Bankruptcy & Insolvency – Law 445
Fall Term 2019

Lecture Notes No. 2

II. CONSTITUTIONAL CONSIDERATIONS (DIVISION OF POWERS)

The Constitution Act, 1867 provides:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
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> ...
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> 21. Bankruptcy and Insolvency.
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> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
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> ...
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> 13. Property and Civil Rights in the Province.
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> ...
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> 16. Generally all Matters of a merely local or private Nature in the Province.

As you know from your study of constitutional law, Canada's federal structure allocates certain powers to the federal government (like bankruptcy) and others to the provincial governments (like enforcement of contracts). Hence one must consider whether a particular enactment or regulation may be *intra* or *ultra vires* the jurisdiction in question. The cases on point are both helpful in deciding the jurisdictional question as well as fleshing out the policies that drive this area of law.

Attorney General (Ontario) v Attorney General (Canada)
[1894] A.C. 89 (Privy Council)

In 1887, the Ontario legislature enacted *An Act respecting Assignment and Preferences by Insolvent Persons*. The effect of the legislation was to allow an insolvent debtor to assign their property to their creditor(s) to wipe out the debts, but no formal discharge from debts generally was available. Also, no federal bankruptcy legislation was in force at the time. The question referred to the Ontario courts and then on appeal to the Privy Council was whether the legislation was ultra vires the Ontario legislature. The Privy Council held that the legislation was within provincial jurisdiction but could be ousted by federal action which would be "paramount" (for those interested, the point was later taken up in *AG (Quebec) v. AG (Canada)*, [1928] 1 DLR 945 (P.C.)).

Section 9 of the statute was the focus of the litigation:

> **An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions** not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands.

Lord Herschell L.C. said:

> 15 Before discussing the effect of the enactments to which attention has been called, it will be convenient to glance at the course of legislation in relation to this and cognate matters both in the province and in the Dominion. The enactments of the 1st and 2nd sections of the Act of 1887 are to be found in substance in sects. 18 and 19 of the Act of the Province of Canada passed in 1858 for the better prevention of fraud. There is a proviso to the latter section which excepts from its operation any assignment made for the purpose of paying all the creditors of the debtor rateably without preference. These provisions were repeated in the Revised Statutes of Ontario, 1877, c. 118. A slight amendment was made by the Act of 1884, and it was as thus amended that they were re-enacted in 1887. At the time when the statute of 1858 was passed there was no bankruptcy law in force in the Province of Canada. In the year 1864 an Act respecting insolvency was enacted. It applied in Lower Canada to traders only; in Upper Canada to all persons whether traders or non-traders. It provided that a debtor should be deemed insolvent and his estate should become subject to compulsory liquidation if he committed certain acts similar to those which had for a long period been made acts of bankruptcy in this country. Among these acts were the assignment or the procuring of his property to be seized in execution with intent to defeat or delay his creditors, and also a general assignment of his property for the benefit of his creditors otherwise than in manner provided by the statute. A person who was unable to meet his engagements might avoid compulsory liquidation by making an assignment of his estate in the manner provided by that Act; but unless he made such an assignment within the time limited the liquidation became compulsory.
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> 16 This Act was in operation at the time when the British North America Act came into force.

17 In 1869 the Dominion Parliament passed an Insolvency Act which proceeded on much the same lines as the Provincial Act of 1864, but applied to traders only. This Act was repealed by a new Insolvency Act of 1875, which, after being twice amended, was, together with the Amending Acts, repealed in 1880.

18 **In 1887, the same year in which the Act under consideration was passed, the provincial legislature abolished priority amongst creditors by an execution in the High Court and county courts, and provided for the distribution of any moneys levied on an execution rateably amongst all execution creditors, and all other creditors who within a month delivered to the sheriff writs and certificates obtained in the manner provided for by that Act.**

19 Their Lordships proceed now to consider the nature of the enactment said to be ultra vires. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are primâ facie within the legislative powers of the provincial parliament. **Executions are a part of the machinery by which debts are recovered; and are subject to regulation by that parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise. The Act of 1887 which abolished priority as amongst execution creditors provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year, containing the section which is impeached, goes a step further, and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor, including those which have been seized in execution.**

20 **But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency, and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament.** Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might he founded, and by the law of the Province of Canada which prevailed at the time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.

