ii) que le cédant verse un dépôt de garantie, augmentant ainsi ses biens réputés. La transaction pourrait également être structurée de manière à éviter toute détérioration de la CGR du cédant par le « regroupement » des permis relatifs aux puits épuisés et de ceux liés aux puits productifs. Une transaction au cours de laquelle on conserve les permis des puits épuisés tandis que les permis des puits productifs sont transférés entraînerait presque toujours une détérioration considérable de la CGR d'une société.

[29] Au cours du présent pourvoi, il a été beaucoup question d'autres régimes de réglementation que l'Alberta aurait *pu* adopter pour éviter que les coûts environnementaux associés à l'industrie pétrolière et gazière ne soient passés au public. Ce que l'Alberta *a* choisi, c'est un régime de permis qui fait de ces coûts une partie inhérente de la valeur des biens visés par les permis. Ce régime a l'avantage de s'accorder avec le principe du pollueur-payeur, un précepte bien reconnu du droit canadien de l'environnement. Ce principe attribue aux pollueurs la charge de réparer les dommages environnementaux dont ils sont responsables, ce qui incite les sociétés à se soucier de l'environnement dans le cadre de leurs activités économiques (*Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624, par. 24). Le Programme d'évaluation de la responsabilité des titulaires de permis exige essentiellement que les titulaires de permis

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.

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.

ou s'en dessaisit ». Dans les présents motifs, le mot « renoncer » sert à raccourcir ces termes, comme cela a été le cas tout au long du litige qui nous occupe.

[45] Je vais maintenant procéder à une brève analyse des faits entourant la faillite de Redwater.

C. *Les faits entourant la faillite de Redwater*

[46] Redwater était une société pétrolière et gazière cotée en bourse. L'organisme de réglementation lui a octroyé ses premiers permis en 2009. Le 31 janvier et le 19 août 2013, ATB a avancé des fonds à Redwater et, en contrepartie, s'est vu accorder une sûreté sur les biens actuels et futurs de Redwater. ATB a prêté des fonds à Redwater en pleine connaissance des obligations de fin de vie associées à ses biens. Au milieu de 2014, Redwater a commencé à éprouver des difficultés financières. Sur demande d'ATB, GTL a été nommé séquestre de Redwater le 12 mai 2015. À cette époque, Redwater devait environ 5,1 millions de dollars à ATB.

[47] Après avoir été informé de la mise sous séquestre, l'organisme de réglementation a envoyé à GTL une lettre datée du 14 mai 2015 exposant sa position. L'organisme de réglementation a fait remarquer que l'*OGCA* et la *Pipeline Act* incluaient à la fois les séquestres et les syndics dans la définition d'un « titulaire de permis ». L'organisme de réglementation a déclaré qu'il n'était pas un créancier de Redwater et qu'il ne faisait pas valoir une [TRADUCTION] « réclamation prouvable dans le cadre de la mise sous séquestre ». Ainsi, malgré la mise sous séquestre, Redwater demeurait tenue de se conformer à toutes les exigences réglementaires, y compris les obligations d'abandon, pour tous les biens visés par des permis. L'organisme de réglementation a déclaré que GTL était légalement tenu de remplir ces obligations avant de distribuer des fonds ou de finaliser toute proposition aux créanciers. L'organisme de réglementation a averti qu'il n'approuverait pas le transfert de l'un ou l'autre permis de Redwater à moins d'être convaincu que le cessionnaire et le cédant seraient en mesure de s'acquitter de toutes les obligations réglementaires. Il a demandé la confirmation que GTL avait pris possession des biens de Redwater visés par des permis et qu'il prenait des mesures pour se conformer à toutes les obligations réglementaires de Redwater.

[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.

[48] À l'époque où elle a connu des difficultés financières, Redwater avait des permis délivrés par l'organisme de réglementation concernant 84 puits, 7 installations et 36 pipelines, tous situés dans le centre de l'Alberta. La grande majorité de ses éléments d'actif étaient ces biens pétroliers et gaziers. Au moment de la nomination de GTL comme séquestre, 19 des puits ou installations étaient productifs, tandis que les 72 autres étaient inactifs ou taris. Il y avait des participants en participation directe dans plusieurs puits et installations. La CGR de Redwater n'est tombée en dessous de 1,0 qu'après la mise sous séquestre de celle-ci et, en conséquence, Redwater n'a jamais versé de dépôt de garantie à l'organisme de réglementation.

[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.

[49] En septembre 2015, la CGR de Redwater avait chuté à 0,93. La valeur nette de ses biens réputés moins ses passifs réputés était égale à un montant négatif de 553 000 $. Les 19 puits et installations productifs pour lesquels Redwater était titulaire de permis avaient une CRG de 2,85 et une valeur nette réputée de 4,152 millions de dollars. Les 72 autres puits ou installations pour lesquels Redwater était titulaire de permis auraient eu une CGR de 0,30 et une valeur nette réputée négative de 4,705 millions de dollars. Puisque Redwater était sous séquestre, l'organisme de réglementation a mentionné qu'il n'approuverait le transfert des permis de Redwater que si cela n'occasionnait pas une détérioration de sa CGR.

[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

[50] Dans son Deuxième rapport à la Cour du Banc de la Reine de l'Alberta daté du 3 octobre 2015, GTL a expliqué pourquoi il avait conclu qu'il ne pouvait pas satisfaire aux exigences de l'organisme de réglementation. D'après GTL, le coût des obligations de fin de vie des puits taris dépasserait probablement le produit de la vente des puits productifs. Il considérait comme improbable la vente des puits inexploités, même s'ils étaient regroupés avec les puits productifs. Si une telle vente était possible, le prix d'achat serait réduit au regard des obligations de fin de vie, annulant ainsi le bénéfice pour l'actif. Sur la base de cette évaluation, par lettre datée du 3 juillet 2015, GTL a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de Redwater (y compris un puits

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 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

qui fuyait et qui a été abandonné par la suite), ainsi que de 3 installations et de 12 pipelines connexes (« biens conservés »), et qu'en vertu du par. 3a) de l'ordonnance de mise sous séquestre, il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de Redwater visés par des permis (« biens faisant l'objet de la renonciation »). Selon GTL, il n'était aucunement tenu de satisfaire aux exigences réglementaires en lien avec les biens faisant l'objet de la renonciation.

[51] Le 15 juillet 2015, l'organisme de réglementation a réagi en rendant des ordonnances au titre de l'*OGCA* et de la *Pipeline Act* enjoignant à Redwater de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner (« ordonnances d'abandon »). Les ordonnances exigeaient que l'abandon soit effectué sur-le-champ dans les cas où il n'y avait pas d'autres participants en participation directe, et, au plus tard le 18 septembre 2015, dans ceux où il y avait d'autres participants en participation directe. L'organisme de réglementation a déclaré qu'il considérait les biens faisant l'objet de la renonciation comme un danger pour l'environnement et la sécurité, et que l'al. 3.012(d) des *Oil and Gas Conservation Rules* obligeait le titulaire de permis à abandonner ces puits ou installations. Lorsqu'il a rendu les ordonnances d'abandon, l'organisme de réglementation s'est également fondé sur les art. 27 à 30 de l'*OGCA* et sur les art. 23 à 26 de la *Pipeline Act*. Si les ordonnances d'abandon n'étaient pas respectées, l'organisme de réglementation menaçait d'effectuer lui-même le processus d'abandon des biens et de sanctionner Redwater par l'application de l'art. 106 de l'*OGCA*. L'organisme a ajouté qu'une fois qu'il y avait eu abandon, la surface devait être remise en état et il fallait obtenir des certificats de remise en état conformément à l'art. 137 de l'*EPEA*.

[52] Le 22 septembre 2015, l'organisme de réglementation et l'OWA ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par GTL des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant GTL à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à GTL de [TRADUCTION] « remplir les obligations légales en tant que titulaire de permis concernant l'abandon,

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"

la remise en état et la décontamination » de tous les biens de Redwater visés par des permis (A.R., vol. II, p. 41). L'organisme de réglementation n'a pas cherché à tenir GTL responsable de ces obligations au-delà des éléments qui faisaient encore partie de l'actif de Redwater. Le 5 octobre 2015, GTL 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. GTL a demandé au tribunal de rendre une ordonnance interdisant à l'organisme de réglementation d'empêcher le transfert des permis associés aux biens conservés en raison, notamment, des exigences relatives à la CGR, du non-respect des ordonnances d'abandon, du refus de prendre possession des biens faisant l'objet de la renonciation ou des dettes en souffrance de Redwater envers l'organisme de réglementation. GTL n'a pas cherché à exclure la possibilité que l'organisme de réglementation ait un autre motif valable de rejeter un transfert proposé.

[53] Le 28 octobre 2015, une ordonnance de faillite a été rendue à l'égard de Redwater, et GTL a été nommé syndic. GTL a envoyé une autre lettre à l'organisme de réglementation le 2 novembre 2015, dans laquelle il invoquait cette fois le sous-al. 14.06(4)a)(ii) de la *LFI* à l'égard des biens faisant l'objet de la renonciation. Les ordonnances d'abandon sont toujours pendantes.

D. *Historique judiciaire*

(1) La Cour du Banc de la Reine de l'Alberta

[54] Le juge siégeant en cabinet a conclu que l'art. 14.06 de la *LFI* visait à permettre aux syndics de renoncer à un bien lorsqu'il s'agissait d'une décision économique rationnelle compte tenu du fait lié à l'environnement et touchant le bien. La responsabilité personnelle du syndic n'était pas une condition préalable au pouvoir de renonciation. Le juge siégeant en cabinet a donc 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 *Pipeline Act*. En vertu de l'art. 14.06 de la *LFI*, GTL pouvait renoncer aux biens et ne pas être responsable des obligations environnementales qui y étaient associées. Cependant, aux termes de l'*OGCA*

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, 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,

III. Analyse

A. *La doctrine de la prépondérance fédérale*

[63] Comme je l'ai expliqué, la législation albertaine accorde à l'organisme de réglementation des pouvoirs étendus pour s'assurer que les sociétés qui ont obtenu des permis d'exploitation dans l'industrie pétrolière et gazière de l'Alberta abandonneront, de façon appropriée et sécuritaire, les puits de pétrole, installations et pipelines à la fin de leur vie productive, et remettront en état leurs sites. GTL cherche à éviter d'être assujetti à deux de ces pouvoirs : celui d'ordonner à Redwater d'abandonner les biens faisant l'objet de la renonciation et celui de refuser de permettre le transfert des permis relatifs aux biens conservés à cause du non-respect des exigences relatives à la CGR. Il s'agit là sans aucun doute de pouvoirs réglementaires valables accordés à l'organisme de réglementation par une loi albertaine valide. GTL cherche à éviter leur application au cours de la faillite en invoquant la doctrine de la prépondérance fédérale, selon laquelle la loi de l'Alberta habilitant l'organisme de réglementation à utiliser les pouvoirs qui sont en litige dans le cadre du présent pourvoi est inopérante dans la mesure où son exercice de ces pouvoirs pendant la faillite entre en conflit avec la *LFI*.

[64] Les questions en litige dans le présent pourvoi découlent de ce qu'on a appelé [TRADUCTION] l'« intersection désordonnée » de la législation provinciale sur l'environnement et de la législation fédérale sur l'insolvabilité (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, par. 8). Les questions de prépondérance se posent souvent dans le contexte de l'insolvabilité. Étant donné la nature procédurale de la *LFI*, le régime de faillite repose en grande partie sur l'application continue des lois provinciales. Toutefois, le par. 72(1) de la *LFI* confirme qu'en cas de conflit véritable entre les lois provinciales concernant la propriété et les droits civils et la législation fédérale sur la faillite, la *LFI* l'emporte (voir *Moloney*, par. 40). En d'autres termes, la faillite est issue de la propriété et des droits civils, mais elle en fait toujours partie conceptuellement. Les lois provinciales valides d'application générale continuent de s'appliquer dans le domaine de la faillite jusqu'à ce

### 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

### C. *Le critère d'Abitibi : L'organisme de réglementation fait-il valoir des réclamations prouvables en matière de faillite?*

[115] La répartition équitable des biens du failli est l'un des objectifs de la *LFI*. Elle est réalisée par le truchement du modèle de la procédure collective. Les créanciers du failli souhaitant faire valoir une réclamation prouvable en matière de faillite doivent participer à la procédure collective. Leurs réclamations recevront en fin de compte la priorité qui leur a été attribuée par la *LFI*. Cela assure la répartition équitable des biens du failli. Ce modèle évite l'inefficacité et le chaos, maximisant ainsi le recouvrement global au profit de tous les créanciers. Pour que le modèle de la procédure collective soit viable, les créanciers ayant des réclamations prouvables ne doivent pas être autorisés à les faire valoir en dehors de la procédure collective.

[116] Il est bien établi qu'une loi provinciale devient inopérante dans le contexte d'une faillite si elle a pour effet d'entrer en conflit avec l'ordre de priorité établi par la *LFI*, de le réarranger ou de le modifier. La juge Martin et le juge siégeant en cabinet ont tous les deux traité de la modification des priorités en matière de faillite en fonction du volet « entrave à la réalisation d'un objet fédéral » de la doctrine de la prépondérance. À mon avis, il pourrait aussi être plausiblement avancé qu'une loi provinciale ayant pour effet de réarranger les priorités en matière de faillite est en conflit d'application avec la *LFI*; telle était la conclusion dans *Husky Oil*, au par. 87. Pour les besoins du présent pourvoi, il n'est pas nécessaire de décider quel serait le bon volet de l'analyse relative à la prépondérance. Dans l'un ou l'autre volet, 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*.

[117] GTL affirme que, même si le fait d'invoquer le par. 14.06(4) ne lui permet pas de délaisser les biens faisant l'objet de la renonciation, les obligations imposées à l'actif de Redwater par l'organisme de réglementation au moyen de l'exercice des pouvoirs que lui confère la loi font exactement cela. Le

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.

[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.]

Parlement a attribué un rang donné aux réclamations environnementales qui sont prouvables en matière de faillite. Il est admis que la superpriorité limitée créée par le par. 14.06(7) de la *LFI* pour les réclamations de cette nature ne s'applique pas en l'espèce et, en conséquence, affirme GTL, l'organisme de réglementation est un créancier ordinaire à l'égard de ces réclamations, c'est-à-dire qu'il n'est ni un créancier garanti ni un créancier privilégié. Les réclamations environnementales de l'organisme de réglementation doivent donc être acquittées au prorata avec celles des autres créanciers ordinaires de Redwater en application de l'art. 141 de la *LFI*. GTL soutient que, pour respecter les ordonnances d'abandon ou les exigences relatives à la CGR, il devra dépenser des fonds avant de partager ses biens entre les créanciers garantis. Cela équivaut, pour l'organisme de réglementation, à utiliser les pouvoirs que lui confère la loi pour se créer une priorité en matière de faillite à laquelle il n'a pas droit.

[118] Toutefois, 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 l'arrêt *Abitibi*, notre 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. En principe, la faillite n'équivaut pas à une autorisation de faire fi des règles. L'organisme de réglementation dit qu'il ne fait valoir aucune réclamation prouvable dans la faillite et que l'actif de Redwater doit respecter ses obligations environnementales dans la mesure des biens dont il dispose.

[119] Le règlement de cette question requiert que l'on applique correctement le critère d'*Abitibi* pour déterminer si une obligation réglementaire précise équivaut à une réclamation prouvable en matière de faillite. Il y a lieu de réitérer ce critère :

> Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. [En italique dans l'original; par. 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 ("*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

[120] Il est incontestable que, dans le présent pourvoi, la deuxième partie du critère est respectée. En conséquence, je ne traiterai que des première et troisième parties.

[121] Devant notre Cour, l'organisme de réglementation, avec l'appui de divers intervenants, a soulevé deux préoccupations quant à la façon dont le critère d'*Abitibi* avait été appliqué, tant par les tribunaux d'instance inférieure que par les cours en général. La première préoccupation concerne le fait que l'étape « créancier » du critère a reçu une interprétation trop large dans des affaires analogues à celle en l'espèce et *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122 (« *Nortel* CA ») et qu'en réalité, cette étape du critère est si aisément franchie qu'elle n'est appliquée que pour la forme et qu'elle n'a pratiquement plus de sens. La seconde préoccupation a trait à l'application de l'étape « valeur pécuniaire » du critère d'*Abitibi* par le juge siégeant en cabinet et le juge Slatter. Cette étape reçoit généralement le nom de « certitude suffisante », compte tenu des directives données dans *Abitibi*. On soutient par là que les tribunaux d'instance inférieure sont allés au-delà du critère établi dans l'arrêt *Abitibi* en se concentrant sur la question de savoir si les obligations réglementaires de Redwater étaient « intrinsèquement financières ». Suivant l'arrêt *Abitibi*, l'analyse de la certitude suffisante aurait dû être axée sur la question de savoir si l'organisme de réglementation effectuerait lui-même, au bout du compte, les travaux environnementaux et ferait valoir une réclamation pécuniaire pour le remboursement.

[122] Les deux préoccupations exprimées par l'organisme de réglementation me paraissent fondées. Comme je vais le démontrer, l'arrêt *Abitibi* ne doit pas être considéré comme soutenant la thèse qu'un organisme de réglementation est toujours un créancier lorsqu'il exerce les pouvoirs d'application qui lui sont dévolus par la loi à l'encontre d'un débiteur. D'après le sens qu'il convient de donner à l'étape « créancier », il est clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public en rendant les ordonnances d'abandon et en assurant le respect des exigences relatives à la CGR, et qu'il n'est donc pas un créancier de Redwater.

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*.

C'est le public, et non l'organisme de réglementation ou le fonds d'administration du gouvernement, qui bénéficie de ces obligations environnementales; la province n'est pas en mesure d'en bénéficier financièrement. Bien que cette conclusion suffise pour trancher cet aspect du pourvoi, par souci d'exhaustivité, je vais aussi démontrer que le juge siégeant en cabinet a eu tort de conclure qu'au vu des faits de l'espèce, il est suffisamment certain que l'organisme de réglementation exécutera au bout du compte les travaux environnementaux et présentera une demande de remboursement. Pour conclure, je me prononcerai brièvement sur les raisons pour lesquelles les *effets* des obligations de fin de vie n'entrent pas en conflit avec le régime de priorité établi dans la *LFI*.

### (1) The Regulator Is Not a Creditor of Redwater

### (1) L'organisme de réglementation n'est pas un créancier de 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).

[123] L'organisme de réglementation et les intervenants qui l'appuient ne sont pas les premiers à cerner des problèmes relativement à l'étape « créancier » du critère d'*Abitibi*. Pendant les six années qui ont suivi l'arrêt *Abitibi*, des problèmes au sujet de cette étape et le fait que, dans son acception courante, cette étape sera toujours — ou presque toujours — franchie ont aussi été énoncés par des commentateurs universitaires tels que 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, p. 178, et M. Stewart. Notre Cour n'a pas eu l'occasion de commenter l'arrêt *Abitibi* depuis qu'il a été rendu. Par contre, l'interprétation de l'étape « créancier » retenue par des juridictions inférieures, notamment la majorité de la Cour d'appel en l'espèce, a mis l'accent sur certaines remarques faites au par. 27 de l'arrêt *Abitibi*. Sur cette base, ces tribunaux ont conclu que l'étape « créancier » est franchie chaque fois qu'un organisme de réglementation exerce à l'encontre d'un débiteur son pouvoir d'appliquer la loi (voir, par exemple, les motifs de la Cour d'appel, par. 60; *Nortel* CA, par. 16).

[124] GTL submits that these lower courts have correctly interpreted and applied the "creditor" step.

[124] Selon GTL, les juridictions inférieures susmentionnées ont bien interprété et appliqué l'étape

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 "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 and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3, at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, 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, 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

« créancier ». Il ajoute qu'à la suite de l'arrêt *Abitibi*, l'arrêt *Northern Badger* rendu en 1991 par la Cour d'appel de l'Alberta n'est d'aucun secours pour analyser la question du créancier. À l'inverse, l'organisme de réglementation soutient avec vigueur qu'il faut situer l'arrêt *Abitibi* dans le contexte des faits qui lui sont propres, et qu'il n'a pas infirmé *Northern Badger*. Se fondant sur cet arrêt, l'organisme de réglementation plaide qu'un organisme de réglementation exerçant un pouvoir pour faire respecter un devoir public n'est pas un créancier de la personne ou de la société assujettie à ce devoir. À l'instar de la juge Martin, je partage l'avis de l'organisme de réglementation sur ce point. Si, comme l'exhorte GTL et le concluent les juges majoritaires de la Cour d'appel, l'étape « créancier » est franchie chaque fois qu'un organisme de réglementation exerce ses pouvoirs d'application à l'encontre d'un débiteur, il est difficile d'imaginer une situation où les actes d'un organisme de réglementation ne franchiraient pas l'étape « créancier ». Monsieur Stewart avait raison de supposer que [TRADUCTION] « la Cour ne souhaitait sûrement pas ce résultat » (p. 189). Pour que l'étape « créancier » ait un quelconque sens [TRADUCTION] « il doit y avoir des situations dans lesquelles les deux autres étapes du critère d'*Abitibi* sont franchies […], mais l'ordonnance [ou l'obligation] environnementale n'est toujours pas une réclamation prouvable car l'organisme de réglementation n'est pas un créancier du failli » (mémoire de la procureure générale de l'Ontario, par. 39).

[125] Avant d'expliquer davantage ma conclusion sur ce point, je dois traiter d'une question préliminaire : l'organisme de réglementation a concédé devant les juridictions inférieures qu'il était un créancier. Il est bien établi que les concessions de droit ne lient pas notre Cour : voir *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control & Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781, par. 44; *M. c. H.*, [1999] 2 R.C.S. 3, par. 45; *R. c. Sappier*, 2006 CSC 54, [2006] 2 R.C.S. 686, par. 62). Comme l'a fait remarquer la juge L'Heureux-Dubé (dissidente, mais non sur ce point) dans *R. c. Elshaw*, [1991] 3 R.C.S. 24, p. 48, « un aveu fait devant une instance inférieure ne signifie rien en soi ». Bien que l'on se fonde souvent

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,

sur les concessions des parties, il revient en fin de compte à notre Cour de statuer sur des points de droit. Pour plusieurs raisons, on ne suscite aucune préoccupation en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation en l'espèce.

[126] Premièrement, dans une lettre adressée à GTL en date du 14 mai 2015, l'organisme de réglementation soutient qu'il était [TRADUCTION] « non pas un créancier de [Redwater] », mais avait plutôt « pour mandat légal de réglementer l'industrie pétrolière et gazière de l'Alberta » (dossier de GTL, vol. 1, p. 78). Je constate qu'il s'agissait de la première communication entre l'organisme de réglementation et GTL et qu'elle est survenue seulement deux jours après la nomination de ce dernier comme séquestre des biens de Redwater. Deuxièmement, les parties ont traité dans leurs mémoires de la question de savoir si l'organisme de réglementation est un créancier. Troisièmement, au cours de sa plaidoirie devant notre Cour, l'organisme de réglementation a été interrogé à propos de sa concession. L'avocate a signalé le point non contesté que les tribunaux supérieurs ne sont pas liés par de telles concessions, et a soutenu que, si l'on interprète correctement l'arrêt *Abitibi*, l'organisme de réglementation n'était pas un créancier. Quatrièmement, quand le statut de l'organisme de réglementation en tant que créancier a été évoqué devant notre Cour, les avocats des parties adverses n'ont pas prétendu qu'ils auraient présenté des éléments de preuve supplémentaires sur ce point s'il avait été soulevé devant les juridictions inférieures. Enfin, le sens qu'il convient de donner à l'étape « créancier » du critère d'*Abitibi* est d'une importance fondamentale pour le bon fonctionnement du régime national de faillite et des régimes environnementaux provinciaux partout au Canada. Je conclus qu'il est indiqué en l'espèce de ne pas tenir compte de la concession faite par l'organisme de réglementation devant les juridictions inférieures.

[127] Pour revenir à l'analyse, je signale qu'il ne faut pas oublier la matrice factuelle unique de l'arrêt *Abitibi*. Dans cette affaire, Terre-Neuve-et-Labrador a exproprié la plupart des biens d'AbitibiBowater dans la province, sans indemnisation. Par la suite,

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.

AbitibiBowater s'est vu accorder une suspension en vertu de la LACC. Elle a ensuite déposé un avis d'intention de soumettre une réclamation à l'arbitrage au titre de l'*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis mexicains et le gouvernement des États-Unis d'Amérique*, R.T. Can. 1994 nº 2 (« ALENA »), pour les pertes résultant de l'expropriation. En réponse, le ministre de l'Environnement et de la Conservation de Terre-Neuve a ordonné à AbitibiBowater de décontaminer cinq sites conformément à l'*Environmental Protection Act*, S.N.L. 2002, c. E-14.2 (« *EPA* »). Trois des cinq sites avaient été expropriés par la province. La preuve a mené à la conclusion que « la province n'avait jamais vraiment eu l'intention qu'Abitibi exécute les travaux [de décontamination] » (*Abitibi*, par. 54) et qu'elle cherchait plutôt à faire valoir une réclamation qui pourrait être utilisée à titre compensatoire au regard de la demande d'indemnisation d'AbitibiBowater fondée sur l'ALENA. Autrement dit, la province voulait tirer un avantage financier des ordonnances de décontamination.