21 It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law.

22 Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent. It was

open to any debtor who might deem his solvency doubtful, and who desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the 9th section would equally apply whether the assignor was or was not insolvent. Stress was laid on the fact that the enactment relates only to an assignment under the Act containing the section, and that the Act prescribes that the sheriff of the county is to be the assignee unless a majority of the creditors consent to some other assignee being named. This does not appear to their Lordships to be material. If the enactment would have been intrà vires, supposing sect. 9 had applied to all assignments without these restrictions, it seems difficult to contend that it became ultrà vires by reason of them. Moreover, it is to be observed that by sub-sect. 2 of sect. 3, assignments for the benefit of creditors not made to the sheriff or to other persons with the prescribed consent, although they are rendered void as against assignments so made, are nevertheless, unless and until so avoided, to be "subject in other respects to the provisions" of the Act.

23 At the time when the British North America Act was passed bankruptcy and insolvency legislation existed, and was based on very similar provisions both in Great Britain and the Province of Canada. Attention has already been drawn to the Canadian Act.

24 The English Act then in force was that of 1861. That Act applied to traders and non-traders alike. Prior to that date the operation of the Bankruptcy Acts had been confined to traders. The statutes relating to insolvent debtors, other than traders, had been designed to provide for their release from custody on their making an assignment of the whole of their estate for the benefit of their creditors.

25 It is not necessary to refer in detail to the provisions of the Act of 1861. It is enough to say that it provided for a legal adjudication in bankruptcy with the consequence that the bankrupt was divested of all his property and its distribution amongst his creditors was provided for.

26 It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define, what is covered by the words "bankruptcy" and "insolvency" in sect. 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.

27 In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the

> exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

In this case, then, the purely voluntary nature of the assignment by a debtor pursuant to the Ontario legislation took it outside the federal bankruptcy jurisdiction. Importantly, there was no federal legislation dealing with bankruptcy at the time. Obviously, things moved on with the enactment of a federal bankruptcy law in 1919.

Alberta (Attorney General) v. Moloney
2015 SCC 51 (S.C.C.)

Per Gascon J.:

I. Overview

1 In Canada, the federal and provincial levels of government must enact laws within the limits of their respective spheres of jurisdiction. The *Constitution Act, 1867* defines which matters fall within the exclusive legislative authority of each level. Still, even when acting within its own sphere, one level of government will sometimes affect matters within the other's sphere of jurisdiction. The resulting legislative overlap may, on occasion, lead to a conflict between otherwise valid federal and provincial laws. In this appeal, the Court must decide whether such a conflict exists, and if so, resolve it.

2 The alleged conflict in this case concerns, on the one hand, the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and on the other hand, Alberta's *Traffic Safety Act*, R.S.A. 2000, c. T-6 ("*TSA*"). It stems from a car accident caused by the respondent while he was uninsured, contrary to s. 54 of the *TSA*. The province of Alberta compensated the individual injured in the accident and sought to recover the amount of the compensation from the respondent. The latter, however, made an assignment in bankruptcy and was eventually discharged. The *BIA* governs bankruptcy and provides that, upon discharge, the respondent is released from all debts that are claims provable in bankruptcy. The *TSA* governs the activity of driving, including vehicle permits and driver's licences, and allows the province to suspend the respondent's licence and permits until he pays the amount of the compensation.

3 As a result of his bankruptcy and subsequent discharge, the respondent did not pay the amount of the compensation in full; because of this failure to pay, Alberta suspended his vehicle permits and driver's licence. The respondent contested this suspension, arguing that the *TSA* conflicted with the *BIA*, in that it frustrated the purposes of bankruptcy. The province replied that there was no conflict since the *TSA* was regulatory in nature and did not purport to enforce a discharged debt. The Court of Queen's Bench and the Court of Appeal found that there was a conflict between the federal and provincial laws. Relying on the doctrine of federal paramountcy, they declared the impugned provision of the *TSA* to be inoperative to the extent of the conflict. I agree with the outcome reached by the lower courts, and I would dismiss the appeal.