[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:

[128] En l'espèce, personne ne conteste qu'en cherchant à assurer le respect des obligations de fin de vie incombant à Redwater, l'organisme de réglementation agit de bonne foi à titre d'autorité de réglementation et il n'est pas en mesure d'obtenir un avantage financier. L'objectif ultime de l'organisme de réglementation est de faire exécuter les travaux environnementaux au profit des tiers propriétaires terriens et de la population en général. L'organisme de réglementation n'a pas fait de tentative déguisée de recouvrer une créance et il n'y avait pas de motif oblique de sa part, comme c'était le cas dans *Abitibi*. La distinction entre les faits du présent pourvoi et ceux de l'affaire *Abitibi* ressort encore plus clairement lorsqu'on examine les motifs exhaustifs du juge siégeant en cabinet dans *Abitibi*. Le cœur des conclusions du juge Gascon (maintenant juge de notre Cour) se trouve aux par. 173-176 :

. . . 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

[TRADUCTION] . . . la province bénéficie directement, d'un point de vue financier, du respect par Abitibi des ordonnances fondées sur l'EPA. En d'autres termes, l'exécution en nature des ordonnances fondées sur l'EPA se traduirait

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.

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)

[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.

par un crédit certain au propre « bilan » de la province. Le passif d'Abitibi à cet égard constitue un actif de la province elle-même.

Soit dit en tout respect, il ne s'agit pas d'une affaire de nature réglementaire; il s'agit plutôt en fait d'une affaire purement financière. Cela s'apparente effectivement davantage à une relation créancier-débiteur qu'à autre chose.

Nous sommes assez loin du cas de l'organisme de réglementation ou d'application de la loi qui a rendu de manière objective une ordonnance dans l'intérêt public. En l'espèce, la province elle-même tire directement l'avantage pécunaire du respect obligatoire, par Abitibi, des ordonnances EPA. La province peut tirer profit du résultat. Aucune des affaires soumises par la province ne ressemble un tant soit peu aux faits à l'origine de la présente instance.

Sous cet angle, la province a agi plus comme un créancier que comme un organisme de réglementation désintéressé.

(*AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1)

[129] Notre Cour a reconnu dans *Abitibi* qu'il était « facile [pour la province] de répondre » à l'exigence relative au créancier (par. 49). Il n'était donc pas nécessaire d'analyser en profondeur le sens de l'étape « créancier » ou la manière dont elle s'appliquerait dans d'autres situations factuelles. Or, même au par. 27 de l'arrêt *Abitibi*, le paragraphe sur lequel se fondent les juges majoritaires de la Cour d'appel, la juge Deschamps a pris soin de souligner que « [l]a plupart des organismes administratifs *peuvent agir* à titre de créanciers en relation avec les obligations pécuniaires ou non pécuniaires imposées par ces lois » (italiques ajoutés). L'interprétation de l'étape « créancier » qu'ont retenue les juges majoritaires de la Cour d'appel et que GTL nous a exhortés à faire nôtre exclut la possibilité qu'un organisme de réglementation faisant respecter des obligations ne soit pas un créancier, alors que cette possibilité a été clairement envisagée au par. 27 de l'arrêt *Abitibi*. Comme je l'ai mentionné ci-dessus, l'interprétation de GTL prive l'étape « créancier » de toute fonction indépendante.

[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. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221, at paras. 23-25, and *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534.

[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

[130] L'arrêt *Northern Badger* a établi qu'un organisme de réglementation faisant respecter un devoir public au moyen d'une ordonnance non pécuniaire n'est pas un créancier. Je rejette la prétention faite dans les motifs dissidents selon laquelle *Northern Badger* devrait recevoir une interprétation différente. Premièrement, je souligne que le point de savoir si l'organisme de réglementation a une réclamation éventuelle relève du critère de la certitude suffisante, lequel suppose au préalable que l'organisme de réglementation est un créancier. Je ne peux accepter la proposition énoncée dans les motifs dissidents selon laquelle *Northern Badger* porte sur ce qui allait devenir le troisième volet du critère d'*Abitibi*. Dans *Northern Badger*, après avoir reconnu que l'abandon constituait une responsabilité, le juge d'appel Laycraft a dit qu'il s'agissait de savoir [TRADUCTION] « si cette responsabilité appartient à l'Office, ce qui fait de lui le créancier » (par. 32). Deuxièmement, le scénario sous-jacent en l'espèce quant aux obligations de fin de vie qui incombent à Redwater est exactement le même que dans *Northern Badger* : un organisme de réglementation ordonne à une entité de se conformer à ses obligations légales pour le bien public. Ce raisonnement exact tiré de *Northern Badger* a été adopté par la suite dans des décisions telles *Strathcona (County) c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221, par. 23-25, et *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534.

[131] Je ne puis souscrire à l'opinion des juges majoritaires de la Cour d'appel en l'espèce selon laquelle *Northern Badger* [TRADUCTION] « n'est guère utile » dans l'application du critère d'*Abitibi* (par. 63). Je partage plutôt l'avis de la juge Martin voulant que l'arrêt *Abitibi* n'ait pas infirmé le raisonnement de *Northern Badger*, et qu'il ait au contraire « mis en relief le besoin de prendre en considération la teneur du règlement provincial pour déterminer s'il crée une réclamation prouvable en matière de faillite » (par. 164). Comme l'a signalé la juge Martin, même depuis l'arrêt *Abitibi*, l'état du droit reste inchangé : « les obligations publiques ne sont pas des réclamations prouvables qui peuvent être comptabilisées ou compromises dans la faillite » (par. 174). L'arrêt *Abitibi* a éclairci la

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. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536, 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 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).

portée de *Northern Badger* en confirmant que les réclamations environnementales d'un organisme de réglementation seront des réclamations prouvables dans certains cas. Il ne permet pas d'affirmer qu'un organisme de réglementation exerçant ses pouvoirs d'application est toujours un créancier. Le raisonnement de l'arrêt *Northern Badger* ne s'appliquait tout simplement pas aux faits de l'affaire *Abitibi*, étant donné les agissements de la province décrits précédemment.

[132] Dans *Abitibi*, la juge Deschamps a signalé que la législation en matière d'insolvabilité avait évolué au cours des années qui ont suivi *Northern Badger*. Cette évolution législative n'a en revanche pas modifié le sens à attribuer au terme « créancier ». À cet égard, je souscris à la conclusion du juge Burrows dans *Strathcona County c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536, suivant laquelle les modifications en matière d'environnement qui ont été apportées à la *LFI* au cours des années suivant *Northern Badger* ne peuvent être interprétées comme ayant infirmé le raisonnement de cet arrêt. Tel qu'il devrait ressortir clairement de mon analyse précédente de l'art. 14.06, les modifications à la *LFI* ne traitent pas des cas où un organisme de réglementation faisant valoir une réclamation environnementale est un créancier.

[133] Les écrits de commentateurs universitaires appuient également la conclusion voulant que le raisonnement de l'arrêt *Northern Badger* conserve sa pertinence depuis *Abitibi* et les modifications à la loi sur l'insolvabilité. Monsieur Stewart estime que, même si l'arrêt *Abitibi* traite de *Northern Badger*, il ne l'a pas infirmé. Il exhorte notre Cour à préciser qu'il subsiste une distinction entre [TRADUCTION] « l'organisme de réglementation qui agit comme créancier car il recouvre une dette et celui qui n'est pas un créancier car il applique la loi » (p. 221). De même, M^me^ Lund fait valoir qu'un tribunal devrait [TRADUCTION] « prendre en considération l'importance que revêtent les intérêts publics protégés par l'obligation réglementaire au moment de décider si le débiteur a une dette, un engagement ou une obligation envers un créancier » (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

[134] Pour les motifs qui précèdent, on ne peut juger que l'arrêt *Abitibi* a modifié le droit, comme l'a résumé le juge en chef Laycraft. Je fais miennes les remarques qu'il fait au par. 33 de *Northern Badger* :

> [TRADUCTION] Les dispositions légales qui exigent l'abandon de puits de pétrole et de gaz font partie du droit commun de l'Alberta et lient chaque citoyen de la province. Toutes les personnes qui acquièrent un permis d'exploitation de puits de pétrole ou de gaz doivent les respecter. Des obligations légales semblables lient les citoyens dans bien d'autres secteurs de la vie moderne [. . .] Mais l'obligation incombant au citoyen n'est pas envers l'agent de la paix ou l'autorité publique qui applique la loi. L'obligation est établie comme une obligation à caractère public qui doit être respectée par l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application du droit commun. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation.

[135] Étant donné l'analyse effectuée dans *Northern Badger*, il est clair que l'organisme de réglementation n'est pas un créancier de l'actif de Redwater. Les obligations de fin de vie que l'organisme de réglementation veut imposer à Redwater sont de nature publique. Ni l'organisme de réglementation ni le gouvernement de l'Alberta ne peuvent bénéficier financièrement de l'exécution de ces obligations. Ces obligations à caractère public sont non pas envers un créancier, mais envers les concitoyens et échappent donc à la portée des « réclamations prouvables ». Je ne veux toutefois pas laisser entendre par là qu'un organisme de réglementation n'est un créancier que s'il se comporte d'une manière identique à la province dans *Abitibi*. Il peut fort bien exister des situations où les agissements d'un organisme de réglementation se situent quelque part entre ceux dans *Abitibi* et ceux en l'espèce. Signalons que, contrairement à certains cas antérieurs, l'organisme de réglementation n'a exécuté aucuns travaux environnementaux lui-même. Je laisse aux tribunaux disposant de dossiers factuels

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

complets le soin de résoudre pareilles situations à l'avenir. Dans la présente affaire, il est clair que l'organisme de réglementation cherche à faire respecter les devoirs à caractère public de Redwater, que ce soit en rendant les ordonnances d'abandon ou en maintenant les exigences relatives à la CGR. L'organisme de réglementation n'est pas un créancier au sens du critère d'*Abitibi*.

[136] Je rejette la thèse voulant que l'analyse qui précède écarte d'une façon ou d'une autre le premier volet du critère d'*Abitibi*. Les faits de l'affaire *Abitibi* n'étaient pas comparables à ceux de l'espèce. Bien que notre Cour ait examiné l'arrêt *Northern Badger* dans *Abitibi*, elle s'est contentée de mentionner les modifications subséquentes à la *LFI* et n'a pas infirmé l'arrêt antérieur. La Cour a été claire : l'issue finale « doit être fondée sur les faits de chaque affaire » (par. 48). Selon les motifs dissidents, vu l'analyse exposée précédemment, il sera presque impossible de juger que des organismes de réglementation sont des créanciers. L'arrêt *Abitibi* démontre lui-même que ce n'est pas le cas. De plus, comme je l'ai dit, il peut fort bien exister des cas qui se situent entre l'affaire *Abitibi* et celle qui nous occupe. Par contre, si l'on considère qu'*Abitibi* exige uniquement que le tribunal décide si l'organisme de réglementation a exercé un pouvoir d'application, il sera en fait impossible pour un organisme de réglementation de *ne pas* être un créancier. Les motifs dissidents ne nient pas sérieusement cette opinion et donnent seulement à penser que les organismes de réglementation peuvent publier des lignes directrices ou délivrer des permis. L'organisme de réglementation fait les deux mais, selon l'approche adoptée dans les motifs dissidents, il est dépourvu de moyens pour prendre quelque mesure concrète que ce soit dans l'intérêt public à propos de ses lignes directrices ou de permis sans avoir le statut de créancier. Comme je l'ai expliqué, l'arrêt *Abitibi* accorde clairement une place aux organismes de réglementation qui ne sont pas des créanciers.

[137] Cela suffit, à proprement parler, pour trancher cet aspect du pourvoi. Cependant, d'autres indications sur l'analyse de la certitude suffisante pourraient se révéler utiles à l'avenir. En conséquence, je passe maintenant à l'analyse de l'étape

of the reasons why the Abandonment Orders and the LMR conditions both fail on this step of the *Abitibi* test. *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).

[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

de la « certitude suffisante » et des raisons pour lesquelles les ordonnances d'abandon et les conditions liées à la CGR ne franchissent pas cette étape du critère d'*Abitibi.*

(2) Il n'est pas suffisamment certain que l'organisme de réglementation exécutera les travaux environnementaux et présentera une demande de remboursement

[138] Le critère de la « certitude suffisante » énoncé aux par. 30 et 36 de l'arrêt *Abitibi* ne fait essentiellement que restructurer et reformuler les exigences des dispositions applicables de la *LFI*. Selon le par. 121(2), des réclamations éventuelles peuvent constituer des réclamations prouvables. Autrement dit, les dettes que devra peut-être le failli à un créancier peuvent constituer des réclamations prouvables, mais pas nécessairement l'être. Le paragraphe 135(1.1) prévoit l'évaluation d'une réclamation éventuelle, qui doit être évaluable suivant cette disposition; elle ne doit pas être trop éloignée ou conjecturale pour constituer une réclamation prouvable au sens du par. 121(2).

[139] Avant de pouvoir atteindre la troisième étape du critère d'*Abitibi*, il faut déjà avoir fait la démonstration que l'organisme de réglementation est un créancier. Au vu des faits de l'espèce, j'ai conclu que l'organisme de réglementation n'est pas un créancier de Redwater. Toutefois, afin d'expliquer pourquoi je me dissocie du juge siégeant au cabinet à l'égard de l'analyse de la « certitude suffisante », je vais procéder comme si l'organisme de réglementation était effectivement un créancier de Redwater en ce qui concerne les ordonnances d'abandon et les exigences de la CGR. Ces obligations de fin de vie n'exigent pas directement de Redwater qu'elle fasse un paiement à l'organisme de réglementation. Elles l'obligent plutôt à *faire quelque chose*. Comme l'indique l'arrêt *Abitibi*, si l'organisme de réglementation était en fait un créancier, les obligations de fin de vie constitueraient ses réclamations éventuelles.

[140] Ce que le tribunal doit décider, c'est s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers un organisme de réglementation.

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

Pour établir si une obligation réglementaire non pécuniaire du failli est trop éloignée ou trop conjecturale pour être incluse dans la procédure de faillite, le tribunal doit appliquer les règles générales qui visent les réclamations futures ou éventuelles. Il doit être suffisamment certain que l'éventualité se concrétisera ou, en d'autres termes, que l'organisme de réglementation fera respecter l'obligation en exécutant les travaux environnementaux et en sollicitant le remboursement de ses frais.

[141] Je vais maintenant analyser les ordonnances d'abandon de même que les exigences relatives à la CGR à tour de rôle et démontrer en quoi elles ne franchissent pas l'étape de la « certitude suffisante » du critère d'*Abitibi*.

a) *Les ordonnances d'abandon*

[142] L'organisme de réglementation a rendu, au titre de l'*OGCA* et de la *Pipeline Act*, des ordonnances enjoignant à Redwater d'abandonner les biens faisant l'objet de la renonciation. Même si l'organisme de réglementation était un créancier de Redwater, les ordonnances d'abandon doivent tout de même pouvoir faire l'objet d'une évaluation pour être incluses dans le processus de faillite. À mon avis, ni les conclusions de fait du juge siégeant en cabinet ni la preuve n'établissent qu'il est suffisamment certain que l'organisme de réglementation procédera à l'abandon et présentera une demande de remboursement. La réclamation est trop éloignée et conjecturale pour être incluse dans la procédure de faillite.

[143] Le juge siégeant en cabinet a reconnu qu'il n'était [TRADUCTION] « pas clair » si l'organisme de réglementation effectuerait lui-même le processus d'abandon ou s'il considérerait les puits assujettis aux ordonnances d'abandon comme orphelins (par. 173). Il a dit que, dans ce dernier cas, l'OWA se chargerait probablement de l'abandon, mais on ne savait pas quand cette tâche serait menée à terme. En effet, le juge siégeant en cabinet a admis qu'étant donné les ressources de l'OWA, cela pourrait lui prendre jusqu'à 10 ans avant qu'elle amorce les travaux environnementaux nécessaires sur la propriété de Redwater. Il a conclu néanmoins que, même

"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).

si l'étape de la « certitude suffisante » n'a pas été franchie au « sens technique », la situation répondait à la norme voulue dans *Abitibi*. Cette conclusion reposait, du moins en partie, sur la sienne voulant que les ordonnances d'abandon soient « intrinsèquement financières » (par. 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.

[144] À mon avis, le juge siégeant en cabinet n'a pas tiré la conclusion de fait que l'organisme de réglementation se chargerait *lui-même* des travaux d'abandon. Je le rappelle, il a reconnu qu'il n'était « pas clair » si l'organisme de réglementation s'en occuperait. On peut difficilement dire qu'il s'agit qu'une conclusion de fait qui commande la déférence. Prise dans son ensemble, la preuve en l'espèce me semble mener à la conclusion selon laquelle l'organisme de réglementation ne procèdera pas lui-même à l'abandon des biens auxquels il a été renoncé.

[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.

[145] Dans le cadre de ses activités, l'organisme de réglementation n'effectue pas lui-même les travaux d'abandon. Il n'est pas tenu par la loi de le faire. Il s'agit plutôt d'une obligation incombant au titulaire de permis. Dans son affidavit, le déposant de l'organisme de réglementation a déclaré que celui-ci procédait très rarement à l'abandon de biens au nom des titulaires de permis et qu'il ne le faisait pratiquement jamais dans le cas d'un titulaire de permis sous séquestre ou en faillite. Le déposant a déclaré que l'organisme de réglementation n'avait pas l'intention d'abandonner les biens de Redwater visés par des permis. Comme l'a signalé le juge siégeant en cabinet, il est vrai que, dans sa lettre adressée à GTL en date du 15 juillet 2015, l'organisme de réglementation a menacé d'effectuer lui-même ces processus, mais il n'a rien fait par la suite pour mettre cette menace à exécution. Même si l'on devrait accorder de l'importance à cette lettre, la contradiction entre elle et les affidavits subséquents de l'organisme de réglementation font en sorte à tout le moins qu'il est difficile de dire avec quoi que ce soit de comparable à une certitude suffisante que l'organisme de réglementation compte effectuer le processus d'abandon. Ces faits distinguent la présente affaire d'*Abitibi*, où les conclusions du juge chargé de la restructuration reposaient sur la prémisse que la province exécuterait fort probablement elle-même les travaux de décontamination.

[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 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.

[146] J'expliquerai ci-après pourquoi l'intervention de l'OWA est insuffisante pour satisfaire au critère de la « certitude suffisante ». Premièrement, je constate que le juge siégeant en cabinet a eu tort de tabler sur le caractère « intrinsèquement financier » des ordonnances d'abandon. Je suis entièrement d'accord avec la juge Martin sur ce point. Se demander si une ordonnance est « intrinsèquement financière » constitue une interprétation erronée de la troisième étape du critère d'*Abitibi*. Elle est trop large et conduirait à la conclusion qu'il y a une « réclamation prouvable » même lorsque l'existence d'une réclamation pécuniaire en matière de faillite ne relève que de la conjecture. Ainsi, dans l'arrêt *Nortel* CA, le juge Juriansz a rejeté à juste titre l'argument selon lequel le critère d'*Abitibi* n'exigeait pas qu'il soit décidé que l'organisme de réglementation exécuterait les travaux environnementaux et demanderait un remboursement, et qu'il suffisait qu'il y ait une ordonnance environnementale exigeant une dépense de fonds par l'actif du failli. Il a déclaré ce qui suit, aux par. 31-32 :

[TRADUCTION] . . . Selon moi, la décision de la Cour suprême est claire : les obligations continues de décontamination environnementale peuvent être réduites à des réclamations pécuniaires pouvant être compromises dans des procédures fondées sur la LACC seulement lorsque la Province a exécuté les travaux de décontamination et qu'elle présente une demande de remboursement, ou lorsque l'obligation peut être considérée comme une réclamation éventuelle ou future, parce qu'il est « suffisamment certain » que la Province fera le travail et cherchera ensuite à obtenir un remboursement.

L'approche des intimées n'est pas seulement incompatible avec celle de l'arrêt *Abitibi*, elle est trop large. Il en résulterait que pratiquement toutes les ordonnances réglementaires en matière d'environnement soient considérées comme des réclamations prouvables. Comme l'a fait remarquer la juge Deschamps, une société peut exercer des activités qui comportent des risques. Lorsque ces risques se matérialisent, les coûts sont supportés par ceux qui détiennent une participation dans la société. Un risque qui entraîne une obligation environnementale n'est soumis au processus d'insolvabilité que lorsqu'il est en substance pécuniaire et qu'il constitue en substance une réclamation prouvable.

[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

[147] Comme l'a reconnu à bon droit le juge siégeant en cabinet, ce n'est pas parce que l'organisme de réglementation n'effectuerait pas lui-même les travaux d'abandon qu'il se laverait les mains des biens faisant l'objet de la renonciation. Il les qualifierait plutôt, au besoin, d'orphelins conformément à l'*OGCA* et les confiera à l'OWA. Je ne prétends pas qu'un organisme de réglementation puisse stratégiquement éviter le critère de la « certitude suffisante » en déléguant simplement des travaux environnementaux à une organisation indépendante. Je ne déciderai pas, comme l'organisme de réglementation nous a exhortés à le faire, que le critère d'*Abitibi* exige *toujours* que les travaux environnementaux soient exécutés par l'organisme lui-même. Cependant, la véritable nature de l'OWA doit être soulignée. Il y a des motifs sérieux de conclure que, vu les caractéristiques propres à ce contexte réglementaire, l'OWA n'est pas l'organisme de réglementation.

[148] La création de l'OWA ne représentait pas une tentative de l'organisme de réglementation pour éviter l'ordre de priorité fixé en matière de faillite par la *LFI*. C'est un organisme sans but lucratif doté de son propre mandat et de son propre conseil d'administration indépendant, et il fonctionne comme une entité financièrement indépendante en vertu du pouvoir qui lui est délégué par la loi. Bien qu'un représentant de l'organisme de réglementation et un représentant d'Alberta Environment and Parks siègent au conseil d'administration de l'OWA, son indépendance n'est pas mise en question. Le rapport annuel 2014-2015 de l'OWA indique que cinq des six directeurs votants représentent l'industrie. L'OWA se sert d'un outil d'évaluation des risques pour décider, en ordre de priorité, quand et de quelle manière elle exécutera des travaux environnementaux sur les centaines de puits orphelins de l'Alberta. Personne ne prétend que l'organisme de réglementation a son mot à dire sur l'ordre dans lequel l'OWA décide d'exécuter des travaux environnementaux. Le rapport annuel 2014-2015 ajoute que, depuis 1992, 87 p. 100 de l'argent recueilli et investi pour financer les activités de l'OWA est fourni par l'industrie via la redevance pour les puits orphelins. Au paragraphe 99 de son mémoire, l'organisme de réglementation laisse

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, 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.

[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

entendre indirectement que la province ou le gouvernement fédéral pourrait accorder à l'avenir des fonds supplémentaires à l'OWA mais, même si cette possibilité se concrétise, les fonds seront presque entièrement consentis sous forme de prêts. Je ne peux accepter la proposition des juges dissidents selon laquelle l'organisme de réglementation et l'OWA sont « inextricablement liés » (par. 273).

[149] À supposer même que l'abandon par l'OWA des biens de Redwater visés par des permis puisse satisfaire au critère de la « certitude suffisante », je conviens avec la juge Martin qu'il est difficile de conclure à la certitude suffisante que l'OWA se chargera effectivement des travaux d'abandon et qu'il n'y a aucune certitude qu'une demande de remboursement sera présentée si l'OWA finit par abandonner les biens.

[150] Les motifs dissidents laissent croire que les faits de l'espèce s'apparentent davantage à ceux de l'affaire *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154, qu'à ceux de *Nortel* CA, faisant valoir qu'il est satisfait au critère de la « certitude suffisante » car, tout comme dans *Northstar*, personne ne veut acheter les biens de Redwater et la débitrice elle-même est insolvable; en conséquence, seule l'OWA peut exécuter les travaux. Il me semble facile de distinguer l'affaire *Northstar* de celle qui nous occupe. Dans cette affaire, le failli effectuait de son plein gré des travaux de décontamination avant sa faillite. Après que le failli eu fait cession de ses biens, le ministre de l'Environnement (« ME ») a pris lui-même la relève des activités de décontamination et il entendait le faire sans préjudice. Selon le juge Jurianz, comme le ME avait déjà entrepris des activités de décontamination, il était suffisamment certain qu'il s'en occuperait. Comme je le démontrerai maintenant, les faits de l'espèce sont fort différents.

[151] Au début du présent litige, l'OWA a estimé qu'il lui faudrait de 10 à 12 ans pour résorber l'arriéré d'orphelins. Cet arriéré augmentait rapidement en 2015 et il peut fort bien avoir continué de croître tout aussi ou encore plus rapidement au cours des années suivantes, comme le soutient l'organisme de réglementation. Cela tend plutôt à établir que l'arriéré pourrait encore augmenter. Rien n'indique

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

qu'une priorité particulièrement grande serait accordée dans l'arriéré aux biens faisant l'objet de la renonciation. Même si la possibilité d'attribuer des fonds supplémentaires se concrétise, l'organisme de réglementation fait valoir que cela prendra une génération ou plus avant que l'OWA ne puisse s'occuper de son inventaire actuel d'orphelins.

[152] Les motifs dissidents se fondent sur la conclusion du juge siégeant en cabinet selon laquelle l'OWA effectuerait « probablement » le processus d'abandon, tout en minimisant le fait qu'il a également conclu que l'OWA ne le ferait pas « nécessairement dans un délai précis » (par. 261 et 278, citant les motifs du juge siégeant en cabinet, par. 173). Vu l'échéancier le plus conservateur — celui de 10 ans dont a parlé le juge siégeant en cabinet —, il est difficile de prédire quoi que ce soit avec une certitude suffisante. La donne pourrait changer considérablement au cours de la prochaine décennie, tant au chapitre de la politique gouvernementale qu'à celui de la volonté de l'industrie pétrolière et gazière de l'Alberta de s'acquitter de ses responsabilités environnementales. Il ne s'agit pas du tout de la même situation que dans *Northstar*, où le ME avait déjà amorcé les travaux environnementaux.

[153] Plus particulièrement, ce long échéancier garantit que, s'il finit par exécuter les travaux, l'OWA ne présentera pas de demande de remboursement. La présentation de la demande est un élément tout aussi essentiel du critère que l'exécution des travaux. L'OWA lui-même ne peut faire rembourser ses frais par les titulaires de permis et, même si les coûts des processus d'abandon effectués par la personne autorisée par l'organisme de réglementation constituent une dette payable à cet organisme suivant le par. 30(5) de l'*OGCA*, on n'a produit aucune preuve montrant que l'organisme de réglementation a exercé son pouvoir de recouvrer ces frais dans des cas analogues, et pour cause : le fait est qu'au moment où l'OWA en arriverait à abandonner l'un ou l'autre des puits de Redwater, la liquidation de l'actif serait terminée et GTL serait libéré depuis longtemps. En somme, le juge siégeant en cabinet a eu tort de ne pas se demander si l'OWA peut être assimilé à l'organisme de réglementation et en ne

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

considérant pas que, même s'il peut l'être, il n'est pas suffisamment certain qu'il effectuera dans les faits le processus d'abandon et présentera une demande de remboursement.

[154] En conséquence, même si l'organisme de réglementation avait agi comme un créancier en rendant les ordonnances, on ne saurait dire avec une certitude suffisante qu'il effectuerait les processus d'abandon et présenterait une demande de remboursement.

b) *Les conditions liées au transfert de permis*

[155] Je traiterai brièvement des conditions relatives à la CGR dont est assorti le transfert de permis. Une grande partie de l'analyse qui précède concernant les ordonnances d'abandon vaut tout autant pour ces conditions. Comme l'a souligné la juge Martin, il est difficile de comparer directement la nécessité d'obtenir une approbation réglementaire pour les transferts de permis et les ordonnances de décontamination en litige dans *Abitibi*. Or, notre Cour a confirmé aux par. 54-55 de *Moloney* que le critère d'*Abitibi* s'applique à une catégorie d'obligations réglementaires plus large que les « ordonnances ». Les conditions relatives à la CGR forment une « obligation non pécuniaire » de l'actif de Redwater, car elles doivent être remplies avant que l'organisme de réglementation n'approuve le transfert de tout permis de Redwater. Cependant, il convient de noter que, même mises à part les conditions relatives à la CGR, les permis sont loin d'être librement transférables. L'organisme n'approuvera pas le transfert des permis si le cessionnaire n'est pas un titulaire de permis au sens de l'*OGCA* ou de la *Pipeline Act* ou des deux. L'organisme de réglementation se réserve également le droit de rejeter un transfert proposé lorsqu'il juge que le transfert n'est pas dans l'intérêt public, comme dans un cas où le cessionnaire a des problèmes non résolus touchant à la conformité.

[156] En un sens, les facteurs laissant croire qu'il n'y a pas de certitude suffisante militent encore plus fortement en faveur des exigences relatives à la CGR que des ordonnances d'abandon. L'*OGCA* et la *Pipeline Act* prévoient un régime de recouvrement

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 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. Canada*, 2013 SCC 29, [2013] 2 S.C.R. 336, 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

de créances en matière d'abandon, mais il n'existe aucun régime de ce genre pour les exigences liées à la CGR. Le refus de l'organisme de réglementation d'approuver les transferts de permis jusqu'à ce que ces exigences aient été satisfaites ne lui donne pas une réclamation pécuniaire contre Redwater. Certes, le respect des exigences relatives à la CGR entraîne une diminution de la valeur de l'actif du failli. Toutefois, comme nous l'avons vu plus tôt, toute obligation qui diminue la valeur de l'actif du failli, et donc la somme que peuvent recouvrer les créanciers garantis, ne franchit pas nécessairement l'étape de la « certitude suffisante ». Il ne s'agit pas de savoir si une obligation est intrinsèquement financière.

[157] Le respect des conditions liées à la CGR avant le transfert des permis reflète la valeur inhérente des biens détenus par l'actif du failli. Sans les permis, les profits à prendre appartenant à Redwater ont, au mieux, peu de valeur. Tous les permis détenus par Redwater ont été reçus par elle, sous réserve d'obligations de fin de vie qui prendraient naissance un jour. Ces obligations constituent une part fondamentale de la valeur des biens visés par des permis, comme si les frais connexes avaient été payés d'emblée. Ayant reçu le bénéfice des biens faisant l'objet de la renonciation pendant la période productive de leur cycle de vie, Redwater ne peut plus éviter les engagements connexes. Cette interprétation concorde avec l'arrêt *Daishowa-Marubeni International Ltd. c. Canada*, 2013 CSC 29, [2013] 2 R.C.S. 336, qui portait sur les obligations légales de reboisement des détenteurs de tenures forestières en Alberta. Notre Cour a conclu à l'unanimité que les obligations relatives au reboisement constituaient « un coût futur inhérent à la tenure forestière qui a pour effet d'en diminuer la valeur au moment de la vente » (par. 29).

[158] La possibilité que des exigences réglementaires coûtent de l'argent ne les transforme pas en régimes de recouvrement de créances. Comme l'a fait remarquer la juge Martin, les exigences en matière de permis précèdent la faillite et s'appliquent à tous les titulaires de permis, peu importe leur solvabilité. GTL ne conteste pas le fait que les permis de Redwater ne peuvent être transférés qu'à

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

d'autres titulaires de permis, ni le fait que l'organisme de réglementation conserve le pouvoir, dans les situations qui s'y prêtent, de rejeter les transferts proposés en raison de préoccupations relatives à la sécurité ou à la conformité. Il n'y a aucune différence entre ces conditions et celle voulant que l'organisme de réglementation n'approuve pas les transferts qui laisseraient en suspens l'exigence de satisfaire aux obligations de fin de vie. Toutes ces conditions réglementaires font baisser la valeur des biens visés par des permis. Aucune ne donne naissance à une réclamation pécuniaire en faveur de l'organisme de réglementation. Les exigences en matière de permis subsistent pendant la faillite, et il n'y a aucune raison pour laquelle GTL ne peut s'y conformer.

(3) Conclusion sur le critère d'*Abitibi*

[159] En conséquence, les obligations de fin de vie incombant à GTL ne sont pas des réclamations prouvables dans la faillite de Redwater et n'entrent donc pas en conflit avec le régime de priorité général instauré dans la *LFI*. Ce n'est pas une simple question de forme, mais de fond. Obliger Redwater à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbe 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 (voir le par. 14.06(7)). Ainsi, la *LFI* envisage explicitement la possibilité que des organismes de réglementation tire une valeur des biens réels du failli touchés par un fait ou dommage lié à l'environnement. Bien que l'organisme de réglementation n'ait pu se prévaloir du par. 14.06(7), compte tenu de la nature de la propriété des biens dans l'industrie pétrolière et gazière de l'Alberta, les ordonnances d'abandon et la CGR reproduisent l'effet du par. 14.06(7) en l'espèce. De plus, il importe de souligner que les seuls biens de valeur de Redwater étaient touchés par un fait ou dommage lié à l'environnement. Les ordonnances d'abandon et exigences relatives à la CGR n'avaient donc pas pour objet de forcer Redwater à s'acquitter des obligations de fin de vie avec des biens étrangers au fait

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 walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a

ou dommage lié à l'environnement. Autrement dit, la reconnaissance que les ordonnances d'abandon et exigences relatives à la CGR ne sont pas des réclamations prouvables en l'espèce facilite l'atteinte des objets de la *LFI* au lieu de la contrecarrer.

[160] 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. À titre d'exemple, ils doivent respecter les obligations non pécuniaires liant l'actif du failli qui ne peuvent être réduites à des réclamations prouvables et dont les effets n'entrent pas en conflit avec la *LFI*, sans égard aux répercussions que cela peut avoir sur les créanciers garantis du failli. Les ordonnances d'abandon et exigences relatives à la CGR reposent sur des lois provinciales valides d'application générale et elles représentent exactement le genre de loi provinciale valide sur lequel se fonde la *LFI*. Tel qu'il est signalé dans *Moloney*, la *LFI* indique clairement que « [l]a propriété de certains biens et l'existence de dettes particulières relèvent du droit provincial » (par. 40). Les obligations de fin de vie sont imposées par des lois provinciales valides qui définissent les contours de l'actif du failli susceptible d'être partagé.

[161] Enfin, rappelons que l'objet général de la *LFI* de favoriser la réhabilitation financière ne concerne pas une société comme Redwater. Les sociétés n'ayant pas assez de biens pour satisfaire leurs créanciers ne seront jamais libérées de leur faillite puisqu'elles ne peuvent acquitter entièrement toutes les réclamations de leurs créanciers (*LFI*, par. 169(4)). Ainsi, la conclusion selon laquelle les obligations de fin de vie incombant à Redwater ne sont pas des réclamations prouvables n'est à l'origine d'aucun conflit avec cet objet.

IV. Conclusion

[162] 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 GTL demeure entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du

# TAB 2

Province of Alberta

# OIL AND GAS CONSERVATION ACT

Revised Statutes of Alberta 2000
Chapter O-6

Current as of December 8, 2021

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(cc) "licensee" means the holder of a licence according to the records of the Regulator and includes a receiver, receiver-manager, trustee or liquidator of property of a licensee and, for greater certainty, includes a person who is a licensee for the purposes of this Act under section 3(3);

(dd) "market demand" means the amount of oil or gas reasonably needed for current consumption, use, storage and working stocks within and outside Alberta;

(ee) "marketable gas" means a mixture mainly of methane originating from raw gas, if necessary through the processing of the raw gas for the removal or partial removal of some constituents, and that meets specifications for use as a domestic, commercial or industrial fuel or as an industrial raw material;

(ff) "methane" means, in addition to its normal scientific meaning, a mixture mainly of methane that ordinarily may contain some ethane, nitrogen, helium or carbon dioxide;

(ff.1) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(gg) "natural gas liquids" means propane, butanes or pentanes plus, or a combination of them, obtained from the processing of raw gas or condensate;

(hh) "oil" means condensate, crude oil or synthetic coal liquid or a constituent of raw gas, condensate or crude oil that is recovered in processing, that is liquid at the conditions under which its volume is measured or estimated;

(ii) "oil sands" means

(i) sands and other rock materials containing crude bitumen,

(ii) the crude bitumen contained in those sands and other rock materials, and

(iii) any other mineral substances, other than natural gas, in association with that crude bitumen or those sands and other rock materials referred to in subclauses (i) and (ii);

(jj) "oil sands deposit" means a natural reservoir containing or appearing to contain an accumulation of oil sands separated or appearing to be separated from any other such accumulation;

(b) cancel a licence for a well if drilling has not commenced within 6 months after the licence was granted,

(c) cancel a licence or approval for a facility if construction has not commenced within one year after the licence or approval was granted,

(d) cancel a licence or approval at the request of the licensee or approval holder, and

(e) issue a new licence or approval in place of a cancelled licence or approval.

RSA 2000 cO-6 s25;2012 cR-17.3 s97(31),(33)

**Amendment of licence or approval**

**26(1)** An application to amend a licence or approval must be submitted to the Regulator.

**(2)** The Regulator, in its discretion, may

(a) amend the licence or approval in accordance with the application,

(b) after notifying the licensee or approval holder of its intention to do so, amend the licence or approval otherwise as it considers fit, or

(c) refuse the application.

RSA 2000 cO-6 s26;2012 cR-17.3 s97(31)

**Security deposit**

**26.1** Where, on the written request of a licensee of a large facility or one or more working interest participants who have a 50% or greater share in a large facility, the Regulator requires the licensee to provide a security deposit in respect of the large facility, each working interest participant in the large facility is responsible for paying its share of the security deposit to the licensee in proportion to its share in the facility.

2009 c20 s7;2012 cR-17.3 s97(31)

**Reasonable care, measures to prevent impairment or damage**

**26.2(1)** A licensee or approval holder shall provide reasonable care and measures to prevent impairment or damage in respect of a well, facility, well site or facility site.

**(2)** If, in the opinion of the Regulator, a licensee or approval holder has failed or is unable to provide reasonable care and measures to prevent impairment or damage in respect of a well, facility, well site or facility site, the working interest participants in

the well, facility, well site or facility site shall provide reasonable care and measures to prevent impairment or damage in respect of the well, facility, well site or facility site.

**(3)** If reasonable care and measures to prevent impairment or damage in respect of a well, facility, well site or facility site are not being provided in a manner satisfactory to the Regulator, the Regulator may order the licensee, a working interest participant or a delegated authority under Part 11 to provide reasonable care and measures to prevent impairment or damage in respect of the well, facility, well site or facility site and may impose any terms or conditions that the Regulator determines are necessary in the order.

**(4)** The provision of reasonable care and measures to prevent impairment or damage in respect of a well, facility, well site or facility site must be carried out in accordance with the rules and any terms or conditions imposed by the Regulator.

2020 c4 s1(8)

**Suspension and abandonment**

**27(1)** Subject to subsection (2), a licensee or approval holder shall suspend or abandon a well or facility when directed by the Regulator or required by the regulations or rules.

**(2)** Notwithstanding subsection (1),

(a) if the Regulator so directs, a well or facility must be suspended or abandoned by a working interest participant other than the licensee or approval holder, and

(b) with the consent of the Regulator, a well or facility may be suspended by a working interest participant other than the licensee or approval holder.

**(3)** The Regulator may order that a well or facility be suspended or abandoned where the Regulator considers that it is necessary to do so in order to protect the public or the environment.

**(4)** A suspension or abandonment must be carried out in accordance with the regulations or rules.

RSA 2000 cO-6 s27;2012 cR-17.3 s97(31),(33)

**Suspension, abandonment by Regulator**

**28** If, in the opinion of the Regulator, a well or facility is not suspended or abandoned in accordance with a direction of the Regulator or the regulations or rules, the Regulator may

(a) authorize any person to suspend or abandon the well or facility, or

(b) suspend or abandon the well or facility on the Regulator's own motion.

RSA 2000 cO-6 s28;2012 cR-17.3 s97(31),(32),(33)

**Continuing liability**

**29** Abandonment of a well or facility does not relieve the licensee, approval holder or working interest participant from responsibility for the control or further abandonment of the well or facility or from the responsibility for the costs of doing that work.

2000 c12 s1(15)

**Costs**

**30(1)** Subject to subsection (2), the suspension costs, abandonment costs, remediation costs and reclamation costs for a well and well site or facility and facility site must be paid by each working interest participant in accordance with their proportionate share in the well or facility.

**(1.1)** Subject to subsection (2), the costs paid by a person who is subject to an order under section 26.2(3) in providing reasonable care and measures to prevent impairment or damage in respect of a well, facility, well site or facility site must be paid by each working interest participant in accordance with their proportionate share in the well or facility.

**(2)** The Regulator may determine the costs referred to in subsection (1) or (1.1)

(a) on the application of the person who provided the reasonable care and measures to prevent impairment or damage in respect of a well, facility, well site or facility site, or conducted the suspension, abandonment, remediation or reclamation, in the case of a well or facility that was operated, suspended, abandoned, remediated or reclaimed by a licensee, approval holder, working interest participant or agent, or

(b) on the Regulator's own motion, in the case of a well or facility suspended, abandoned, remediated or reclaimed by a person authorized by the Regulator,

and the Regulator shall allocate those costs to each working interest participant in accordance with their proportionate share in the well or facility and shall prescribe a time for payment.

**(3)** A working interest participant that fails to pay its share of costs as determined under subsection (2) within the period of time prescribed by the Regulator must pay, unless the Regulator directs otherwise, a penalty equal to 25% of its share of the costs.

**(4)** Where a well, facility, well site or facility site is suspended, abandoned, remediated or reclaimed by a licensee, approval holder, working interest participant or agent, the costs as determined under subsection (2), together with any penalty prescribed by the Regulator under subsection (3), constitute a debt payable to the licensee, approval holder, working interest participant or agent who carried out the suspension, abandonment, remediation or reclamation.

**(5)** Where a well, facility, well site or facility site is suspended, abandoned, remediated or reclaimed by the Regulator or by a person authorized by the Regulator, the costs as determined under subsection (2), together with any penalty prescribed by the Regulator under subsection (3), constitute a debt payable to the Regulator.

**(6)** A certified copy of the order of the Regulator determining the costs and penalty under this section and the allocation of those costs to each working interest participant in the well or facility may be filed in the office of the clerk of the Court of Queen's Bench and, on being filed and on payment of any fees prescribed by law, the order may be entered as a judgment of the Court and may be enforced according to the ordinary procedure for enforcement of judgments of the Court.

RSA 2000 cO-6 s30;2012 cR-17.3 s97(31),(32);2020 c4 s1(9)

**Deemed working interest participant**

**31(1)** Where

(a) a transaction occurs that results in a person no longer being a working interest participant in a well or facility,

(b) the successor working interest participant is a person other than the licensee of the well or facility, and

(c) the successor working interest participant fails to pay its proportionate share of the suspension costs, abandonment costs, remediation costs and reclamation costs,

the Regulator may deem the person referred to in clause (a) to continue to be a working interest participant for the purposes of sections 27 to 30 and Part 11 if subsection (2) applies.

**(2)** The Regulator may deem as provided in subsection (1) if

(a) in the case of a well, the transaction occurred after the well ceased to meet the economic limit test set out in the regulations or rules, or

# TAB 3

# In the Court of Appeal of Alberta

**Citation: PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited, 1991 ABCA 181**

**Date:** 19910612
**Docket:** 11698 & 11713
**Registry:** Calgary

**Between:**

**PanAmericana de Bienes y Servicios, S.A.**

Respondent
(Plaintiff)

- and -

**Northern Badger Oil & Gas Limited**

Respondent
(Defendant)

**And Between:**

**The Energy Resources Conservation Board**

Appellant
(Applicant)

- and -

**Vennard Johannesen Insolvency Inc., Receiver and Manager of Northern Badger Oil & Gas Limited**

Respondent

- and -

**Attorney General of Alberta**

Appellant
(Intervenor)

**The Court:**

**The Honourable Chief Justice Laycraft**
**The Honourable Mr. Justice Foisy**
**The Honourable Mr. Justice Irving**



**Reasons for Judgment of The Honourable Chief Justice Laycraft**
**Concurred in by The Honourable Mr. Justice Foisy**
**And Concurred in by The Honourable Mr. Justice Irving**

**APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE MACPHERSON OF THE COURT OF QUEEN'S BENCH OF ALBERTA DATED THE 20TH DAY OF DECEMBER, 1989**

COUNSEL:

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## REASONS FOR JUDGMENT OF THE HONOURABLE CHIEF JUSTICE LAYCRAFT

[1] The issue on this appeal is whether the **Bankruptcy Act** (R.S.C. 1980, c. B-3) prevents the court appointed Receiver/Manager of an insolvent and bankrupt oil company from complying with an order of the Energy Resources Conservation Board of the Province of Alberta. The order required the Receiver/Manager, in the interests of environmental safety, to carry out proper abandonment procedures on seven suspended oil wells. In Court of Queen's Bench, Mr. Justice MacPherson held that the order requiring "the abandonment and securing of potentially dangerous well sites is at the expense of the secured creditor's entitlement"

under the Bankruptcy Act and is "beyond the province's constitutional powers". He directed the Receiver/Manager not to comply with the order. For the reasons which follow, I respectfully disagree with that conclusion and would allow the appeal by the Board.

[2] "Abandonment" and "abandon" are terms with different meanings in the oil industry than when used in their usual legal sense. In the oil industry they refer to 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. In general terms, the process requires that the well bore be sealed at various points along its length to prevent cross-flows of liquids or gases between formations, or into aquifers or from the surface. The cost may vary from a few hundred dollars to tens of thousands of dollars depending on the circumstances.



## I FACTS

[3] Prior to May, 1987 Northern Badger Oil and Gas Limited carried on business in the exploration for, and the production of, oil and gas in Alberta and Saskatchewan. It was licensed to operate 31 oil and gas wells in Alberta of which 11 were producing wells. The remainder were suspended or standing in a non-producing condition. Northern Badger owned varying interests approximating 10 per cent in each well and was the operator of them on behalf of itself and other working interest owners.

[4] On November 1, 1985, Northern Badger granted floating charge debenture security over certain oil and gas assets, including its interest in the 31 Alberta wells, to the respondent Panamericana. It defaulted under the debenture and in May, 1987, Panamericana applied for and obtained a court order appointing Vennard Johannesen Insolvency Inc. ("the Receiver")

> "…Receiver and Manager of all of the undertaking, property, and assets of the Defendant, Northern Badger Oil and Gas Limited with authority to manage, operate, and carry on the business and undertaking of the Defendant…"

[5] On August 7, 1987, a Receiving Order, effective retroactively to July 7, 1987, placed Northern Badger in Bankruptcy. Collins Barrow Limited was appointed Trustee in Bankruptcy.

[6] On July 20, 1987, the Energy Resources Conservation Board wrote to Northern Badger referring to the insolvency and

> "requiring an undertaking that the wells will continue to be operated in adherence with the regulations and conditions of the well licenses. Also it is essential that the licensee

be capable of responding to any problems which may occur and properly abandoning the well once production is complete."

[7] The Board further suggested that "the solution to the problem" would be to transfer the wells to a party "who is prepared to take on the responsibilities of the licensee". The Receiver responded to this letter on August 14, 1987. It reported that 21 of the wells had been transferred to other parties, but that 12 wells had not. It then said:

> "The Receivership Manager is presently involved in negotiations to sell all of the assets and liabilities to a number of interested parties. Vennard Johannesen is therefore striving to pass on the obligations to the prospective purchaser." (emphasis added)

[8] The Board wrote again to the Receiver on December 11, 1987, pointing out that their records still showed Northern Badger to be the licensee of the wells. The letter asked the Receiver to confirm that no permits, licenses or approvals would be remaining before they applied for discharge "or alternatively that you give the Board notice of any application to be discharged".

[9] During the interval between these two letters, the Receiver had attempted to sell the Northern Badger properties to various prospective purchasers including Senex Corporation. On November 13, Senex made an offer to purchase the remaining Northern Badger assets held by the Receiver for $1,850,000.00 plus a carried interest of 17.5% on certain undeveloped properties held by Northern Badger. Under this offer Senex would become the licensee of the remaining wells. However, the agreement had a clause which provided:

> "The purchaser may elect to exclude any interest of the Vendor in any lands which has a value less than the costs of abandonment as agreed by the parties, or, failing agreement by Sproule Associates Limited, on or before the closing date."

[10] The Receiver applied to the Court for approval of the sale; the affidavit material filed in support of the application made no express reference to the "back out" clause. The Receiver did not give notice to the Board of the application. The Court approved the transaction on December 18, 1987 and the closing date of the sale was set for January 15, 1988.

[11] Prior to the closing, by an agreement dated on the same day, Senex exercised its rights under the "back out" clause and passed seven wells back to the Receiver. This amending agreement did not vary the purchase price of the remaining assets. All the wells

passed back must now be abandoned; two of them require minor expenditures, but the other five will require expenditures in the range of $40,000.00 each.

[12] The court order of December 18, 1987, set aside five different funds to meet the claims of named claimants against Northern Badger for sums held in trust for them, or where claimants had rights of set-off, or to meet lien claims against the properties themselves. None of these funds made allowance for the abandonment of the wells. The remainder of the moneys were held by the Receiver awaiting the outcome of litigation to determine whether Panamericana was entitled to priority over other creditors.

[13] On January 27, 1988, the Receiver advised the Board that

> "effective January 15, 1988 Vennard Johannesen Insolvency Inc. in its capacity as Receiver and Manager of Northern Badger Oil and Gas Limited has sold all of the assets of the company to Senex corporation.
>
> "Please cancel our account with you effective January 15, 1988. We will not be responsible for any charges or fees incurred after January 15, 1988…." (emphasis added)

[14] After a six day trial in May, 1988, Panamericana obtained judgment against Northern Badger for $1,304,112.00, and also obtained a declaration that it had priority over all other creditors of Northern Badger for the payment of sums due under the debenture. Thereupon, on May 29, 1988, the Receiver applied to Court of Queen's Bench for an order approving its administration of the Receiving order and for a discharge from its responsibilities. The affidavit filed in support detailed the payment or settlement of all claims for which provision had been made by the five funds established in December 1987. It disclosed that, after all assets were distributed to Panamericana, there would still be a substantial deficiency in the payment of the debenture debt.

[15] At the time of this application, the Receiver had approximately $226,000. on hand which it sought to pay to Panamericana after deducting its fees and disbursements. It wished to deliver to Collins Barrow, as Trustee in Bankruptcy, what were termed "minor, unrealized receivables" including the interest of Northern Badger in the seven wells and the well licenses relating to them. The affidavit did not refer specifically to the liability arising from the obligation to abandon the seven wells. An apparent indirect reference to these seven wells is contained in paragraph 18 of the supporting affidavit:

> "The Receiver has determined that certain assets of Northern Badger were not marketable and were excluded by Senex Corporation in its purchase of the assets of

Northern Badger, which assets shall remain with the estate of Northern Badger, subject to any further direction of this Honourable Court."

[16] The record before this court makes only brief reference to events during the next year. However, the application by the Receiver to be discharged remained in abeyance. In December 1988, the Board wrote to the Receiver pointing out that a number of wells were still licensed to Northern Badger. The Receiver did not respond until May 3, 1989. It advised the Board that five of the seven wells which now require to be abandoned, had been deleted from the Senex sale.

[17] The Board's reaction to this information was, apparently, immediate. On June 1, 1989, an Order in Council of the Lieutenant Governor in Council purporting to be issued under Section 7 of the Oil and Gas Conservation Act approved the issuance by the Board of an order respecting the abandonment of those five wells and the two others.

[18] The Board order authorized by the Order in Council was issued on June 6, 1989. It required the Receiver to submit abandonment programs for the seven wells by June 15, 1989 and to abandon them in accordance with an approved program on or before February 28, 1990. On June 13, 1989 the Board moved in Court of Queen's Bench for an order requiring the Receiver to comply with the Board's order and this litigation resulted.

[19] While the Board's motion was pending, an effort was made to obtain contribution toward the cost of abandonment from other working interest owners. Upon the application of the Board, on November 23, 1989, Mr. Justice MacPherson directed the Receiver to take steps to collect from other working interest owners of the seven wells their proportionate share of abandonment costs totalling $202,500.00. The proportion of these costs attributable to the percentage interest of Northern Badger in the wells was estimated at $17,330.00. Nothing in the record before the Court discloses whether, or the extent to which, this effort succeeded.

[20] On this appeal, the respondents objected that a portion of the evidence presented on behalf of the Board was inadmissible. They strongly urged that there was, in the result, no evidence that failure to abandon the wells presented any danger. The evidence in question was the affidavit of Mr. G.J. DeSorcy, Chairman of the Energy Resources Conservation Board. In that affidavit Mr. DeSorcy stated that he is a Professional Engineer and Chairman of the Board. He testified, on information and belief, as to a considerable amount of technical information about the five wells, the formations encountered, and the present condition of

them. He expressed opinions as to the danger of cross flows of liquids and gases, and as to hazards to the environment and to "public health and safety". The information was, apparently, derived from the records of the wells filed with the Board; the expressions of opinion were his own.

[21] In my opinion, it is not necessary to determine whether this information was admissible in this form or to consider the need for a new trial if it was not. Even if the information and expressions of opinion in this affidavit are ignored, there is ample evidence on the record in other affidavits, including those filed on behalf of the Receiver, to establish the probable cost of abandonment of the wells and the need for that process. As will be discussed later in these reasons, the process of abandonment of oil and gas wells is part of the general law of Alberta enacted to protect the environment and for the health and safety of all citizens.



## II THE REASONS FOR JUDGMENT

[22] The learned Chambers Judge delivered extensive reasons for Judgment. He held that the Board order sanctioned by the Order in Council was within the Board's jurisdiction under its the general powers contained in sections 4(b), 4(f) and 7 of the Oil and Gas Conservation Act. He held, however, that the Board "is a creditor seeking to have its claim to have the seven wells abandoned, preferred to the claim of the secured creditor and to the scheme of distribution set forth in section 107 of the Bankruptcy Act." He cited Re Rainville [1980] 1 S.C.R. 45 (S.C.C.) and R. v. Henfrey, Samson and Belair Limited [1989] 2 S.C.R. 24 (S.C.C.) and said:

> "The E.R.C.B. Orders-in-council in form relate to a constitutionally valid objective, that is, abandonment of gas wells. The genuine purpose is to do something beyond the province's constitutional powers. It is to take money directed, by the Bankruptcy Act, to be paid to a secured creditor, and apply it to another purpose.
>
> ……..
>
> "Subject to the rights of secured creditors, everything in the nature of property of the bankrupt vests in the Trustee in bankruptcy. The E.R.C.B. has the powers under the Oil and Gas Conservation Act to abandon the wells and collect the costs from the appropriate parties.
>
> This claim, whether done directly or ordered to be done, is a claim provable in bankruptcy.
>
> Section 121 of the Bankruptcy Act:

'All debts and liabilities, present or future, to which the bankrupt is subject'

is surely wide enough to cover this liability.

The proper approach to solving problems such as are raised in the case at bar is prescribed by the Supreme Court of Canada in the Federal Business Development Bank v. Commission de la Sante et de la Securlte du Travail et al. 68 C.B.R. 209 at page 217 and following. A similar case of contest between preserving the secured creditors' rights as opposed to saving the public purse.

The Bankruptcy Act has not been amended to deal with modern social problems of abandonment of contaminated property. Here the abandonment and the securing of potentially dangerous well sites is at the expense of the secured creditors' entitlement if the E.R.C.B. were to succeed.

While I am aware that the Supreme Court of the United States of American split five to four in deciding a similar issue in the matter of Quanta Resources, 474 U.S. 494 (1986), I am of the view that the law of Canada accords with the dissenting view of the Chief Justice of the United States when he said that it was for the legislature to change the law, not the courts, when it came to impairing otherwise valid security for societal purposes. One should see also Lloyd's Bank of Canada v. International Warranty Company Limited et al., an unreported decision of the Alberta Court of Appeal (1989) as to the need for clear legislative statements before destroying property rights.

Accordingly, I must instruct the Receiver/manager that he must not proceed to abandon the several wells directed to be abandoned by the order of the E.R.C.B. out of the monies held for the secured creditors."

## III THE REGULATORY REGIME FOR ALBERTA OIL AND GAS WELLS

[23] The regulatory scheme for oil and gas operations in Alberta is contained in the Oil and Gas Conservation Act (R.S.A. 1980 c. 0-5, in the Energy Resources Act (R.S.A. 1980 c. E-11) and in the regulations under those acts. Each statute contains a statement of its purposes. Section 4 of the Oil and Gas Conservation Act provides:

"4. The purposes of this Act are:

(b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, completing, reworking, operating and abandonment of wells and in operations for oil and gas.

……

(f) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction.

[24] The Board is given wide specific powers under the act in the regulation of operations in the exploration for, and production of, oil and gas. Where a specific power is not given to the Board to be exercised on its own volition, it has a wide general power to be exercised with the authorization of the Lieutenant Governor in Council. Section 7 provides:

> 7. The Board, with the approval of the Lieutenant Governor in Council, may make any just and reasonable orders and directions the Board considers necessary to effect the purposes of this Act and that are not otherwise specifically authorized by this Act.

[25] Section 9 provides that a Board order shall override the terms of any contract. Sections 11 to 20 provide for the licensing of oil and gas drilling and producing operations. Section 11 provides that no person shall continue any producing operations unless

> "(b) he is the licensee or is acting under the instructions of the licensee."

[26] Section 13 provides that if it is established that a licensee does not have the right to produce oil or gas from land, the license becomes "void for all purposes except as to the liability of the holder of the license to complete or abandon the well…". Section 3.030 (3) of the regulations also provides, in some circumstances, for the Board to direct a licensee to abandon a well. Section 18 provides that a well license shall not be transferred without the consent of the Board. Section 19 outlines circumstances in which the Board may cancel a license.

[27] By sections 92(1) and (2) the Board is empowered to enter a well site and to perform, itself, work needed for "control, completion, suspension or abandonment of the well". The cost of this work then becomes a "debt payable by the licensee of a well to the Board". Section 95 empowers the Board to enforce any order by taking over the production, management and control of the well.

[28] The Energy Resources Conservation Act (R.S.A. 1980 c. fill), which establishes the Board, has a similar statement of its purposes in Section 2. Among these purposes are:

> "2 (c) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta;
>
> (d) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy;
>
> (e) to secure the observance of safe and efficient practices in the exploration for, processing, development and transportation of the energy resources of Alberta;"

[29] It is evident that the regulatory regime contained in these statutes and regulations contemplates that all wells drilled for oil or gas will one day be abandoned. That is so whether the well is unsuccessful or whether it produces large quantities of oil or gas. At some point, when further production is not possible or the cost of production of remaining quantities exceeds the revenue which could be obtained from it, the process of abandonment is required of the well licensee. In those situations where there is no solvent entity able to carry out the abandonment duties the wells become, in the descriptive vernacular of the oil industry, "orphan wells". Thus the direct issue in this litigation, in my opinion, is whether the Bankruptcy Act requires that the assets in the estate of a insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public.



## IV DID THE BOARD HAVE A PROVABLE CLAIM IN THE BANKRUPTCY?

[30] A basic premise of the respondents' position in Court of Queen's Bench, and in this court, is that the Board has a provable claim as a creditor in the bankruptcy of Northern Badger. From this it is contended that, in enforcing the requirement for the proper abandonment of oil and gas wells, the Board simply ranks as a creditor. Then, it is said, the scheme of distribution of the Bankruptcy Act gives priority to the secured creditors so that the trustee is unable to obey the law requiring abandonment of oil and gas wells. That is so, it is urged, because the requirement of the provincial legislation cannot subvert the scheme of distribution specified by the Bankruptcy Act. The respondents point to the definition of "creditor" in Section 2 of the Bankruptcy Act and to the elements of a "provable claim" set forth in section 121.

[31] Mr. Justice MacPherson agreed with these contentions saying that the words in sections 2 and 121 of the Bankruptcy Act were "surely wide enough to cover" Northern Badger's liability to abandon the wells. These sections provide:

> "2. In this Act,
>
> "Creditor" means a person having a claim preferred, secured or unsecured, provable as a claim under this Act;"
>
> "121(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act."

[32] There are two aspects to the question whether the Board had a "provable claim" in the bankruptcy. The first is whether Northern Badger had a liability; the second is whether that liability is to the Board so that it is the Board which is the creditor. I respectfully agree that Northern Badger had a liability, inchoate from the day the wells were drilled, for their ultimate abandonment. It was one of the expenses, inherent in the nature of the properties themselves, taken over for management by the Receiver. With respect, I do not agree, however, that the public officer or public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it.

[33] 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.

[34] 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.

[35] Counsel for Panamericana cited three authorities in support of its argument that the Board is a creditor of Northern Badger: Re Rainville [1980] 1 S.C.R. 45; Deloitte, Haskins & Sells **Ltd.** v. WCB (1985), 19 D.L.R. (4th) 577 (S.C.C.); and R. in Right of British Columbia v. Henfrey Samson Belair Ltd. [1989] 5 W.W.R. 577 (S.C.C.). But in all these cases some actual impost had been levied against the citizen and a sum of money was due and owing to the specific public authority involved. In Rainville, Quebec had registered a "privilege" for $5,474.08 for sales tax which the company had failed to remit; in Deloitte, Haskins & Sells, the sum in dispute was a levy of $3,646.68 made under the Workers' Compensation Act; in

Henry, Samson, Belair Ltd. the company had collected, and failed to remit sales tax of $58,763.23. Thus in each case a specific sum was due to the Crown, or a Crown agency, as a debt. None of the cases is authority for the proposition that a public officer ordering a citizen to obey the general law thereby becomes a creditor for any amount the citizen may ultimately be required to spend in complying.

[36] In my view, the Board is not, at this point, a "creditor" of Northern Badger with a claim provable in its bankruptcy. The problem presented by this case is not to be solved, therefore, by determining whether the Board ranks as a creditor of Northern Badger before or after the secured creditors. Rather it must be determined whether the Receiver, which was the operator of the oil wells in question, had a duty to abandon them in accordance with the law.

## V THE DUTIES OF THE RECEIVER

[37] Vennard Johannesen Insolvency Inc. assumed its duties as Receiver in this case as an officer of the court. The nature of its duties has been determined by a long line of cases, now reinforced by the provisions of the Business Corporations Act (R.S.A. 1980 c. B-15). Sections 92 and 93 require the Receiver to act in accordance with the directions of the Court and of the instrument under which the appointment was made. Sections 94 and 95 provide:

> "94 A receiver or receiver-manager of a corporation appointed under an instrument shall
>
> (a) act honestly and in good faith and,
>
> (b) deal with any property of the corporation in his possession or control in a commercially reasonable manner.
>
> 95 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> (a) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;
>
> (b) an order determining the notice to be given to any person or dispensing with notice to any person;
>
> (c) an order fixing the remuneration of the receiver or receiver-manager;
>
> (d) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(d.1) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of his administration that the Court specifies;

(e) an order giving directions on any mater relating to the duties of the receiver or receiver-manager."



[38] A receiver appointed by the court must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking. The receiver is not the agent of the debtor or the creditor or of any other party, but has the duty of care, supervision and control which a reasonable person would exercise in the circumstances. The receiver may be liable for failure to exercise an appropriate standard of care. These points have been made in many cases starting in 1905 with **Plisson v. Duncan** (1905) 36 S.C.R. 647. The decision of Viscount Haldane in **Parsons et al v. Sovereign Bank of Canada** [1913] A.C.160, which has been frequently quoted, emphasizes the independence of the receiver from those who procured the appointment.

[39] It is also clear that the receiver takes full responsibility for the management, operation and care of the debtor's assets, but does not take legal title to them. That point has been made in a number of decisions including that of Lamer J. (as he then was) speaking for the court in F.B.D.B. v. Commission de Sante et al. (1988) 84 N.R. 308. At page 315 he said:

> "… the immoveable in the case at bar is property of the bankrupt within the meaning of the Bankrupt Act. Even if the trustee takes possession of the immoveable before the bankruptcy, the bankrupt remains owner of his property. The trustee who has seized an encumbered right of ownership over that property: he has only the rights of a creditor under a pledge or hypothec. This Court has ruled this way twice in Laliberte v. Larue, [1931] S.C.R. 7 and Trust general du Canada v. Roland Chalifoux Ltee, [1962] S.C.R. 456."

[40] A further factor affecting the obligation of a court appointed receiver is the receiver's status as an officer of the court; the standard required because of that status is one of meticulous correctness. In Alta Treasury Branches v. Invictus Financial Corporation Ltd. (1986) 42 Alta L.R. (2d) 181, Stratton J. (as he then was) said that the receiver's obligations

"reach further than merely acting honestly". He quoted with approval the statement of Wilson J. in Fotti v. 777 Mgmt. Inc. [1981]5 W.W.R. 48 at 54:

> "… the receiver is an officer of the court and in his discharge of that office he may not, in the name of the court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed."

[41] The same concern for proper conduct by the court's appointed officer may be seen in the judgment of the Saskatchewan Court of Appeal in Canadian Commercial Bank v. Simmons Drilling Ltd. (1989) 76 C.B.R. 241. In that case the Receiver undertook a lengthy review of the debtor's records, and discovered that some subcontractors, who had not registered liens in time, were unpaid. In some cases, the time for filing liens had expired after the Receiver had been appointed. The Court affirmed the duty of a Receiver to ascertain his obligations within a reasonable time and noted that the Receiver's actions in the discharge of those obligations are the actions of the court which appointed him. It held that, whether by intention or by default, an officer of the court, cannot be permitted to change the relative rights of those for whom he is acting. Sherstobitoff J.A. said at page 249:

> "The receiver, and through it the bank, must bear responsibility for the consequences of the failure to act with sufficient diligence to discover the claims within a reasonable time, thereby permitting lapse of the limitation period.
>
> What is clear is that, when the receiver was appointed, the subcontractors were entitled to payment from the trust fund. The failure to make payment to the subcontractors within a reasonable time thereafter, an obligation imposed by s. 89 of the Business Corporations Act and s. 7 of the Builders' Lien Act taken together, was in default of those statutory obligations. If the receiver had applied to the court for directions for payment out of the moneys on that date or within a reasonable time thereafter, the money would have been ordered paid to the subcontractors. The result is that the default of the receiver in failing to act with sufficient promptness and diligence to discover and pay the claims against the trust before expiration of the limitation period has deprived the subcontractors of the right to realize their claims from the trust fund.
>
> The bank now seeks to benefit from that default and the receiver supports its position. That position is untenable. While it may not be improper for a private debtor to withhold payment of a debt due and owing, whether deliberately or by neglect or oversight, and thereby benefit from an intervening limitation period, the same is not true of a receiver, <u>for he is an officer of the court.</u> The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default."
>
> (emphasis added)

[42] In the present case it is clear that almost from the commencement of the receivership, the Receiver was aware of the obligation, in law, of Northern Badger to see the oil and gas wells properly abandoned. The correspondence from the Board detailed the obligation for the proper operation of the wells and the ultimate abandonment of them.

[43] As one reviews the sequence of events leading to the sale of the assets to Senex, it is difficult to escape the conclusion that the "back out" clause was deliberately negotiated to achieve the very result for which the respondents now contend. The "back out" clause contemplates the situation that the costs of abandonment of some wells may exceed the revenue to be gained from them. Of course, no matter what wealth a well has produced in the past, there comes a time, in the last days of its life, when little oil remains and the well must be abandoned. At that point it is a liability with the cost of abandonment exceeding the revenue that could be obtained. In this case, the parties even provided for an arbitrator to determine, if need be, whether that moment had arrived. All wells with some value were to be sold; the remainder were to be left in the bankrupt estate when the Receiver obtained a discharge from its duties.

[44] Moreover, whether by accident or design, the Board was not made aware of the developing situation. Despite the correspondence, the Board was not aware that Senex was able to exercise a "back out" clause in the sale agreement. The Board was first told of the effort "to sell all the assets and liabilities". It was then told that "all the assets have been sold". Only the most alert reader would detect the subtle difference in the two quoted portions of the Receiver's letters. On the material filed, it is also difficult to escape the conclusion that the court approved the sale to Senex without being aware of the prospect that some wells were to be left as "orphans".

## VI CONCLUSION

[45] In my opinion the Board had the power, when authorized by the Lieutenant Governor in Council, to order the abandonment of the wells by some person. The order was clearly within the general regulatory scheme, and within the expressed purposes, of both of the statutes regulating the oil and gas industry. Indeed, the contrary was not argued. What was contended is that the Board should have directed its order to Northern Badger or to the trustee in bankruptcy rather than to the Receiver. What was further contended is that the receiver or trustee in bankruptcy is unable to obey the general law enacted by the provincial

legislature to govern oil wells because to do so would subvert the scheme Parliament has devised for distribution of assets in a bankruptcy.

[46] The parties referred the court to some cases in the United States and to one in Canada where a debtor's legal duties on environmental matters conflicted with the potential distribution of the estate on insolvency. In each case, however, the response of the court was to some degree determined by statutory provisions. The cases are not easy to reconcile.

[47] In Kovacs v. B & W Enterprises (1984) 469 U.S. 649 a state obtained an injunction ordering an individual to clean up a hazardous site, and later a receiver was appointed to seize property of the debtor and perform the duty. The individual filed for bankruptcy and the issue was whether his subsequent discharge from bankruptcy cleared the obligation. It was held in the Sixth Circuit Court of Appeals that the claim was essentially a monetary "liability on a claim" under the bankruptcy statute, and that the debtor was discharged. The United States Supreme Court affirmed.

[48] In Penn Terra Ltd. V. Dept. of Environmental Resources (1984) 733 F. 2d 267 the Third Circuit Court of Appeals was required to decide whether an exemption clause in the bankruptcy legislation should be construed to exempt from discharge an order requiring the debtor to complete restoration of the sites after coal operations. The court observed that the judgment obtained was not in the form of a traditional money judgment as for a tort or other claim. It then held that the debtor was not discharged and was required to perform the restoration.

[49] In Midlantic National Bank v. New Jersey Department of Environmental Protection (1985) 474 U.S. 494, a corporation filed for bankruptcy after it was discovered to have stored oil contaminated with a carcinogen at a site in New Jersey and another in New York. The trustee proposed to abandon the sites on the ground that they were of "inconsequential value" to the estate. In New Jersey, State environmental officials ordered the site cleaned up. A majority of the United States Supreme Court held that a bankruptcy trustee may not abandon property in contravention of state law. The minority would have held that the abandonment might be barred in emergency conditions, which did not yet exist in the case.

[50] A similar problem arose again after both the above cases had been decided in United States v. Whizco Inc. (1988) 841 F. (2d) 147. The United States sought an injunction to force obedience to a statutory obligation to abandon a worked out coal mine. The Sixth

Circuit Court of Appeals held, following the Kovacs case, that the operator's discharge under the Bankruptcy Act discharged the operator's liability to the extent that it would require the expenditure of money.

[51] One similar case has arisen in Canada. In Canada Trust Company v. Bulora Corporation (1980) 34 C.B.R. 145, the Receiver, as in the present case, had been appointed to receive and manage the company. The Fire Marshall ordered the Receiver to demolish certain housing units which were in a "serious and hazardous" condition. It was urged that, despite the appointment of the Receiver, the company continued to exist and to hold title to its assets. Thus, it was said, the proper recipient of the demolition order was the company, itself, and not the Receiver. Cory J., then a judge of the High Court of Ontario, summarized the argument in these terms at page 151:

> "It was contended that the nature of the position of the receiver, although it might paralyze the power of the company for which it was appointed, did not extinguish the legal existence of that company. Thus Bulora continued to exist and continued as the entity responsible for the required demolition. It was said that, as the Fire Marshal had every right to recover the municipality, the receiver should not and could not be required to undertake the demolition, which would have the effect of reducing the amount recovered by Canada Trust, the secured creditor."

[52] Cory J. then summarized the powers of the Receiver under the order appointing it, which gave it very wide powers of management and control similar to those given the Receiver in this case. He then said at page 152:

> "There remains the major problem of determining who should bear the costs of the demolition. The order of the Fire Marshal is of vital concern for the safety of residents of the units adjacent to and close by the abandoned units. The safety of those persons occupying such units should be of paramount importance. If the receiver is given wide and sweeping powers in the management of the company, surely in the course of such management it has a duty to comply with a demolition order where the safety of individuals is so vitally concerned. It is indeed unfortunate that a creditor must suffer the loss resulting from the demolition. Nevertheless, the asset to be managed by the receiver must, in my opinion, be managed with a view to the safety of those residing in and beside that asset. Receivership cannot and should not be guided solely by the recovery of assets. In my view, there is a social duty to comply with an order such as this which deals with the safety of individuals affected by an asset the receiver is managing.
>
> The direction then will be that the receiver is to comply with the order of the Fire Marshal and proceed with the demolition of the specified units."

[53] The Court of Appeal affirmed the judgment of Cory J. [(1981) 39 C.B.R. 153]. The endorsement on the record was as follows:

> "There was an order made by the fire marshall the legality and appropriateness of which is not challenged by the appellant. We are of the view that under the circumstances it was not only within the jurisdiction of the learned judge to direct that the court-appointed receiver-manager carry out that order but those circumstances necessitated that the receiver-manager be so directed. Although Cory J. referred to a 'social duty' to comply with the order that language, with deference, was inappropriate. The duty involved was a statutory one and it was unnecessary for him to consider the social implications of the order. The appeal is dismissed with costs."

[54] As in Bulora Corporation, it is urged in this case that Northern Badger is the licensee of the wells; the Receiver has never had legal title to them and is not the licensee. Therefore, it is said, the abandonment order should be directed to Northern Badger and not to the Receiver. In my opinion, that contention is not valid.

[55] The Receiver has had complete control of the wells and has operated them since May, 1987, when it was appointed Receiver and Manager of them. It has carried out for more than three years activities with respect to the wells which only a licensee is authorized to do under the provisions of the Oil and Gas Conservation Act. In that position, it cannot pick and choose as to whether an operation is profitable or not in deciding whether to carry it out. If one of the wells of which a receiver has chosen to take control should blow out of control or catch fire, for example, it would be a remarkable rule of law which would permit him to walk away from the disaster saying simply that remedial action would diminish distribution to secured creditors.

[56] While the Receiver was in control of the wells, there was no other entity with whom the Board could deal. An order addressed to Northern Badger would have been fruitless. That is so because, by order of the court, upon the application of the debenture holder, neither Northern Badger nor its trustee in bankruptcy had any right even to enter the well sites or to undertake any operation with respect to them. Moreover, under the regulatory scheme for Alberta oil wells, only a licensee is entitled to produce oil and gas. The Receiver cannot be heard to say that, while functioning as a licensee to produce the wells and to profit from them, it assumed none of a licensee's obligations.

[57] I must also consider the contention, which found favour in the Court of Queen's Bench, that the receiver or bankruptcy trustee managing and operating oil and gas wells need not, and, indeed, is forbidden, to obey the general provincial law governing property of that description. Put another way, this argument states that the general provincial law regulating

the operation of oil and gas wells in Alberta is invalid to the extent that it purports to govern a receiver or bankruptcy trustee in possession of such wells.

[58] Conflict between federal and provincial legislation is, of course, a classic Canadian problem. A number of cases have considered the situation where either a federal or provincial law, validly enacted within the constitutional power reserved to the enacting body, also touches upon or affects a heading of power reserved to the other level of government. These cases have been extensively reviewed and commented upon in the recent decision of the Supreme Court of Canada in **Bank of Montreal v. Hall** [1990] 1 S.C.R. 121.

[59] Provincial legislation has often been upheld despite incidental effects on a subject under the federal power. Where there is direct confrontation (as where one statute says "yes" and the other says "no" -- as Dickson J. (as he then was) expressed it in Multiple Access Ltd. v McCutcheon [1982] 2 S.C.R. 16) the doctrine of paramountcy may force a conclusion of invalidity of the provincial legislation.

[60] That the two statutes affect the same subject matter does not necessarily mean that one or the other of them is invalid. An early case of this type was Canadian Pacific Railway Company v. Notre Dame de Bonsecours [1899] A.C. 367. In that case the Privy Council held that since Parliament has the exclusive right to prescribe regulations for the construction/ repair and alteration of a railway, a provincial legislature could not regulate the structure of a ditch forming part of the works. But it held intra vires a municipal code which prescribed the cleaning of the ditch and the removal of obstructions to prevent flooding.

[61] Similarly in **Royal Bank of Canada v. Workmen's Compensation Board of Nova Scotia** [1936] S.C.R. 560, the Supreme Court of Canada held valid a levy for worker's compensation which adversely affected security granted under the Bank Act. La Forest J., giving the judgment of the court in **Bank of Montreal v. Hall** (supra), quoted the judgment of Davis J. in the Nova Scotia case (at 568-569) as follows (at 148):

> "…I have reached the conclusion that the goods in question, though owned by the bank subject to all the statutory rights and duties attached to the security were property in the province of Nova Scotia
>
> > 'used in or in connection with or produced by the industry with respect to which the employer (was) assessed though not owned by an employer'
>
> and became subject to the lien of the provincial statute the same as the goods of other owners…It is a provincial measure of general application for the benefit of workmen

employed in industry in the province and is not aimed at the impairment of bank securities though its operations may incidentally in certain cases have that effect."

(emphasis added by La Forest J.)

[62] In **Bank of Montreal v. Hall** (supra) the provincial legislation in conflict with valid federal legislation was forced to give way. The bank sought to enforce security granted to it under the **Bank Act** and the issue was whether it was required to follow the procedures and experience delays prescribed by the Saskatchewan **Limitation of Civil Rights Act.** After a review of the case law and of the two enactments La Forest J. was "led inescapably to the conclusion" that there was an "actual conflict in operation" between them. The provincial legislation was held inoperative in respect of security taken by the bank.

[63] In my view, there is no such direct conflict in this case. The Alberta legislation regulating oil and gas wells in this province is a statute of general application within a valid provincial power. It is general law regulating the operation of oil and gas wells, and safe practices relating to them, for the protection of the public. It is not aimed at subversion of the scheme of distribution under the Bankruptcy Act though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the Receiver with the general law means that less money will be available for distribution.

[64] I respectfully agree with the decision in **Bulora Corporation** (supra). In my opinion, the Receiver, the manager of the wells with operating control of them, was bound to obey the provincial law which governed them.

[65] I would not attempt to define the limits of provincial regulatory authority in relation to the federal powers respecting insolvency and bankruptcy. The various levels of government regulate business in a myriad of ways. The extent to which these levels of government may, in the exercise of their powers, affect in an incidental way, the distribution of insolvent estates must depend, to a considerable extent, on the facts of the particular case.

[66] I would allow the appeal and direct the Receiver to comply with the Board Order. The parties may speak to costs.

DATED AT CALGARY, ALBERTA
THIS 12th DAY OF JUNE
A.D. 1991.

# TAB 4


Province of Alberta

OIL AND GAS CONSERVATION ACT

# OIL AND GAS CONSERVATION RULES

**Alberta Regulation 151/1971**

With amendments up to and including Alberta Regulation 57/2022

Current as of April 6, 2022

Office Consolidation



Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

**3.011** No person shall produce gas from a well completed in the oil sands strata prior to obtaining an approval from the Regulator in accordance with section 3 of the *Oil Sands Conservation Rules* (AR 76/88), unless the Regulator has exempted the well from the application of this section.

AR 47/99 s3;89/2013

*Abandoned Wells*

**3.012** A licensee shall abandon a well or facility

(a) on the termination of the mineral lease, surface lease or right of entry,

(b) where the licensee fails to obtain the necessary approval for the intended purpose of the well, if the licensee does not hold the right to drill for and produce oil or gas from the well,

(c) if the licensee has contravened an Act, a rule, a regulation or an order or direction of the Regulator and the Regulator has suspended or cancelled the licence,

(d) if the Regulator notifies the licensee that in the opinion of the Regulator the well or facility may constitute an environmental or a safety hazard,

(e) if the licensee is not or ceases to be a working interest participant in the well or facility,

(e.1) if the licensee

(i) is not or ceases to be resident in Alberta,

(ii) has not appointed an agent in accordance with section 91 of the Act, and

(iii) does not hold a subsisting exemption under section 1.030 from the requirement to appoint an agent,

(f) if the licensee is

(i) a corporation registered, incorporated or continued under the *Business Corporations Act* whose status is not active or has been dissolved or if the corporate registry status of the corporation is struck or rendered liable to be struck under any legislation governing corporations, or

(ii) an individual who is deceased,

# TAB 5

# Directive 006

**Release date: December 1, 2021**
**Effective date: December 1, 2021**
**Replaces previous edition issued February 17, 2016**

## Licensee Liability Rating (LLR) Program

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### Contents

## 1 Purpose of the LLR Program

The purpose of the Alberta Energy Regulator (AER) LLR Program as set out in this directive is to

- prevent the costs to suspend, abandon, remediate, and reclaim a well, facility, or pipeline in the LLR Program from being borne by the public of Alberta should a licensee become defunct, and
- minimize the risk to the Orphan Fund posed by the unfunded liability of licences in the program.

Inquiries regarding this directive should be directed by email to inquiries@aer.ca or by phone to the AER's Customer Contact Centre at 403-297-8311 or toll-free at 1-855-297-8311.

## 2 What's New in This Edition

Components related to licence transfer applications and their security collection have been removed. The title of the directive has been changed accordingly. Revised requirements are now in *Directive 088: Licensee Life-Cycle Management*.

## 3 Scope of the LLR Program

The LLR Program applies to all upstream oil and gas wells, facilities, and pipelines included within the scope of the expanded Orphan Fund. A description of the AER-approved well, facility, and pipeline types included in the LLR Program is in appendix 1.

## 4 Definitions

For the purpose of this program:

- **Eligible producer licensee** is a licensee whose deemed assets from production volumes reported to Petrinex have fallen below its deemed liabilities in the LLR Program and is therefore eligible to have any deemed assets from midstream activities in the LLR, LFP, and OWL programs included in its liability management rating deemed asset calculation.

- **Large Facility Liability Management Program (LFP)** is the liability management program governing the large upstream oil and gas facilities specified in appendix 1 of *Directive 024.*
- **Liability assessment** is an assessment conducted by a licensee to estimate the cost to suspend, abandon, remediate, and reclaim a site.
- **Liability Management Rating (LMR)** is the ratio of a licensee's eligible deemed assets in the LLR, LFP, and Oilfield Waste Liability (OWL) programs to its deemed liabilities in these programs.
- **Licensee Liability Rating (LLR) Program** is the liability management program governing most conventional upstream oil and gas wells, facilities, and pipelines, as specified in appendix 1 of *Directive 006.*
- **Midstream activity** is the handling of third-party volumes for a fee or other consideration by a well or facility included in the LLR Program. For the purpose of this program, midstream activities include the operation of a nonsulphur recovery gas plant, gas storage scheme, custom processing facility, water or gas injection or disposal well, gas gathering, transportation or compression scheme, gas storage scheme, marketing, and/or any other activity determined by the AER to be a midstream activity.
- **Netback** is earnings before interest, taxes, and depreciation and is equal to gross margin (midstream revenue less cost of goods sold) less direct operating costs and applicable general and administrative expenses.
- **Nonproducer licensee (NPL)** is a licensee whose deemed assets from midstream activities in the LLR, LFP, and OWL programs exceed its deemed assets from production volumes reported to Petrinex or a licensee having only facilities included in the LFP or OWL programs.
- **Oilfield Waste Liability (OWL) Program** is the liability management program governing oilfield waste management facilities specified in appendix 1 of *Directive 075.*
- **Producer licensee** is a licensee whose deemed assets from production volumes reported to Petrinex exceed its deemed liabilities in the LLR, LFP, and OWL programs.
- **Site-specific liability** is the estimated cost to suspend, abandon, remediate, and reclaim a facility in the LLR Program.

## 5 Liability Management Rating Assessment

The AER's LMR assessment is a comparison of a licensee's deemed assets in the LLR, LFP, and OWL programs to its deemed liabilities in these programs. Any security deposit provided to the AER as a result of the operation of these programs is considered in determining a licensee's "security-adjusted" LMR. The LMR assessment is designed to assess a licensee's ability to address its suspension, abandonment, remediation, and reclamation liabilities. This assessment is conducted

monthly. The determination of deemed assets and deemed liabilities in each of these programs is documented in

- this directive and *Directive 011: Licensee Liability Rating (LLR) Program—Updated Industry Parameters and Liability Costs*, for licences included in the LLR Program;
- *Directive 024,* for licences included in the LFP;
- *Directive 075,* for licences and approvals included in the OWL Program; and
- *Directive 001: Requirements for Site-Specific Liability Assessments in Support of the ERCB's Liability Management Programs*, for licensees required to provide a site-specific liability cost estimate.

If a licensee's deemed liabilities in these three programs exceed its deemed assets in these programs plus any previously provided security deposits (including facility-specific security deposits), it has a security-adjusted LMR below 1.0 and is required to provide the AER with a security deposit for the difference.

A security deposit determined as a result of an LMR assessment is required to minimize the possibility of the licensee's suspension, abandonment, remediation, and reclamation costs being borne by the Orphan Fund.

For LMR calculation purposes, 100 per cent of the deemed assets and 100 per cent of the deemed liabilities of a well or facility for which it is the licensee are attributed to the licensee.

## 6 LMR Security Deposit Requirements

The AER conducts its LMR assessment on the first Saturday of each month, following receipt of updated production information from Petrinex.

A licensee required to provide the AER with a security deposit as a result of a monthly LMR and transfer assessment will be advised in writing of the amount of the security deposit required and the date by which the security deposit must be received. The date specified for payment of a monthly LMR assessment is ordinarily the Friday before the first Saturday of the following month.

If a licensee in the LLR, LFP, or OWL programs becomes defunct:

- any non-facility-specific LMR security deposit held by the AER will be allocated to address its unfunded suspension, abandonment, remediation, or reclamation liability in each program in which it had liability in proportion to its deemed liability in each program; and
- any facility-specific security deposit held by the AER will be applied first to the facility for which it was collected, with any surplus being available for any unfunded liability held by the licensee.

The AER's requirements with respect to the form, use, and refund of security deposits provided under a liability management program are in *Directive 068: ERCB Security Deposits.*

A licensee can view information on the type and amount of any security deposit it has with the AER through Systems & Tools > Digital Data Submission > Reports > Liability Rating on the AER website, www.aer.ca, using its DDS Logon ID and password.

## 7 Orphan Program and Fund

The Orphan Fund will pay the costs to suspend, abandon, remediate, and reclaim a well, facility, or pipeline included in the LLR Program if a licensee or working interest participant (WIP) becomes defunct.

The Orphan Fund is fully funded by licensees in the LLR Program and licensees holding Waste Management (WM) approvals and licences included in the OWL Program through a levy administered by the AER.

The Orphan Fund is administered by the Alberta Oil and Gas Orphan Abandonment and Reclamation Association (OWA), a nonprofit society incorporated under the *Societies Act* on March 20, 2001.

### 7.1 Orphan Site

A well, facility, or pipeline in the LLR program is eligible to be declared an orphan when the licensee of that licence becomes insolvent or defunct. Once it determines a well, facility, or pipeline meets the criteria outlined in section 70(2) of the *Oil and Gas Conservation Act*, the AER will designate it as an orphan. The well, facility, or pipeline will then be considered to be an orphan for all aspects of this program: suspension, abandonment, remediation, and reclamation.

### 7.2 LLR and OWL Orphan Levy Base and Formula

A licensee in the LLR or OWL Program is responsible for its percentage of any orphan levy calculated as the sum of the deemed liability of its licences in the LLR and OWL programs to the total liability of all licences in the LLR and OWL programs as of the date the levy is calculated, in accordance with the following formula:

$$\text{Licensee's share of levy} = \frac{\text{A}}{\text{B}} \times \text{Required levy amount}$$

where

- A is the licensee's deemed liability in the LLR and OWL programs on the date the levy is calculated, determined in accordance with this directive and *Directive 075,* and
- B is the deemed liability of all licences in the LLR and OWL programs on the date the levy is calculated, determined in accordance with this directive and *Directive 075.*

The deemed liability of licences in the LFP is tracked and, as required, assessed separately, as the LFP has a separate and distinct orphan levy base.

### 7.3 OWL NPL Levy

NPLs in the OWL Program are subject to an additional transitional levy, which is detailed in *Directive 075.*

## 8 LLR Program Administration

### 8.1 Program Operation

Detailed information on the operation of the LLR Program is in appendices 2 through 6.

### 8.2 Confidentiality

The AER will hold as confidential the information submitted to or acquired by the AER for the purpose of conducting an LMR assessment. The AER will post only the licensee's security-adjusted LMR on its website.

### 8.3 Program Review

The AER will continually monitor the LLR Program to ensure that it is achieving its desired outcome and is protecting both the public interest and the Orphan Fund.

# Appendix 1 Licence Types Included in the LLR Program and Protected by the Orphan Fund

## 1 LLR Program and Orphan Fund Inclusions

The following upstream oil and gas wells, facilities, and pipelines are protected by the Orphan Fund and included in the LLR Program:

**Wells (code from *Directive 056: Energy Development Applications and Schedules* provided in brackets)**

- oil, gas, and bitumen wells (140, 150, 280, 290, 360, 370, 570, 610, 620, 621, 622)
- injection wells
- disposal wells Class I(b), II, III, and IV
- gas storage wells
- oilfield source water wells (141)
- observation wells
- brine wells
- liquefied petroleum gas (LPG) wells

The following upstream oil and gas wells, while protected by the Orphan Fund, are not administered in the LLR Program:

- oil and gas wells drilled by industry and transferred as a farm gas well
- unlicensed sites associated with oilfield activities (e.g., remote sumps)

**Facilities (*Directive 056* code provided in brackets)**

- gas, oil, and bitumen batteries, single or multiwell (020, 030, 031, 310, 311, 320, 321, 330, 331, 410, 411, 420, 421, 430, 431)
- gas processing and fractionating plants (010, 011, 300, 301, 400, 401)
- sulphur recovery gas plants licensed under *Directive 056* as a Facility Category Type 300 (producing less than 1 ton of sulphur per day)
- oil sands central processing facilities having a design capacity of less than 5000 cubic metres ($m^3$) per day
- compressor stations, except those that are part of an oil or gas transmission pipeline (040, 340, 440)
- custom treating facilities (080)

- injection/disposal facilities—water (090)
- injection/disposal facilities—enhanced oil recovery (EOR) (091)
- oil and bitumen satellites, single or multiwell (070, 071, 350, 351, 450, 451)
- line heaters (352, 470)
- oilfield waste management components that do not require a waste management approval

**Pipelines**

- oil and gas pipelines other than transmission lines

## 2 LLR Program and Orphan Fund Exclusions

The following wells, facilities, and pipelines are excluded from the LLR Program and Orphan Fund:

**Wells (*Directive 056* code provided in brackets)**

- wells designated as contaminated under section 110 of the *Environmental Protection and Enhancement Act*
- water wells less than 150 m (licensed in error)
- municipal water wells
- domestic and farm water wells
- test holes
- industrial waste disposal wells, Class 1(a)
- oil sands evaluation (OV Lahee Class 11)
- farm and domestic gas wells **not** drilled by industry as an oil or gas well
- training wells (if there is no penetration of a hydrocarbon formation and they are used solely for the testing of downhole tools and/or training of personnel to use such tools)

**Facilities (*Directive 056* code provided in brackets)**

- facilities designated as contaminated under section 110 of the *Environmental Protection and Enhancement Act*
- mine site or coal processing plant as defined in the *Coal Conservation Act*
- mine site or processing plant as defined in the *Oil Sands Conservation Rules*
- oil sands central processing facilities having a design capacity of 5000 $m^3$/day or greater

- sulphur recovery facilities (600), except those licensed under *Directive 056* as a Facility Category Type 300 (producing less than 1 ton of sulphur per day)
- oilfield waste management facilities that require a Waste Management Approval (see *ID 2000-03)*
- standalone straddle plants (200, 302)
- refineries as defined in the *Pipeline Act*
- sites on which a sulphur recovery straddle plant or oil sands central processing facility having a design capacity of 5000 $m^3$/day or greater previously existed
- facilities listed in the *Oil and Gas Conservation Rules* as exempt from this program

**Pipelines**

- gas transmission pipelines and associated compression and measurement facilities licensed to the licensee of the pipeline
- oil transmission pipelines and associated storage, pumping, and measurement facilities licensed to the licensee of the pipeline

## Appendix 2 Licence Status Change Notification Process

The AER requires accurate information on the operational status of wells, facilities, and pipelines to correctly determine their abandonment and reclamation liability in monthly LMR and transfer assessments and for use in the orphan levy calculation. Accordingly, licensees must notify AER Liability Management within 30 days when a gas plant licence is amended to an operating function other than a gas plant (i.e., compressor station, battery). The liability cost of a gas plant is based upon the current submitted site-specific liability assessment (SSLA). A gas plant's liability cost does not change when the licence is amended, the liability only changes when a new SSLA is accepted by the AER.

### 1 Electronic Submission of Notification

A licence status change notification must be submitted electronically through the AER's Digital Data Submission (DDS) system and the appropriate subsystem. Facility abandonment notifications, linked facility notifications, and well licence name change notifications are submitted using the Licence Notification System (LNS) subsystem, while multiwell pad notifications are submitted on the Multi Licence Pad (MLP) subsystem.

### 2 Well and Facility Abandonment Notification

A licensee must notify the AER within 30 days of the completion of the abandonment of a licensed well or facility. A licensee is required to identify all WIPs in the well or facility at the time of abandonment, with WIP participation totalling 100 per cent.

### 3 Linked Facility Notification

*Directive 056* permits a licensee to "link" a nonproduction reporting facility to the first downstream production reporting facility to which it delivers product. A nonproduction reporting facility can only be linked to one production reporting facility at a time, while a reporting facility may have more than one nonproduction reporting facility linked to it.

### 4 Well Name Change Notification

The AER does not use well names and encourages licensees not to submit a well name change notification. At this time, however, a licensee remains able to submit a well name change notification to the AER through the LNS subsystem. A proposed well name change must be consistent with the *Oil and Gas Conservation Rules*. The AER does not accept notification of facility name or facility name changes.

### 5 Multiwell Pad Notification

A licensee may establish a multiwell pad for those sites on which it has more than one well on a single surface lease. Both the well licences and the surface lease must be held by the same licensee.

The establishment of a multiwell pad provides for a reduction in the reclamation liability of the wells located on the pad. (Refer to appendix 5, “Deemed Liabilities,” for details of this calculation.)

## Appendix 3 LMR and LLR Assessment Formulas

### 1) Calculation of LMR Rating

The following LMR formula is applicable to producer licensees in the LLR Program:

$$\text{LMR} = \frac{\text{DA in LLR}}{\text{DL in LLR} + \text{DL in LFP (if any)} + \text{DL in OWL (if any)}}$$

where

DA = deemed assets

DL = deemed liabilities

The following LMR formula is applicable to NPL and eligible producer licensees in the LLR:

$$\text{LMR} = \frac{\text{DA in LLR} + \text{DA in LFP (if any)} + \text{DA in OWL (if any)}}{\text{DL in LLR} + \text{DL in LFP (if any)} + \text{DL in OWL (if any)}}$$

The calculation of a licensee's deemed assets and deemed liabilities in the LLR are detailed in appendix 4, "Deemed Assets," and appendix 5, "Deemed Liabilities."

### 2) Calculation of LLR

The following LLR formula is applicable to producer licensees in the LLR Program:

$$\text{LLR} = \frac{\text{m}^3\text{OE} \times \text{Industry netback} \times 3 \text{ years}}{\text{Sum of the deemed liabilities}}$$

The following LLR formula is applicable to NPLs and eligible producer licensees in the LLR Program:

$$\mathbf{LLR} = \frac{(\mathbf{NPL\ vol.} \times \mathbf{Licensee\ netback} \times \mathbf{3\ years}) + (\mathbf{m^3OE\ (if\ any)} \times \mathbf{Industry\ netback} \times \mathbf{3\ years})}{\mathbf{Sum\ of\ the\ deemed\ liabilities}}$$

## Appendix 4 Deemed Assets

The deemed assets of a producer licensee, eligible producer licensee, and nonproducer licensee (NPL), while based on the same principles and methodology, are determined using different parameters and volumes.

### 1 Producer Licensee

The deemed assets of a producer licensee is the cash flow derived from oil and gas production reported to Petrinex from wells for which it is the licensee. Deemed assets are calculated by multiplying a licensee's reported production of oil and gas from the preceding 12 calendar months in cubic metres oil equivalent ($m^3$ OE) by the 3-year average industry netback by 3 years, where

- *$m^3$ OE* is defined as the 12-month production of oil plus gas volumes reduced by a *shrinkage factor* (sales gas) and a gas/oil *($m^3$ OE) conversion factor*. Crude oil, bitumen, and field condensate are treated as oil. Natural gas liquid revenue is included in the gas revenue. Sulphur is excluded.
- The *shrinkage factor* is a rolling 3-year provincial industry average.
- The *$m^3$ OE conversion factor* is a rolling 3-year provincial industry average.
- *Industry netback* is a rolling 3-year provincial industry average netback.

The current *shrinkage factor*, *$m^3$ OE conversion factor*, and *industry netback* factors are in *Directive 011*. These parameters will be updated as appropriate and in conjunction with updated deemed liability parameters.

The AER's use of production information reported to Petrinex results in a 2-month delay between the last day of a production month and the date that month's production is available for use in the LLR calculation. This delay accommodates the late submission of production information and subsequent data corrections.

### 2 Eligible Producer Licensees

The deemed asset of an eligible producer licensee is the sum of its cash flow derived from oil and gas production reported to Petrinex from wells for which it is the licensee calculated in accordance with section 1, and the cash flow derived from midstream activity from wells or facilities for which it is the licensee calculated in accordance with section 3.

### 3 Nonproducer Licensees

Due to the limited number of licensees in this industry subsector and the mix of public and private companies, the determination of an industry average netback is not possible. As a result, each NPL must calculate its own netback and have it reviewed and approved by the AER annually.

An NPL must submit its request for an approval of a netback to the AER on the designated form (appendix 11), together with all required supporting documentation. The AER treats financial information submitted in support of an NPL netback as confidential. An approved netback is valid for a 12-month period, commencing the month it was approved by the AER. An NPL must submit a request for approval of its netback for the following year 30 days before the expiry of its approved 12-month period.

Failure to submit or to obtain AER approval of its netback will result in the NPL's netback being set at $0.00 and the requirement for the NPL to place a security deposit with the AER to offset all of the NPL's calculated deemed liability.

An NPL not prepared to provide the financial information required by the AER to verify a netback calculation must submit a security deposit for 100 per cent of its deemed liability.

The deemed asset of an NPL is the sum of the cash flow derived from facility throughput of water injection/disposal, oil processing, and gas processing reported to Petrinex from facilities for which it is the licensee, and the cash flow derived from oil and gas production reported to Petrinex from any well for which it is the licensee.

The deemed asset of an NPL is calculated by multiplying the NPL volume from the preceding 12 calendar months by the NPL's netback by 3 years, where

- *NPL volume* is defined as the 12-month volume of oil, gas, and water processed or injected through the licensee's facilities (an NPL processing oil or gas from wells for which it is the licensee must subtract these volumes in its NPL deemed asset calculation), and
- *NPL netback* is defined as the NPL's net profit per unit of volume processed or injected.

If an NPL has oil or gas production, the cash flow derived from those volumes will be determined in accordance with section 1 using the **industry average netback** and will be included in the deemed asset calculation.

### 4 Calculating Deemed Assets—Gas Storage Operators

Because gas storage wells may report either production or injection on a monthly basis, a means of including an appropriate asset value in the calculation of deemed assets is needed. A licensee operating a gas storage facility is required to identify storage wells that form part of a particular storage facility and to report the minimum operating pressure and the storage facility production rate at that pressure as part of its annual storage filing with the AER.

A licensee operating a gas storage facility is to add its $m^3$ OE for AER-approved storage facilities, instead of its actual production from these wells, to its $m^3$ OE.

*$m^3$ OE for AER-approved storage facilities* is defined as the production rate that a licensee's storage facilities would be capable of at the minimum reservoir pressure experienced in the previous storage facility reporting period.

## 5 Gas Plants Having a *Directive 001* Liability Assessment

An NPL having a gas plant on which the AER has accepted a liability assessment meeting the requirements of *Directive 001* may calculate the deemed asset value of that gas plant using a facility-specific netback. An NPL exercising this option must provide the AER with a completed Facility Netback Calculation Form (appendix 11) and required supporting documentation. Should an NPL exercising this option already have an approved licensee netback, it must provide the AER with an updated Nonproducer Licensee Netback Calculation Form (appendix 9) that excludes any volumes associated with that facility, as well as any required documentation.

## Appendix 5 Deemed Liabilities

The deemed liability of a producer licensee, eligible producer licensee, and nonproducer licensee (NPL) is determined in the same manner. The deemed liability of a licensee is the sum of the costs to suspend, abandon, remediate, and reclaim all wells and facilities for which it is the licensee, adjusted for status (active, inactive, abandoned, and problem site designation).

### 1 Definitions

For the purpose of the LLR Program, terms are defined as follows:

- *Active well* is a well that has reported an operation (production or injection) to Petrinex in the last 12 calendar months or is classified as an observation well by the AER.
- *Active facility* is a facility that has reported an operation (throughput) to Petrinex in the last 12 calendar months or is a nonproduction reporting facility linked to an active facility.
- *Inactive well* is a well that has not reported an operation (production or injection) to Petrinex in the last 12 calendar months.
- *Inactive facility* is a facility that has not reported throughput to Petrinex in the last 12 calendar months or is a nonproduction reporting facility that has not been linked or that has been linked to an inactive facility.
- *Abandoned unreclaimed well* is a well that according to the records of the AER has been "surface abandoned" but is not in receipt of a reclamation certificate or its equivalent from the appropriate regulatory authority.
- *Abandoned unreclaimed facility* is a facility that according to the records of the AER has been abandoned but is not in receipt of a reclamation certificate or its equivalent from the appropriate regulatory authority.
- *Gas plant* is a facility licensed by the AER through *Directive 056* as a gas processing or gas fractionating plant (codes 010, 011, 300, 301, 400, 401) that is not included in the Large Facility Liability Management Program.
- *Potential problem site* is a site identified by the AER as having
  - a potential abandonment liability equal to or greater than 4 times the amount normally calculated for that type of site in that regional abandonment cost area, or
  - a potential reclamation liability equal to or greater than 4 times the amount normally calculated for that type of site in that regional reclamation cost area.
- *Designated problem site* is a site designated by the AER on the basis of a cost estimate determined from an assessment conducted according to *Directive 001* that shows that the site's

  - abandonment liability equals or exceeds 4 times the amount normally calculated for that type of site in that regional abandonment cost area, or
  - reclamation liability equals or exceeds 4 times the amount normally calculated for that type of site in that regional reclamation cost area.

- *Facility Well Equivalent Table* is the table below that provides the well equivalent for each facility based on its category or fluid type and licensed design capacity:

**Facility Well Equivalent Table**

| Category/Fluid Type | Licensed Design Capacity | Well Equivalent |
|---|---|---|
| Oil/bitumen processing or injection/disposal facility | 0-50 $m^3$ fluid/day | 5 |
| | > 50 $m^3$ ≤500 $m^3$/day | 10 |
| | > 500 $m^3$ ≤3000 $m^3$/day | 20 |
| | > 3000 $m^3$ /day | 40 |
| Oil/bitumen satellite | Any throughput level | 2 |
| Line heaters | Any throughput levels | 2 |
| Gas processing facility | 0-900 $10^3$ $m^3$ gas inlet/day | 10 |
| | >900 $10^3$ $m^3$ /day ≤ 2500 $10^3$ $m^3$/day | 20 |
| | >2500 $10^3$ $m^3$ /day | 40 |
| Gas (compressor, dehydration, etc.) facility | Any throughput level | 5 |

- *New well* is a well that has not been abandoned within 12 calendar months of its finished drilling date.
- *New facility* is a facility that has not reported throughput or been abandoned within 12 calendar months of its licence approval date.
- *Non-gas plant* is any facility licensed by the AER through *Directive 056* not having a facility type description of gas processing plant or gas fractionating plant.
- *Abandonment cost estimate acceptable to the AER* is an abandonment cost estimate based on a site-specific liability assessment conducted according to *Directive 001* and submitted to the AER in the specified level of detail.
- *Reclamation cost estimate acceptable to the AER* is a reclamation cost based on a site-specific liability assessment conducted according to *Directive 001* and submitted to the AER in the specified level of detail.

- *Regional Abandonment Cost Map* is the map provided as appendix 7. This map illustrates the boundaries of the geographic regions for which average well abandonment costs are determined.
- *Regional Reclamation Cost Map* is the map provided as appendix 8. This map illustrates the boundaries of the geographic regions for which average well and facility well equivalent costs are determined.

## 2 Calculation of Deemed Liability

While the deemed liability of a well or facility includes the costs to suspend, abandon, remediate, and reclaim the site, this liability is captured under the terms abandonment and reclamation.

### 2.1 Deemed Liability of a Well

The deemed liability of a well is the sum of its abandonment and reclamation liability. The liability for an abandoned but uncertified or unreclaimed well is solely its reclamation cost.

The abandonment liability of a well is determined on a site-specific basis using the AER's licence cost processing program. It estimates the cost to abandon a well based on the depth of the well, the number of events requiring abandonment, the requirement for groundwater protection, and whether there is gas migration or surface casing vent flows. The wellbore configuration is based on the current operational status of the well (e.g., "crude oil pumping" considers the well to have tubing and rods) or, in the case of a suspended well, the last reported operational status issued. The requirement for groundwater protection is included in the calculation if the surface casing depth is less than the deepest aquifer requiring protection.

The reclamation liability of a well is the cost specified by the Regional Reclamation Cost Map for the area in which the well is located.

#### 2.1.1 Deemed Liability of a New Well

A new well, as defined in this directive, will not have its deemed liability included in its LLR calculation until the earlier of its abandonment date or 12 calendar months from its finished drilling date.

#### 2.1.2 Deemed Liability of a Multiwell Pad

The abandonment liability for wells located on a multiwell pad is the sum of the abandonment liability calculated for each well located on the pad. The reclamation liability for wells located on a multiwell pad is 100 per cent of the reclamation cost specified for a well in the Regional Reclamation Cost Map area in which the pad is located for the first well plus 10 per cent of that value for each additional well on the same pad.

### 2.2 Deemed Liability of a Non-Gas Plant Facility

The deemed liability of a non-gas plant facility is the sum of its abandonment liability plus its reclamation liability. The liability for an abandoned but uncertified or unreclaimed facility is solely its reclamation cost.

The abandonment liability of a non-gas plant facility is determined by multiplying its well equivalent, determined from the Facility Well Equivalent Table, by the well equivalent cost.

The reclamation liability of a non-gas plant facility is determined by multiplying its well equivalent, determined from the Facility Well Equivalent Table, by the cost specified by the Regional Reclamation Cost Map for the area in which the facility is located.

### 2.3 Deemed Liability of a Gas Plant

The cost estimates must be the total undiscounted current-day estimates for suspension, abandonment, remediation, and reclamation.

The deemed liability of a 40-well-equivalent gas plant is the cost estimate based on a site-specific liability assessment meeting the requirements of *Directive 001* provided by the licensee and accepted by the AER.

The deemed liability of a 20-well-equivalent gas plant is the cost estimate based on a site-specific Phase I environmental site assessment, with additional work to a Phase II environmental site assessment standard where required by the results of the Phase I assessment, that is provided by the licensee and accepted by the AER.

The deemed liability of a 10-well-equivalent gas plant is the cost estimate based on a site-specific liability assessment meeting Canadian Institute of Chartered Accountants (CICA) standards that is provided by the licensee and accepted by the AER.

**Gas Plant Cost Estimates**

All site-specific liability assessments provided for gas plants must be completed using the Facility Liability Declaration Form (appendix 10) and submitted electronically to the AER through its DDS system.

Gas plant cost estimates must reflect the total undiscounted current-day cost to suspend, abandon, remediate, and reclaim the site, and identify any seller-retained liability.

The AER will review submitted Facility Liability Declaration Forms; if the AER considers that a facility cost estimate deviates significantly from that of similar facilities, it may require the licensee to provide all supporting documentation on which the cost estimate was based and conduct a detailed review of the cost estimate and documentation.

### 2.4 Deemed Liability of a Facility

#### 2.4.1 Deemed Liability of a Linked Facility

In accordance with *Directive 056*, a nonproduction reporting facility (satellite, compressor) **may** be "linked" to the first downstream production reporting facility to which it delivers product. The linked nonproduction reporting entity receives the active or inactive status of the production reporting entity to which it is linked. A nonreporting facility that is not linked to a production reporting entity will be identified as inactive.

#### 2.4.2 Deemed Liability of a New Facility

A new facility, as defined in this directive, will not have its deemed abandonment and reclamation liability included in its LLR calculation until the earliest of its first reported throughput, abandonment date, or 12 calendar months from its licence approval date.

### 2.5 Pipelines

A pipeline licence is not considered in the calculation of deemed liabilities unless it is a designated problem site.

### 2.6 Problem Sites

#### 2.6.1 Potential Problem Site

A "potential problem site" is identified by the AER through an on-site inspection. This inspection may be conducted in the course of normal AER field activities or in response to a request from a landowner. If an inspection indicates that a site's abandonment or reclamation liability equals or exceeds 4 times the amount normally calculated for that type of site in that abandonment or reclamation region, the site will be classified as a potential problem site. See *Directive 001* for conditions that may result in this classification.

The AER will advise a licensee of any site identified as a potential problem site and provide the licensee with an opportunity to respond to the identification. If a licensee cannot establish that the potential problem site identification was in error, the licensee must have a site-specific liability assessment conducted on the site in accordance with AER *Directive 001* at its expense and within the time period specified by the AER.

If a site-specific liability assessment acceptable to the AER is conducted on a potential problem site and the assessment confirms that site has an abandonment liability less than 4 times the cost determined by the Regional Abandonment Cost Map or a reclamation liability less than 4 times the cost determined by the Regional Reclamation Cost Map, the potential problem site classification will be removed.

If a site-specific liability assessment acceptable to the AER is conducted on a potential problem site and the assessment confirms that the site has an abandonment liability equal to or greater than 4 times the cost determined by the Regional Abandonment Cost Map or a reclamation liability equal to or greater than 4 times the cost determined by the Regional Reclamation Cost Map, the site will be classified as a "designated problem site." That designation will remain in effect until abandonment or reclamation work has been conducted on the site and a subsequent site-specific liability assessment acceptable to the AER estimates the associated costs at less than 4 times the amounts normally calculated for that site. The deemed liability of a former designated problem site will subsequently be the new estimated amount.

The costs determined from a site-specific liability assessment accepted by the AER will be used in calculating the deemed liability of the assessed site regardless of whether those costs are higher or lower than those that would ordinarily be determined by the LLR formula.

While the liability assessment is being prepared, for monthly LMR assessment purposes the liability of a potential problem site is calculated as if it were not a potential problem site.

For licence transfer assessment purposes, the liability calculated for a potential problem site included in an application is

- the sum of its calculated abandonment cost and 20 times the reclamation cost for that type of site in that reclamation cost area where a site-specific reclamation assessment is required, or
- the sum of its calculated reclamation cost and 20 times the abandonment cost for that type of site in that abandonment cost area where a site-specific abandonment assessment is required, or
- the sum of 20 times the abandonment cost for that type of site in that abandonment cost area and 20 times the reclamation cost for that type of site in that reclamation cost where a site-specific abandonment and reclamation assessment is required.

A licensee acquiring a potential problem site will have the site's liability calculated at this higher rate for monthly LMR and transfer assessments until the potential problem site identification is removed or converted to a designated problem site.

If a licensee of a potential problem site proposes to transfer a well and/or facility licence to another party while remaining the licensee of the potential problem site, the AER will assess whether approval of the transfer will result in the transferor having sufficient deemed assets to address the liability of the potential problem site and whether approval of the proposed licence transfer application is in the public interest.

### 2.6.2 Voluntary Disclosure of a Potential Problem Site

A licensee may voluntarily advise the AER of a potential problem site and, in so doing, propose its own schedule for completing a liability assessment conducted according to *Directive 001*. Self-disclosure of a potential problem site by a licensee enables the AER to develop a more comprehensive inventory of higher liability sites. A licensee advising the AER of potential problem sites is ordinarily permitted to conduct the site-specific liability assessment on the identified site in accordance with its own schedule and is not required to conduct a site-specific assessment within a specified period of time. The voluntary identification of a potential problem site by a licensee does not preclude the AER from requiring a site-specific liability assessment to be conducted within a specified period if it is in the public interest.

While the liability assessment is being prepared, for monthly LMR assessment purposes the liability of a self-disclosed potential problem site is calculated as if it were not a potential problem site. For transfer assessment purposes, the liability of a self-disclosed potential problem site is calculated in the same manner as a potential problem site identified by the AER. Once reviewed and accepted by the AER, the costs estimated from the site-specific assessment are used in calculating the deemed liability of the assessed site.

### 2.6.3 Designated Problem Site

If a site-specific liability assessment conducted on a potential problem site confirms that the site has an abandonment liability equal to or greater than 4 times the cost determined by the Regional Abandonment Cost Map or a reclamation liability equal to or greater than 4 times the cost determined by the Regional Reclamation Cost Map, the site will be classified as a designated problem site.

For monthly LMR and transfer assessment purposes, the deemed liability of a designated problem site is the sum of its abandonment liabilities determined by the LMR formula (unless a site-specific abandonment assessment was conducted) and its reclamation liability determined by the LLR formula (unless a site-specific reclamation assessment was conducted). Costs determined from a liability assessment accepted by the AER are used in place of the costs that would ordinarily be determined by the LMR formula.

## 3 Deemed Liability Parameter Updates

The AER will update and publish

- the costs to be used for each region of the Regional Abandonment Cost Map,
- the costs to be used for each region of the Regional Reclamation Cost Map,
- the costs to be used for the Licence Cost Processor, and
- the facility well equivalent cost

in conjunction with the updating of deemed asset parameters in *Directive 011*.

# Appendix 6 Variation of LLR Formula Parameters

## 1 Licensee-Initiated Request for Variation of an LLR Parameter

The LLR Program is based on the use of provincial and regional averages, and their use may not accurately reflect the deemed assets or deemed liabilities of a particular licensee. As a result, the AER will consider a request by a licensee that does not meet the LMR threshold of 1.0 for a variation of the following LLR parameters.

Any parameter variation request made under this section must be based upon licensee specific data for *all* parameters. This includes both deemed asset and deemed liability parameters for *all* wells and facilities and prevents licensees from only applying for variation of parameters believed to be high.

All site-specific liability assessments must be current and conducted in accordance with *Directive 001*.

The submission of a request for a variation does not eliminate or reduce a security deposit requirement determined by a monthly LMR or transfer assessment.

### 1.1 Licensee Netback

A licensee may request use of its own netback (including its own shrinkage and $m^3$ OE conversion factors) rather than the industry average netback in the LLR formula if it believes its average three-year netback is higher than the industry average netback.

A licensee requesting a variation of its netback must submit a letter requesting the variation, a completed Licensee Netback Calculation Form (appendix 9), and financial information acceptable to the AER supporting its three-year historical netback, shrinkage, or conversion values. If a licensee does not have three years of history, its netback must include the industry average for those years required to make up the three-year period.

If a licensee-specific netback is approved as a result of a variation request, the approved netback will be used for the month the variation was approved and for each subsequent month until the industry average netback is updated by the AER. A licensee may request another variation of its netback after the industry netback has been updated, provided that its LMR remains below 1.0.

### 1.2 Well Abandonment Liability

A licensee may request the use of site-specific well abandonment costs rather than those determined by the AER's licence cost processing program in the LLR formula if it believes these more accurately reflect actual abandonment costs.

Well abandonment costs determined from a site-specific assessment acceptable to the AER will replace those determined by the LLR formula for the wells for the following three calendar years.

### 1.3 Well Reclamation Liability

A licensee may request the use of site-specific well reclamation costs rather than those determined by the Regional Reclamation Cost Map in the LLR formula if it believes these more accurately reflect actual reclamation costs.

Well reclamation costs determined from a site-specific assessment acceptable to the AER will replace those determined by the LLR formula for the wells for the following three calendar years.

### 1.4 Facility Abandonment Liability

A licensee may request that the AER accept the use of site-specific facility abandonment costs rather than those determined by the facility well equivalent and well equivalent cost factor in the LLR formula if it believes, and can establish to the AER's satisfaction, that these more accurately reflect actual abandonment costs.

If accepted and permitted by the AER, facility abandonment costs determined from a site-specific assessment acceptable to the AER will replace those determined by the LLR formula for the facilities for the following three calendar years.

### 1.5 Facility Reclamation Liability

A licensee may request the use of site-specific facility reclamation costs rather than those determined by the Regional Reclamation Cost Map in the LLR formula if it believes these more accurately reflect actual reclamation costs.

Facility reclamation costs determined from a site-specific assessment acceptable to the AER will replace those determined by the LLR formula for the facilities for the following three calendar years.

### 1.6 Outstanding Reclamation Certificate

A licensee may request a 50 per cent reduction in the reclamation liability determined for an abandoned well or facility by the LLR formula if all of the work required to obtain a reclamation certificate or its equivalent from the appropriate regulatory authority has been completed and the delay in obtaining a reclamation certificate is solely to re-establish vegetative cover.

A licensee requesting a variation of this assessment will be required to provide detailed reclamation cost estimates based on a site-specific assessment.

A reduction in a well's or facility's reclamation costs based on an assessment acceptable to the AER will replace those determined by the LLR formula for the well or facility for the next 12

calendar months. Should a reclamation certificate not be received within this period, a licensee may request another variation on such sites if it again does not meet the LMR threshold.

### 2 AER Review of LLR Parameters

The AER may initiate a detailed review of a licensee's LMR if it believes the LLR formula does not accurately reflect the licensee's deemed assets and/or deemed liabilities.

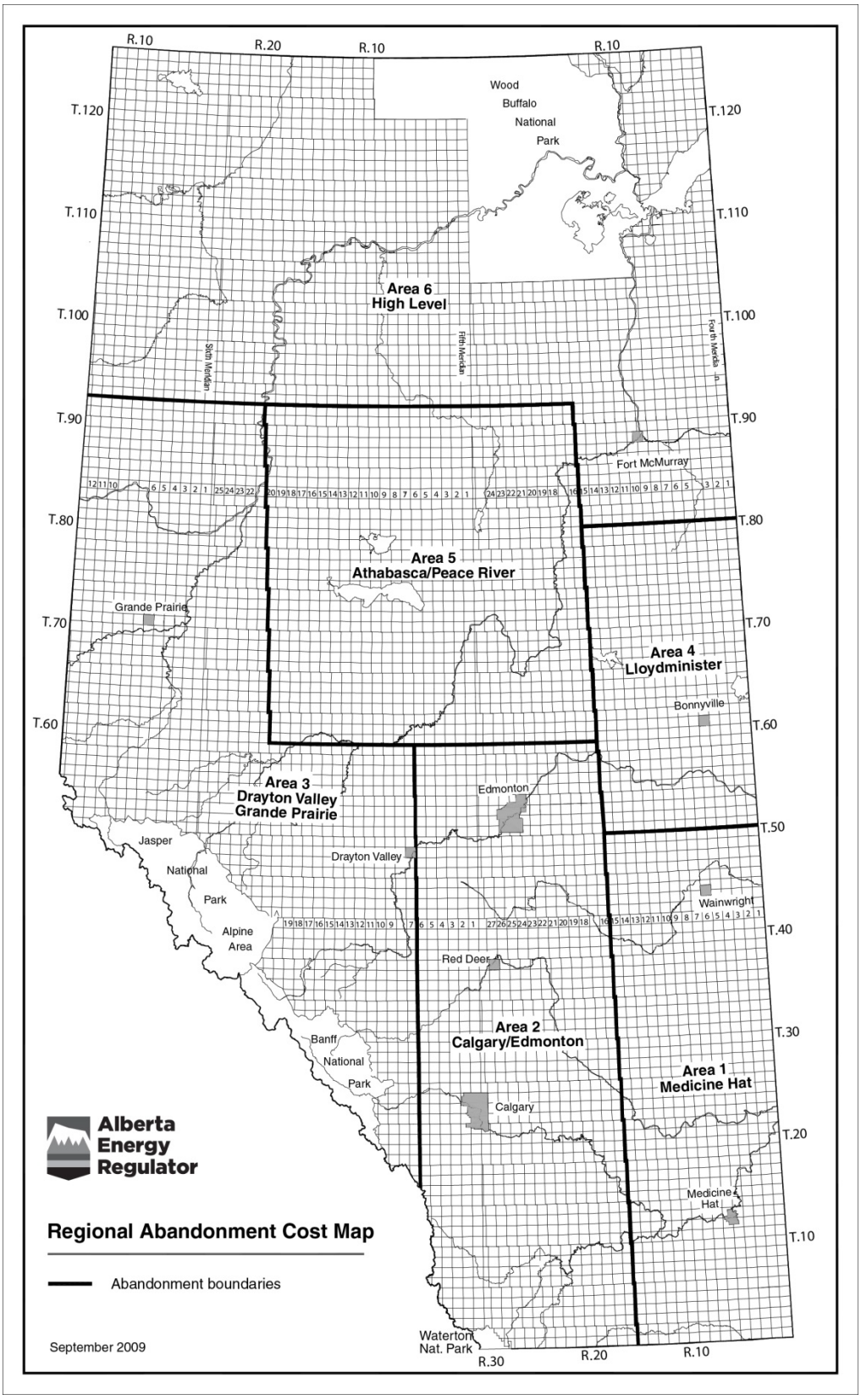
As part of its detailed review process, the AER may require information on all factors used by a licensee in determining its netback. If as a result of a detailed review the AER determines that a licensee's use of the industry average netback is not warranted, the licensee's netback will be used to calculate its LMR until the industry average netback is updated.

### 3 LLR Parameter Formula Variation Requests

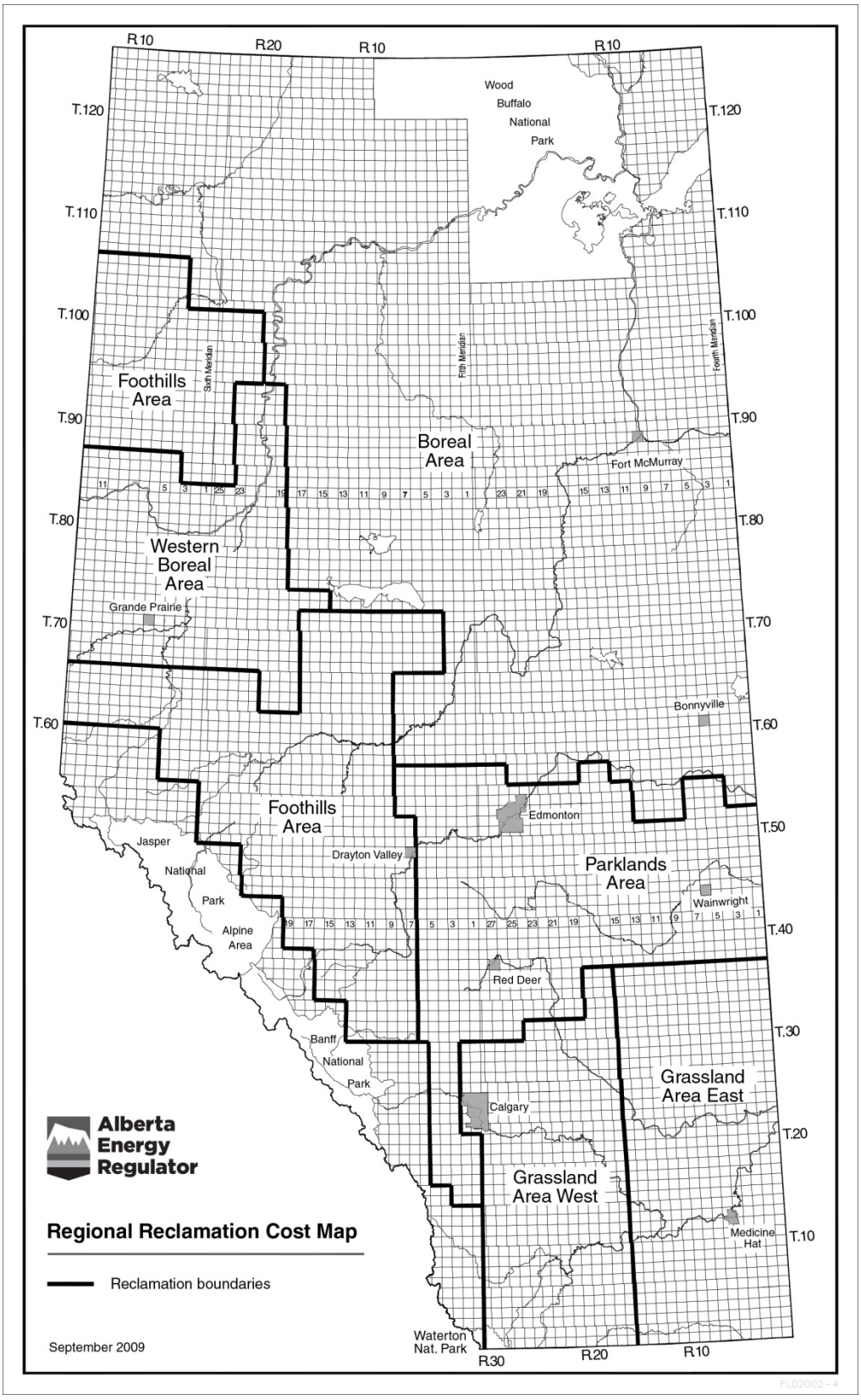
A licensee requesting a variation of LLR formula parameters must direct a written request and supporting documentation to the section leader of Liability Management.

Licensees requesting an LLR variation are not eligible for a waiver under section 4.2 of *Directive 001* when a Phase II ESA is required as part of a site-specific liability assessment.

## Appendix 7 Regional Abandonment Cost Map



## Appendix 8 Regional Reclamation Cost Map



## Appendix 9 Licensee Netback Calculation Form

The form is available at Regulating Development > Rules and Directives > AER Forms > Directive Forms > *Directive 006* > Appendix 9.

## Appendix 10 Facility Liability Declaration Form

The form is available at Regulating Development > Rules and Directives > AER Forms > Directive Forms > *Directive 006* > Appendix 10.

## Appendix 11 Facility Netback Calculation Form

The form is available at Regulating Development > Rules and Directives > AER Forms > Directive Forms > *Directive 006* > Appendix 11.

### Completing the Netback Calculation Form

- The AER must be able to clearly track the financial information provided on the Facility Netback Calculation Form back to the financial statements provided. An in-house profit-and-loss statement and/or an explanation of the methodology used to come up with the entries on the Facility Netback Calculation Form may be required.
- All entries reported on the Facility Netback Calculation Form must correspond to the same accounting time period as the company's corporate year-end financial statements.
- Excluded revenues are to be recorded in the "Other revenue or expense" column to reconcile totals with the company's corporate year-end financial statements.
- If the licensee's net revenue is negative for all the facilities that would normally be recorded on the Facility Netback Calculation Form, no netback submission is required, as an asset value will not be generated for a negative net revenue value.
- For the purpose of the netback submission, net revenue refers to earnings before interest, taxes, and depreciation and is equal to gross margin (midstream revenue less cost of goods sold) less direct operating costs and applicable general and administrative costs.
- The netback under liability management programs is intended to represent the net revenue value that a similar midstream licensee could achieve if it operated the same midstream facility. Therefore, revenue and expense items that would not be typical of facility operations should be excluded from the netback calculations.
- "Corporate Officer" is a position listed in the corporation's bylaws and ordinarily includes president, vice president, treasurer, and secretary.

**NPL Volumes**

- *Directive 006* (LLR) and *Directive 024* (LFP) – "NPL volumes" refers to the total received inlet volumes reported to Petrinex against the reporting facility ID codes attached to your facility licences. Report only third-party volumes from which you generate revenue. Volumes from a licensee's own production are not to be included.
- *Directive 075* (OWL) – "NPL volumes" refers to the volume of material that has been removed from a facility and/or disposed of permanently at a facility via deep well disposal that was initially received as industrial or oilfield waste.

**Large Facility Program (LFP)**

- *Directive 024* LFP submissions for straddle plants require a five-year average netback. List each of the five years separately using the format in Part B. Submit the corresponding financial documentation for the most recent year-end. If five years' worth of financial information is not available for a facility, the AER will use the average for the number of years that a licensee has owned the facility until such time as a five-year average is available.

**Oilfield Waste Liability (OWL) Program**

- The first waste management (WM) facility that receives the waste volumes is the facility that is to record the revenue for netback calculation purposes. The volumes reported must correspond to the same accounting period as the licensee's most recent year-end.
- Under Petrinex, produced water going to a waste plant (WP) gets reported to the WP. Therefore, for those instances where the produced water is reported to a WP, the first WM facility that receives the produced water is the facility that is to record the volume and corresponding facility-specific netback for those volumes. The netback would not be reflected in the LLR Program in these instances.

Direct any questions by email to LiabilityManagement@aer.ca or by phone to the Liability Management help line at 403-297-3113.

# TAB 6

# Directive 067

**Release date: April 7, 2021**

**Effective date: April 7, 2021**

**Replaces previous edition issued December 6, 2017**

## Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals

### Contents



## 1 Introduction

Acquiring and holding a licence or approval for energy development in Alberta is a privilege, not a right. The *Oil and Gas Conservation Act*, *Pipeline Act*, *Oil and Gas Conservation Rules*, and *Pipeline Rules* contain requirements related to eligibility for acquiring and holding licences and approvals. This directive expands on those requirements.

This new edition increases the scrutiny the AER applies to ensure that this privilege is only granted to and maintained by responsible parties throughout the energy development life cycle

Changes in this edition include requiring additional information, particularly financial information, at the time of application and throughout the energy development life cycle to enable the AER to

- assess licensee eligibility,
- assess the capabilities of licensees and approval holders to meet their regulatory and liability obligations throughout the energy development life cycle,
- administer our liability management programs, and
- ensure the safe, orderly, and environmentally responsible development of energy resources in Alberta throughout their life cycle.

## 2 Business Associate Codes

The *Oil and Gas Conservation Act* and *Pipeline Act* require that a person (which includes a corporation) hold a subsisting identification code in order to apply to the AER for a licence or approval under those acts. The AER has referred to these as business associate (BA) codes. The AER no longer issues BA codes. These are issued through Petrinex.

1) Any party that seeks to apply for and hold AER licences or approvals must first apply for and obtain a BA code through Petrinex (www.petrinex.ca). Parties who hold a BA code are not permitted to hold AER licences or approvals unless the AER has determined they are eligible to do so.

## 3 Licence Eligibility Types

The AER may grant licence eligibility with or without restrictions, terms, and conditions, or it may refuse to grant licence eligibility. There are three eligibility types:

- **No Eligibility:** Not eligible to acquire or hold licences or approvals for wells, facilities, or pipelines.
- **General Eligibility:** Eligible to acquire or hold licences and approvals for all types of wells, facilities, and pipelines.
- **Limited Eligibility:** Eligible to acquire or hold only certain types of licences and approvals, or eligibility is subject to certain terms and conditions.

Restrictions, terms, and conditions may include

- the types of licences or approvals that may be held,
- the number of licences or approvals that may be held,
- additional scrutiny required at time of application for or transfer of a licence or approval,
- requirement to provide security,
- requirements regarding the minimum or maximum working interest percentage permitted,
- a requirement to address outstanding noncompliances of current or former AER licensees that are directly or indirectly associated with the applicant or its directors, officers, or shareholders, and
- anything else the AER considers appropriate in the circumstances.

## 4 Obtaining General Licence Eligibility

Once a person has a BA code, they may apply to the AER for licence eligibility by submitting schedules 1 and 3 (and 2, if applicable) through the designated information submission system. Upon review of the information provided, the AER may request additional information, including reserves information. The AER may audit the information provided for accuracy and completeness at any time before or after granting eligibility.

Requests for licence eligibility that do not contain all the information required will be summarily closed.

The AER will assess the information provided in the application, along with any other relevant information, and will determine whether the applicant meets the eligibility requirements for acquiring and holding AER licences or approvals.

2) An applicant must be an individual or a corporation that meets the requirements of section 20 of the *Oil and Gas Conservation Act* or section 21 of the *Pipeline Act*.

3) An applicant must sign a declaration attesting to the truth and completeness of the application, consenting to the release and collection of compliance information regarding the applicant from other jurisdictions and regulators as applicable, and attorning to the jurisdiction of Alberta (Schedule 1).

### 4.1 Residency Requirements

4) An applicant must

   a) be resident in Alberta, as defined in section 1.020(2.1) of the *Oil and Gas Conservation Rules* and section 1(6) of the *Pipeline Rules*; or

b) appoint an agent that is resident in Alberta (schedule 2) and have that appointment approved by the AER, as required by section 91 of the *Oil and Gas Conservation Act* and section 19 of the *Pipeline Act*; or

c) be exempt from the resident/agent requirement (granted under specific circumstances set out in section 1.030 of the *Oil and Gas Conservation Rules* and section 1.1 of the *Pipeline Rules*).

For these purposes, "resident" means,

- in the case of an individual, having their home in and being ordinarily present in Alberta or,
- in the case of a corporation, having a director, officer, or employee that has their home in and is ordinarily present in Alberta and is authorized to makes decisions about the licensing and operating of the well, pipeline, or facility and about implementing the directions of the AER regarding the well, pipeline, or facility.

5) Both the applicant and the agent (if appointed) must meet all the licence eligibility requirements set out in this directive.

### 4.2 Insurance

6) At the time of applying for licence eligibility, applicants must have and maintain comprehensive general liability insurance with minimum coverage of $1 000 000.

7) Applicants must submit a certificate of proof of insurance or a statement of the insurer describing the coverage, effective date, and termination date of the insurance.

8) Should eligibility be granted, the licensee or approval holder must maintain reasonable and appropriate insurance coverage for the operations of the company, including

a) pollution coverage sufficient to cover the cost of removal and cleanup operations required as a result of an incident, and

b) sufficient coverage for loss or damage to property or bodily injury caused during operations.

9) Unless otherwise authorized, an applicant, licensee or approval holder must have insurance issued from a company registered in Alberta to provide insurance in Alberta.

10) Upon request, information regarding coverage and content of the insurance must be provided.

The AER may require the licensee or approval holder to obtain additional insurance; at all times the licensee is solely responsible for maintaining appropriate levels of insurance given the nature and scope of operations.

### 4.3 Fee

For most licence eligibility types, a fee is required. The amount of the fee is prescribed in the *Oil and Gas Conservation Rules* and may be waived or varied by the AER if circumstances warrant (section 17.010).

Applications that do not include the required fee will be summarily closed.

### 4.4 Financial Information

Financial statements and financial summary (Schedule 3) will be used by the AER to

- assess licensee eligibility,
- assess the capabilities of licensees and approval holders to meet their regulatory and liability obligations throughout the energy development life cycle,
- administer our liability management programs, and
- ensure the safe, orderly, and environmentally responsible development of energy resources in Alberta, throughout their life cycle.

11) An applicant must submit a complete financial summary (Schedule 3).

    a) Full audited financial statements must be submitted when available, matching the totals in Schedule 3. If audited statements are not available, those prepared by management may be acceptable.

    b) In the case of an applicant that is a new company with no financial history, details of financing must be provided (Schedule 3).

    c) If the financial records of the applicant are consolidated into another corporation's consolidated financial statements (the "parent corporation"), then a financial summary (Schedule 3) for the parent corporation and its consolidated financial statements must also be submitted.

12) Licensees and approval holders must also annually submit financial statements (audited or management-prepared) and a financial summary (Schedule 3), once finalized, or within 180 days of fiscal year end, whichever comes first, or as directed by the AER, in order to maintain eligibility.

Upon review of the information provided, the AER may request additional information. Financial information provided to the AER under this requirement will be kept confidential for the time period outlined in section 12.152(2) of the *Oil and Gas Conservation Rules*.

### 4.5 Unreasonable Risk

13) An applicant must not, in the AER's opinion, pose an unreasonable risk.

In assessing whether the applicant, licensee, or approval holder poses an unreasonable risk, the AER may consider any of the following factors:

- failure to maintain in Alberta persons who are authorized to make decisions and take actions on behalf of the licensee or approval holder to address any matters or issues that arise in respect of the wells, pipelines, facilities, well sites, and facility sites of the licensee or approval holder
- the compliance history of the applicant, licensee, or approval holder, including its directors, officers, and shareholders in Alberta and elsewhere
- the compliance history of entities currently or previously associated or affiliated with the applicant, licensee, or approval holder or its directors, officers, and shareholders
- outstanding noncompliances of current or former AER licensees or approval holders that are directly or indirectly associated or affiliated with the applicant, licensee, or approval holder or its directors, officers, or shareholders
- the experience of the applicant, licensee, or approval holder and its directors, officers, and shareholders
- corporate and ownership structure
- working interest participant arrangements, including participant information and proportionate shares
- the financial health of the applicant, licensee, or approval holder and entities currently associated or affiliated with the applicant, licensee, or approval holder or its directors, officers, and shareholders
- the assessed capability of the applicant, licensee, or approval holder to meet its regulatory and liability obligations throughout the energy development life cycle
- the assessed ability of the applicant, licensee, or approval holder to provide reasonable care and measures to prevent impairment or damage in respect of a pipeline, well, facility, well site, or facility site
- outstanding debts owed to AER or the Orphan Fund by the applicant, licensee, or approval holder, or by current or former AER licensees or approval holders that are directly or indirectly associated or affiliated with the applicant, licensee, or approval holder, or its directors, officers, or shareholders
- outstanding debts owed for municipal taxes, surface lease payments, or public land disposition fees or rental payments by the applicant, licensee, or approval holder, or by current or former

AER licensees or approval holders that are directly or indirectly associated or affiliated with the applicant, licensee, or approval holder, or its directors, officers, or shareholders

- being or having been subject to or initiating insolvency proceedings (which includes bankruptcy proceedings, receivership, notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, proceedings under *Companies Creditors Arrangement Act*)
- involvement of the applicant, licensee, or approval holder's directors, officers, or shareholders in entities that have initiated or are or have been subject to insolvency proceedings
- cancellation of or significant reduction to insurance coverage
- naming of directors, officers, or shareholders of the applicant, licensee, or approval holder in a declaration made under section 106 of the *Oil and Gas Conservation Act* and section 51 of the *Pipeline Act*
- any other factor the AER considers appropriate in the circumstances

## 5 Maintaining Eligibility

14) All existing licence or approval holders must meet licence eligibility requirements (section 4) on an ongoing basis and ensure that the information the AER has on file is kept accurate.

Licensees and approval holders must annually submit financial information as per requirement 12 in order to maintain eligibility.

15) Licensee and approvals holders must have and maintain at all times an official regulatory email address that is frequently monitored for regulatory communication with the AER.

16) Licensees and approval holders must notify the AER immediately in any of the following cases:

    a) General or emergency contact information has changed (submit updated Schedule 1, sections A and B).

    b) Insurance coverage is cancelled or significantly reduced.

    c) They initiate or are subject to insolvency proceedings.

The AER encourages any licensee considering initiating insolvency proceedings to contact the AER and to engage their working interest participants in their plans.

17) Licensees and approval holders must notify the AER within 30 days of defaulting on debt or violating debt covenants.

18) An updated Schedule 1 and any associated documents must be provided within 30 days of any material change, which includes the following:

    a) changes to legal status and corporate structure

    b) addition or removal of a related corporate entity

    c) amalgamation, merger, or acquisition

    d) changes to directors, officers, or shareholders directly or indirectly holding 20 per cent or more of the outstanding voting securities of the licensee or approval holder

    e) plan of arrangement or any other transaction that results in a significant change to the operations of the licensee

    f) the sale of all or substantially all of the licensee's assets

    g) a significant change to working interest participant arrangements, including participant information and proportionate shares

    h) the licensee or approval holder has initiated or is subject to insolvency proceedings

    i) cancellation of or significant reduction to insurance coverage

Before effecting a material change, a licensee or approval holder may request an advance determination on whether the AER would consider the proposed change to result in the licensee or approval holder posing an unreasonable risk (see section 4.5).

The AER may request additional information following a material change to assess whether a licensee or approval holder poses an unreasonable risk (see section 4.5).

## 6 Restriction of Licence Eligibility

There are three main circumstances in which the AER may revoke or restrict licence eligibility:

- Failure to provide complete and accurate information, or to update that information, as required and within the prescribed timelines.
- A finding by the AER that the licensee or approval holder poses an unreasonable risk.
- The licensee fails to acquire or hold licences or approvals within one year following granting of licence eligibility.

If a party already holds licences or approvals, licence eligibility will be restricted. If the party had general eligibility, this will be changed to limited eligibility, and additional terms or conditions may be imposed. If the licensee or approval holder has limited eligibility, licensee eligibility may be further restricted to impose additional terms or conditions.

If a party does not hold licences or approvals, licence eligibility will be revoked. The party will have to reapply under this directive for licence eligibility.

## 7 Application to Amend Eligibility

Application to amend licence eligibility will require reapplication under this directive, which may include payment of an additional fee, and may result in the imposition of restrictions, terms, or conditions.

# TAB 7

Province of Alberta

# ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT

Revised Statutes of Alberta 2000
Chapter E-12

Current as of December 8, 2021

Office Consolidation



Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
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(a) give notice of the issuance of the order to the local authority of the municipality in which the contaminated site is located, and

(b) provide notice of the issuance of the order in accordance with the regulations.

1992 cE-13.3 s115

**Compensation**

**131** The Minister may

(a) in accordance with any applicable regulations, or

(b) in the absence of any applicable regulations, in the manner and amount the Minister considers appropriate

pay compensation to any person who suffers loss or damage as a direct result of the application of this Division.

1992 cE-13.3 s116

**Ministerial regulations**

**132** The Minister may make regulations regulating and prohibiting the use of a contaminated site or the use of any product that comes from a contaminated site.

1992 cE-13.3 s117

**Lieutenant Governor in Council regulations**

**133** The Lieutenant Governor in Council may make regulations

(a) authorizing the payment of compensation by the Government for the purposes of section 131, including regulations respecting

(i) the circumstances under which compensation will be paid, and

(ii) the manner in which a claim for compensation is assessed and made and the determination of the amount payable;

(b) respecting the manner in which notice is to be provided under sections 126(b) and 130(b).

1992 cE-13.3 s118

# Part 6
# Conservation and Reclamation

**Definitions**

**134** In this Part,

(a) "expropriation board" means the board, person or other body having the power to order termination of a right of entry order as to the whole or part of the land affected by the order;

(b) "operator" means

(i) an approval or registration holder who carries on or has carried on an activity on or in respect of specified land pursuant to an approval or registration,

(ii) any person who carries on or has carried on an activity on or in respect of specified land other than pursuant to an approval or registration,

(iii) the holder of a licence, approval or permit issued by the Alberta Energy Regulator or the Alberta Utilities Commission for purposes related to the carrying on of an activity on or in respect of specified land,

(iv) a working interest participant in

(A) a well,

(B) a mine,

(C) a coal processing plant,

(D) an oil sands processing plant, or

(E) a plant or facility that is subject to the Large Facility Liability Management Program administered by the Alberta Energy Regulator

on, in or under specified land,

(v) the holder of a surface lease for purposes related to the carrying on of an activity on or in respect of specified land,

(vi) a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in any of subclauses (i) to (v), and

(vii) a person who acts as principal or agent of a person referred to in any of subclauses (i) to (vi);

(c) "reclamation certificate" means a reclamation certificate issued under this Part;

surface lease is discharged or otherwise terminated as to the whole or part of the land affected by the surface lease;

(i) "termination" means the termination of a right of entry order by an expropriation board as to the whole or part of the land affected by the order;

(j) "working interest participant" means a person who owns or controls all or part of a beneficial or legal undivided interest in an activity described in clause (b)(iv) under an agreement that pertains to the ownership of that activity.

RSA 2000 cE-12 s134;2006 c15 s16;2007 cA-37.2 s82(6);
2012 cR-17.3 s88;2020 cL-2.3 s30

**Security by operator**

**135(1)** If required by the regulations, an operator shall provide financial or other security and carry insurance in respect of the activity carried on by the operator on specified land.

**(2)** Subsection (1) does not apply to the Government or a Government agency.

1992 cE-13.3 s120

**Reclamation inquiry**

**136** An inspector shall, when required to do so by the regulations, conduct a reclamation inquiry in accordance with the regulations.

1992 cE-13.3 s121

**Duty to reclaim**

**137(1)** An operator must

(a) conserve specified land,

(b) reclaim specified land, and

(c) unless exempted by the regulations, obtain a reclamation certificate in respect of the conservation and reclamation.

**(2)** Where this Act requires that specified land must be conserved and reclaimed, the conservation and reclamation must be carried out in accordance with

(a) the terms and conditions in any applicable approval or code of practice,

(b) the terms and conditions of any environmental protection order regarding conservation and reclamation that is issued under this Part,

(c) the directions of an inspector or the Director, and

(d) this Act.

RSA 2000 cE-12 s137;2003 c37 s21

**Issuance of reclamation certificate**

**138(1)** An application for a reclamation certificate must be made by the operator to the Director or an inspector in the form and manner and within the time provided for in the regulations.

**(1.1)** The Director or an inspector may refuse to accept an application for a reclamation certificate if, in the Director's or inspector's opinion, the application is not complete and accurate.

**(2)** An inspector may refuse to issue a reclamation certificate where the applicant is indebted to the Government.

**(3)** An inspector may issue a reclamation certificate to the operator if the inspector is satisfied that the conservation and reclamation have been completed in accordance with section 137(2).

**(4)** An inspector may issue a reclamation certificate with respect to all or only a part of the specified land, and in the latter case section 137 continues to apply with respect to the remaining specified land.

**(5)** An inspector may issue a reclamation certificate subject to any terms and conditions the inspector considers appropriate.

**(6)** An approval in respect of an activity on specified land expires on the date that the final reclamation certificate is issued under this Part unless the approval specifies a different expiry date.

RSA 2000 cE-12 s138;2003 c37 s22

**Amendment and cancellation of certificate**

**139(1)** The Director or an inspector may

(a) amend a term or condition of, add a term or condition to or delete a term or condition from a reclamation certificate if the Director or the inspector considers it appropriate to do so,

(b) cancel a reclamation certificate issued in error,

(c) cancel a reclamation certificate where no reclamation inquiry was conducted prior to the issuance of the certificate and the Director or the inspector is of the opinion that further work may be necessary to conserve and reclaim the specified land to which the certificate relates, or

(d) correct a clerical error in a reclamation certificate.

# TAB 8

CANADA

CONSOLIDATION

CODIFICATION

# Bankruptcy and Insolvency Act

# Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to April 4, 2022

Last amended on November 1, 2019

À jour au 4 avril 2022

Dernière modification le 1 novembre 2019

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time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.

de l'actif, examinent ses comptes, s'enquièrent de la suffisance de la garantie fournie par le syndic et, sous réserve du paragraphe (4), approuvent l'état définitif des recettes et des débours préparé par le syndic, le bordereau de dividende et la disposition des biens non réalisés.

**Approval of trustee's final statement by inspectors**

**(4)** Before approving the final statement of receipts and disbursements of the trustee, the inspectors shall satisfy themselves that all the property has been accounted for and that the administration of the estate has been completed as far as can reasonably be done and shall determine whether or not the disbursements and expenses incurred are proper and have been duly authorized, and the fees and remuneration just and reasonable in the circumstances.

**Approbation par les inspecteurs de l'état définitif préparé par le syndic**

**(4)** Avant d'approuver l'état définitif des recettes et des débours du syndic, les inspecteurs doivent s'assurer eux-mêmes qu'il a été rendu compte de tous les biens et que l'administration de l'actif a été complétée, dans la mesure où il est raisonnablement possible de le faire, et doivent établir si les débours et dépenses subis sont appropriés ou non et ont été dûment autorisés et si les honoraires et la rémunération sont justes et raisonnables en l'occurrence.

**inspector's expenses and fees**

**(5)** Each inspector

**(a)** may be repaid actual and necessary travel expenses incurred in relation to the performance of the inspector's duties; and

**(b)** may be paid such fees per meeting as are prescribed.

**Frais et honoraires**

**(5)** Chaque inspecteur peut être remboursé des frais de déplacement réels et nécessaires engagés dans le cadre de ses fonctions et il peut aussi recevoir les honoraires prescrits pour chaque assemblée.

**Special services**

**(6)** An inspector duly authorized by the creditors or by the other inspectors to perform special services for the estate may be allowed a special fee for those services, subject to approval of the court, which may vary that fee as it deems proper having regard to the nature of the services rendered in relation to the obligations of the inspector to the estate to act in good faith for the general interests of the administration of the estate.

R.S., 1985, c. B-3, s. 120; 1992, c. 27, s. 49; 2001, c. 4, s. 30; 2004, c. 25, s. 65(F); 2005, c. 47, s. 85.

**Services spéciaux**

**(6)** Un inspecteur régulièrement autorisé par les créanciers ou par les autres inspecteurs à exécuter des services spéciaux pour le compte de l'actif peut avoir droit à des honoraires spéciaux pour ces services, sous réserve de l'approbation du tribunal qui peut modifier ces honoraires comme il le juge à propos eu égard à la nature des services rendus par rapport à l'obligation qu'a l'inspecteur d'agir de bonne foi en vue de l'intérêt général de l'administration de l'actif.

L.R. (1985), ch. B-3, art. 120; 1992, ch. 27, art. 49; 2001, ch. 4, art. 30; 2004, ch. 25, art. 65(F); 2005, ch. 47, art. 85.

# Claims Provable

**Claims provable**

**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.

# Réclamations prouvables

**Réclamations prouvables**

**121 (1)** Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

**Contingent and unliquidated claims**

**(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.

**Debts payable at a future time**

**(3)** A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

**Family support claims**

**(4)** A claim in respect of a debt or liability referred to in paragraph 178(1)(b) or (c) payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse, former spouse, former common-law partner or child was living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.

R.S., 1985, c. B-3, s. 121; 1992, c. 27, s. 50; 1997, c. 12, s. 87; 2000, c. 12, s. 14.

**Claims provable in bankruptcy following proposal**

**122 (1)** The claims of creditors under a proposal are, in the event of the debtor subsequently becoming bankrupt, provable in the bankruptcy for the full amount of the claims less any dividends paid thereon pursuant to the proposal.

**Interest**

**(2)** If interest on any debt or sum certain is provable under this Act but the rate of interest has not been agreed on, the creditor may prove interest at a rate not exceeding five per cent per annum to the date of the bankruptcy from the time the debt or sum was payable, if evidenced by a written document, or, if not so evidenced, from the time notice has been given the debtor of the interest claimed.

R.S., 1985, c. B-3, s. 122; 2004, c. 25, s. 66(E).

**Proof in respect of distinct contracts**

**123** Where a bankrupt was, at the date of the bankruptcy, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals,

**Décision**

**(2)** La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

**Créances payables à une date future**

**(3)** Un créancier peut établir la preuve d'une créance qui n'est pas échue à la date de la faillite, et recevoir des dividendes tout comme les autres créanciers, en en déduisant seulement un rabais d'intérêt au taux de cinq pour cent par an calculé à compter de la déclaration d'un dividende jusqu'à la date où la créance devait échoir selon les conditions auxquelles elle a été contractée.

**Réclamations alimentaires**

**(4)** Constitue une réclamation prouvable la réclamation pour une dette ou une obligation mentionnée aux alinéas 178(1)b) ou c) découlant d'une ordonnance judiciaire rendue ou d'une entente conclue avant l'ouverture de la faillite et à un moment où l'époux, l'ex-époux ou ancien conjoint de fait ou l'enfant ne vivait pas avec le failli, que l'ordonnance ou l'entente prévoie une somme forfaitaire ou payable périodiquement.

L.R. (1985), ch. B-3, art. 121; 1992, ch. 27, art. 50; 1997, ch. 12, art. 87; 2000, ch. 12, art. 14.

**Réclamations prouvables en faillite à la suite d'une proposition**

**122 (1)** Les réclamations des créanciers aux termes d'une proposition sont, dans le cas où le débiteur deviendrait subséquemment en faillite, prouvables dans la faillite pour le plein montant des réclamations moins tout dividende payé à cet égard en conformité avec la proposition.

**Intérêts**

**(2)** Lorsque l'intérêt sur toute créance ou somme déterminée est prouvable sous le régime de la présente loi, mais qu'il n'a pas été convenu du taux d'intérêt, le créancier peut établir la preuve d'un intérêt à un taux maximal de cinq pour cent par an jusqu'à la date de la faillite à compter de la date où la créance ou somme était exigible, si elle est attestée par un document écrit, ou, si elle n'est pas ainsi attestée, à compter de la date où il a été donné au débiteur avis de la réclamation d'intérêt.

L.R. (1985), ch. B-3, art. 122; 2004, ch. 25, art. 66(A).

**Preuve à l'égard de contrats distincts**

**123** Lorsqu'un failli était, à la date de la faillite, responsable à l'égard de contrats distincts, en qualité de membre de plusieurs firmes distinctes, ou en qualité de signataire individuel des contrats et aussi à titre de membre d'une firme, le fait que les firmes sont

or that the sole contractor is also one of the joint contractors, shall not prevent proof, in respect of the contracts, against the properties respectively liable on the contracts.

R.S., c. B-3, s. 96.

entièrement ou en partie composées des mêmes personnes, ou que le signataire individuel des contrats est aussi l'une des parties contractantes conjointes, n'empêche nullement la preuve relativement aux contrats contre les biens respectivement impliqués dans les contrats.

S.R., ch. B-3, art. 96.

## Proof of Claims

### Creditors shall prove claims

**124 (1)** Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

### Proof by delivery

**(2)** A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

### Who may make proof of claims

**(3)** The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

### Shall refer to account

**(4)** The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.

**(5)** [Repealed, 2005, c. 47, s. 86]

R.S., 1985, c. B-3, s. 124; 2005, c. 47, s. 86.

### Penalty for filing false claim

**125** Where a creditor or other person in any proceedings under this Act files with the trustee a proof of claim containing any wilfully false statement or wilful misrepresentation, the court may, in addition to any other penalty provided in this Act, disallow the claim in whole or in part as the court in its discretion may see fit.

R.S., c. B-3, s. 97.

### Who may examine proofs

**126 (1)** Every creditor who has filed a proof of claim is entitled to see and examine the proofs of other creditors.

## Preuve de réclamations

### Les créanciers doivent prouver leurs réclamations

**124 (1)** Chaque créancier doit prouver sa réclamation, faute de quoi il n'a pas droit de partage dans la distribution qui peut être opérée.

### Remise de preuve

**(2)** Une réclamation est prouvée par la remise, au syndic, d'une preuve de la réclamation selon la forme prescrite.

### Qui peut faire la preuve d'une réclamation

**(3)** La preuve de réclamation peut être faite par le créancier lui-même ou par une personne qu'il a autorisée à agir en son nom; la preuve, si elle est faite par une personne ainsi autorisée, doit énoncer l'autorisation et les sources de renseignement de cette personne.

### La preuve doit mentionner un état de compte

**(4)** La preuve de réclamation doit contenir ou mentionner un état de compte énonçant les détails de la réclamation, ainsi que toute créance compensatoire que le failli peut avoir à la connaissance du créancier, et doit aussi spécifier les pièces justificatives ou autre preuve, s'il en est, qui peuvent en établir le bien-fondé.

**(5)** [Abrogé, 2005, ch. 47, art. 86]

L.R. (1985), ch. B-3, art. 124; 2005, ch. 47, art. 86.

### Peine en cas de réclamation fausse ou injustifiable

**125** Lorsqu'un créancier ou une autre personne, au cours de procédures prises en vertu de la présente loi, dépose entre les mains du syndic une preuve de réclamation contenant une déclaration délibérément fausse ou une fausse représentation faite de propos délibéré, le tribunal peut, en sus de toute autre peine prévue par la présente loi, rejeter la créance en tout ou en partie selon que, à sa discrétion, il pourra juger à propos.

S.R., ch. B-3, art. 97.

### Qui peut examiner la preuve

**126 (1)** Tout créancier qui a déposé une preuve de réclamation a le droit de voir et d'examiner les preuves d'autres créanciers.

# TAB 9

**Her Majesty The Queen in Right of the Province of Newfoundland and Labrador** *Appellant*

*v.*

**AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders)** *Respondents*

and

**Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty The Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada** *Interveners*

**Indexed as: Newfoundland and Labrador *v.* AbitibiBowater Inc.**

**2012 SCC 67**

File No.: 33797.

2011: November 16; 2012: December 7.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Bankruptcy and Insolvency — Provable claims — Contingent claims — Corporation filing for insolvency protection — Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order — Whether environmental protection orders are monetary claims that*

**Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador** *Appelante*

*c.*

**AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., comité ad hoc des créanciers obligataires, comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang)** *Intimés*

et

**Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Sa Majesté la Reine du chef de la Colombie-Britannique, Ernst & Young Inc., en sa qualité de contrôleur, et Les Ami(e)s de la Terre Canada** *Intervenants*

**Répertorié : Terre-Neuve-et-Labrador *c.* AbitibiBowater Inc.**

**2012 CSC 67**

N^o^ du greffe : 33797.

2011 : 16 novembre; 2012 : 7 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

*Faillite et insolvabilité — Réclamations prouvables — Réclamations éventuelles — Demande de protection contre l'insolvabilité par une société — Ordonnances environnementales émises par la province contre la société et demande, par la province, d'un jugement déclarant que les ordonnances ne constituent pas des « réclamations » aux termes de la Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985,*

[23] Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

[24] This definition is completed by s. 121(1) of the *BIA*:

**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.

[25] Sections 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is 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.

[26] These provisions highlight three requirements that are relevant to the case at bar. 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. I will examine each of these requirements in turn.

[23] L'article 12 de la *LACC* renvoie aux règles de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). L'article 2 de la *LFI* définit ainsi une réclamation prouvable en matière de faillite :

« réclamation prouvable en matière de faillite » ou « réclamation prouvable » Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité de la présente loi par un créancier.

[24] Cette définition est complétée par le par. 121(1) de la *LFI* :

**121.** (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

[25] Les paragraphes 121(2) et 135(1.1) de la *LFI* donnent des indications additionnelles lorsqu'il s'agit de déterminer si une ordonnance constitue une réclamation prouvable :

**121.** . . .

(2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

**135.** . . .

(1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

[26] Ces dispositions font ressortir trois conditions pertinentes à la présente affaire. Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. Je vais examiner chacune de ces conditions à tour de rôle.

# TAB 10

# Court of Queen's Bench of Alberta

**Citation: Re: SemCanada Crude Company (Celtic Exploration Ltd. #2), 2012 ABQB 489**

**Date:** 20120731
**Docket:** 0801 08510
**Registry:** Calgary



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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options Inc. and 1380331 Alberta ULC

(Re: Celtic Exploration Ltd.#2)

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**Reasons for Decision**
**of the**
**Honourable Madam Justice B.E. Romaine**

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## Introduction

[1] Celtic Exploration Ltd. applies for relief arising from the suspension of an inlet gas purchase agreement (the "IGPA") that it had entered into with SemCAMS ULC. The IGPA was suspended in July, 2008 in connection with SemCAMS' filing for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and was the subject of reasons for decision dated August 27, 2010, cited as 2010 ABQB 531 (the "IGPA decision"). Leave to appeal the IGPA decision was denied on December 17, 2010.

[2] Celtic seeks an order (i) permitting it to file a late amended claim for damages arising from the suspension of the IGPA for the period from July 22, 2008 (the date of the Initial Order in the CCAA proceedings) to and including November 30, 2009 when the Plan of Arrangement (the "Plan") came into effect and SemCAMS emerged from the protection of the CCAA (the "CCAA Period"), and (ii) declaring that its claims for suspension damages for the periods from December 1, 2009 to and including September 30, 2009 (the "Post Plan Implementation Period") and from October 1, 2010 onwards (the "Post October 2010 Period") are not Affected Claims compromised, barred and released by the Plan or otherwise.

Section 19(2) does not apply in this case.

[22] As noted by SemCAMS, Section 19(1) was not proclaimed in force until September 18, 2009, which was after the Initial Order was granted, but prior to the Sanction Order. It may thus be argued that Section 19(1) does not apply to this issue, but I am satisfied that it would not make a difference to Celtic's application if former Section 12 was the applicable statutory provision, and I have conducted the analysis under Section 19.

[23] Celtic submits that Section 19(1) permits the compromise of debts and liabilities in respect of two time periods: the period up to commencement of proceedings under the CCAA and claims that relate to debts or liabilities to which the debtor may become subject before the Sanction Order in respect of obligations incurred by the debtor before the commencement of proceedings.

[24] This interpretation of Section 19(1) ignores the words "that relate to liabilities, present or future" that modify the term "claims". It is clear that SemCAMS was subject to the possibility of liability under the IGPA before the CCAA proceedings commenced. The claims for suspension damages are claims that relate to the IGPA and to the suspension of the IGPA that occurred as a result of the CCAA proceedings. Section 19(1) does not limit the claims that may be dealt with by a Plan under the CCAA to presently existing liabilities. This is made clear by the addition of the word "future" in both Section 19(1)(a) and Section 19(1)(b).

[25] The claims relating to the suspension of the IGPA during the CCAA Period and beyond are exactly the kind of anticipatory, future claims that are referenced in Section 19(1). A "claim" for the purpose of the CCAA includes any indebtedness, liability or obligation that would be provable under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended: Section 2(1) of the CCAA. Section 121(1) of the BIA defines "provable claims" as being:

> . . . (a)ll debts and liabilities, present and 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 reasons of any obligation incurred before the day on which the bankrupt becomes bankrupt . . .

[26] Section 121(2) of the BIA makes it clear that this includes contingent or unliquidated claims, with the procedure for evaluating contingent or unliquidated claims described in Section 135. Section 20(1)(a) of the CCAA describes how the amount of an unsecured claim that is a provable claim under the BIA may be determined by a court on summary application if it is not admitted by the debtor company.

[27] It may well have been difficult to value a contingent claim for future suspension damages that was filed before the Claims Bar Date, but that is often the nature of a contingent or future claim. In particular, there may have been issues relating to when the IGPA could reasonably be

# TAB 11

# In the Court of Appeal of Alberta

**Citation: Repsol Canada Energy Partnership v Delphi Energy Corp, 2020 ABCA 364**

**Date:** 20201015
**Docket:** 2001-0193-AC
**Registry:** Calgary



**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 Delphi Energy Corp. and Delphi Energy (Alberta) Limited**

**Between:**

**Repsol Canada Energy Partnership and Repsol Oil & Gas Canada Inc.**

Applicants

- and -

**Delphi Energy Corp. and Delphi Energy (Alberta) Limited**

Respondents

- and -

**PricewaterhouseCoopers Inc. and Luminus Management LLC**

Interested Parties

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**Reasons for Decision of The Honourable Madam Justice Marina Paperny**

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> subject to the possibility of liability under the IGPA before the CCAA proceedings commenced. The claims for suspension damages are claims that relate to the IGPA and to the suspension of the IGPA that occurred as a result of the CCAA proceedings. Section 19(1) does not limit the claims that may be dealt with by a Plan under the CCAA to presently existing liabilities. This is made clear by the addition of the word "future" in both Section 19(1)(a) and Section 19(1)(b).

[18] As was noted by Romaine J at para 25 of *SemCanada*, a "claim" for the purpose of the *CCAA* includes any "indebtedness, liability or obligation that would be provable under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3". Section 121(1) of the BIA defines "provable claims" as "all debts and liabilities, present and future, to which the bankrupt is subject... , or to which the bankrupt may become subject... by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt..."; s 121(2) of the BIA makes clear that this includes contingent or unliquidated claims: *SemCanada* at paras 25-26.

[19] The Supreme Court of Canada has confirmed that a claim may be provable in bankruptcy even if it is a contingent claim: see *AbitibiBowater Inc., Re,* 2012 SCC 67 at para 28; *Orphan Well Association v Grant Thornton Ltd.,* 2019 SCC 5 at para 36. "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'"": *Orphan Well Association*, citing *Peters v Remington*, 2004 ABCA 5 at para 23.

[20] More recently, the Quebec Court of Appeal commented that "post-debts are only those incurred after and also resulting from an obligation originating after Determination", and that "an obligation can be contingent, unliquidated, or not exigible as at the day of Determination, but existing and able to give rise to a claim if a court decision 'deems it provable'": *Arrangement relatif à Kitco Metals Inc*, 2017 QCCA 268 at para 77-78 [unofficial English translation].

[21] In light of the plain language of s 19, and the authorities interpreting that provision and conducting a similar analysis under the *Bankruptcy and Insolvency Act*, I am not satisfied that the issue raised is sufficiently meritorious to warrant an appeal. Accordingly, the application for leave to appeal is dismissed.

Application heard on October 7, 2020

Reasons filed at Calgary, Alberta
this 15th day of October, 2020

Paperny J.A.

TAB 12

Unofficial English Translation



# COURT OF APPEAL



CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

Nos. 500-09-025913-161 / 500-09-025914-169
(500-11-040900-116)

DATE: February 20, 2017

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**CORAM: THE HONOURABLE PAUL VÉZINA, J.A.**
**LORNE GIROUX, J.A.**
**ÉTIENNE PARENT, J.A.**

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IN THE MATTER OF THE PLAN OF ARRANGEMENT WITH THE CREDITORS OF KITCO METALS INC., DEBTOR (*COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36):

No. 500-09-025913-161

**AGENCE DU REVENU DU QUÉBEC**
APPELLANT – creditor – respondent
v.

**KITCO METALS INC.**
RESPONDENT – debtor – applicant
and
**ATTORNEY GENERAL OF CANADA**
IMPLEADED PARTY – creditor – respondent
and
**ATTORNEY GENERAL OF QUEBEC**
IMPLEADED PARTY – impleaded party
and
**RICHTER LLP**
IMPLEADED PARTY – monitor / impleaded party
and
**HERAEUS METALS NEW YORK LLC**
IMPLEADED PARTY – impleaded party
and

**CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS (CAIRP)**
INTERVENER

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No. 500-09-025914-169

**ATTORNEY GENERAL OF CANADA**
APPELLANT – creditor – respondent
v.

**KITCO METALS INC.**
RESPONDENT – debtor – applicant
and
**RICHTER LLP**
IMPLEADED PARTY – monitor – impleaded party
and
**HERAEUS METALS NEW YORK LLC**
IMPLEADED PARTY – impleaded party
and
**ATTORNEY GENERAL OF QUEBEC**
IMPLEADED PARTY – impleaded party
and
**AGENCE DU REVENU DU QUEBEC**
IMPLEADED PARTY – creditor – respondent
and
**CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS (CAIRP)**
INTERVENER

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JUDGMENT

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[1] The appellants, the Agence du revenu du Québec and the Attorney General of Canada, appeal from a judgment rendered on February 1, 2016, by the Superior Court, District of Montreal (the Honourable Madam Justice Marie-Anne Paquette), which condemned them respectively to pay Kitco $1,443,713.16 and $335,866.78, as refunds of the Goods and Services Tax (GST) and the Quebec Sales Tax (QST) owed to Kitco up to November 30, 2015, with interest and the additional indemnity.

[2] For the reasons of Vézina, J.A., with which Giroux and Parent, JJ.A. agree, **THE COURT**:

> [TRANSLATION]
>
> . . . since *D.I.M.S. Construction inc. (Trustee of) v. Québec (Attorney General)* [*D.I.M.S.*], it has been established that equitable set-off is no longer applicable in Quebec.
>
> This is what led this Court, in *Daltech Architectural inc. (Syndic de)* [*Daltech*], to conclude that legal compensation under the *CCQ* must be interpreted broadly:….
>
> Compensation of related debts that are not necessarily certain, liquid or exigible as at the date of institution of insolvency proceedings is thus permitted under Quebec civil law. This right was in fact reaffirmed by the Court in *Commission de la santé et de la sécurité du travail v. Dolbec Transport inc.*[15] …
>
> [Citations omitted.]

[74] So far, so good. But problems arise when, at the end of the last paragraph cited, the ARQ adds:

> [TRANSLATION]
>
> Regarding this aspect, the trial judge failed to take into account any of the foregoing judgments; she erred.

[75] According to the ARQ, the [TRANSLATION] "broad interpretation" of the case law would have led the Court in *Dolbec* to allow compensation to be effected between pre- and post-debts. This is not the case.

[76] In *Dolbec*, the Court noted that both of the debts to which set-off was applied were incurred before Determination. It wrote:

> [TRANSLATION]
>
> [37] This is why, although, following approval by the Court and payment of a dividend, the CSST was bound by the proposal and could no longer claim the balance of its debt under section 62(2) *BIA*, the Court is nevertheless of the opinion that, to defend itself against Dolbec's action, the CSST could still avail itself of the provisions of section 97(3) *BIA* and effect compensation against the balance of the debt since there is nothing in the proposal to prevent this, the debts are related, and both occurred after Dolbec had filed its notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*.

[77] The source of the error lies in the fact that the pre-debts include those incurred after Determination where they result from an obligation that originated before

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15 *Commission de la santé et de la sécurité du travail v. Dolbec Transport inc.*, 2012 QCCA 698.

Determination. Post-debts are only those incurred after and also resulting from an obligation originating after Determination, such as the $1.7 million tax refund claimed after Determination and resulting from the company's post-Determination operations.

[78] Certainly, an obligation can be contingent, unliquidated, or not exigible as at the day of Determination, but existing and able to give rise to a claim if a court decision "deems it provable," as provided in sections 121(1) and (2), which refer to 135(1.1) and (4) *BIA*.

| | |
|---|---|
| **Art. 121 (1)** | **Section 121 (1)** |
| Réclamations prouvables | Claims provable |
| 121 (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi. | 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. |
| Décision | Contingent and unliquidated claims |
| **(2)** La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135. | **(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** … | **135** … |
| Réclamations éventuelles et non liquidées | Determination of provable claims |
| **(1.1)** Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation. | **(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. |
| … | … |
| | Determination or disallowance final |

| | |
|---|---|
| Effet de la décision | and conclusive |
| **(4)** La décision et le rejet sont définitifs et péremptoires, à moins que, dans les trente jours suivant la signification de l'avis, ou dans tel autre délai que le tribunal peut accorder, sur demande présentée dans les mêmes trente jours, le destinataire de l'avis n'interjette appel devant le tribunal, conformément aux Règles générales, de la décision du syndic. | **(4)** A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules. |

[79] Even though date of the court's ruling is long after Determination, such an obligation is nonetheless a "provable claim" as of that day, to which compensation can apply.

[80] In *Daltech*[16] as well, the Court reiterated that the mutual obligations at the source of the debts to be compensated must exist on the day of Determination. In that judgment, we read:

> [TRANSLATION]
>
> [58] In *D.I.M.S. Construction inc. (Trustee of) v. Québec (Attorney General)*, Deschamps, J. interpreted section 97(3) *BIA*. "… as implicitly requiring that the mutual debts come into existence before the bankruptcy". In this case, I share the opinion of the trial judge that compensation applies because, prior to the bankruptcy, the bankrupt had a claim against the respondent, as evidenced by the right of retention set out provided in the Contract. At the time of the bankruptcy, both parties were mutually creditor and debtor.

[81] For compensation to be possible, the question is not whether there is a debt, or whether it is liquid or exigible, or related to another debt, but whether it is a provable claim duly proved or "deemed a proved claim".

[82] In my opinion, sections 21 *CCAA* and 97(3) *BIA*, which provide that the "law of set-off or compensation applies to all claims…", thereby identify the point in time when compensation is effected, or in other words, the moment at which the claims must be established: it is on the date of Determination that temporal reciprocity is established.

[83] Thus, a creditor establishes its claim as at Determination, at which time it subtracts its own debt to the debtor. If the balance is in the creditor's favour, it

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[16] *Daltech Architectural inc. (Syndic de)*, 2008 QCCA 2441.