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IV. Issue

12 The Chief Justice formulated the following constitutional question:
Is s. 102(2) of Alberta *Traffic Safety Act*, R.S.A. 2000, c. T-6, constitutionally inoperative by reason of the doctrine of federal paramountcy?
Although the constitutional question, as formulated, refers only to s. 102(2), the proceedings below and the parties' submissions concern the section in its entirety. Accordingly, I will examine all of the relevant aspects of s. 102.

V. Analysis

13 Various government actors have been involved in this dispute. Unless otherwise specified, I will refer to the province of Alberta as encompassing these different actors. I will first review the principles applicable to the doctrine of federal paramountcy and then apply them to the facts of this appeal.

A. The Doctrine of Federal Paramountcy

14 Each level of government — Parliament, on the one hand, and the provincial legislatures, on the other — has exclusive authority to enact legislation with respect to certain subject matters. Sections 91 and 92 of the *Constitution Act, 1867* assign each power to the level of government best suited to exercise it: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.) ("*Secession Reference*"), at para. 58. Broad powers were given to the provincial legislatures with respect to local matters, in recognition of regional diversity, while powers relating to matters of national importance were given to Parliament, to ensure unity: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at para. 22.

15 Legislative powers are exclusive, and one government is not subordinate to the other: *Secession Reference*, at para. 58, citing *Reference re Initiative & Referendum Act (Manitoba)*, [1919] A.C. 935 (Jud. Com. of Privy Coun.), at p. 942. However, the legislative matrix is not as clearly defined as ss. 91 and 92 might suggest. It is often impossible for one level of government to legislate effectively within its jurisdiction without affecting matters that are within the other level's jurisdiction: *Western Bank*, at para. 29; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 465.

Furthermore, it is often impossible to make a statute fall squarely within a single head of power: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at pp. 180-81. This leads to overlap in the exercise of provincial and federal powers. The tendency has been to allow these overlaps to occur as long as each level of government properly pursues objectives that fall within its jurisdiction: *Reference re Securities Act (Canada)*, 2011 SCC 66, [2011] 3 S.C.R. 837 (S.C.C.), at para. 57; *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.), at para. 62; *Western Bank*, at paras. 37 and 42. This tendency reflects the theory of co-operative federalism: *Western Bank*, at para. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), at para. 162.

16 That said, there comes a point where legislative overlap jeopardizes the balance between unity and diversity. In certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level: *Western Bank*, at para. 32. To protect against such intrusions, the Court has developed various constitutional doctrines. For the purposes of this appeal, I need only refer to one: the doctrine of federal paramountcy. This doctrine "recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse": *Western Bank*, at para. 32. When there is a genuine "inconsistency" between federal and provincial legislation, that is, when "the operational effects of provincial legislation are incompatible with federal legislation", the federal law prevails: *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53 (S.C.C.), at para. 65, quoting *Western Bank*, at para. 69; see also *Marine Services*, at paras. 66-68; *Multiple Access*, at p. 168. The question thus becomes how to determine whether such a conflict exists.

17 First and foremost, it is necessary to ensure that the overlapping federal and provincial laws are independently valid: *Western Bank*, at para. 76; *Husky Oil*, at para. 87. This means determining the pith and substance of the impugned provisions by looking at their purpose and effect: *Western Bank*, at para. 27; *Reference re Firearms Act (Canada)*, 2000 SCC 31, [2000] 1 S.C.R. 783 (S.C.C.), at para. 16. Once a provision's true purpose is identified, its validity will depend on whether it falls within the powers of the enacting government: *Law Society (British Columbia) v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113 (S.C.C.), at para. 24. If the legislation of one level of government is invalid, no conflict can ever arise, which puts an end to the inquiry. If both laws are independently valid, however, the court must determine whether their concurrent operation results in a conflict.

18 A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

19 What is considered to be the first branch of the test was described as follows in *Multiple Access*, the seminal decision of the Court on this issue:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one

enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [Emphasis added; p. 191.]

In *Western Bank*, Binnie and LeBel JJ. referred to this passage as "the fundamental test for determining whether there is sufficient incompatibility to trigger the application of the doctrine of federal paramountcy" (para. 71). Under that test, the question is whether there is an actual conflict in operation, that is, whether both laws "can operate side by side without conflict" (*Marine Services*, at para. 76) or whether both "laws can apply concurrently, and citizens can comply with either of them without violating the other": *Western Bank*, at para. 72; see also *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 60; *Marine Services*, at para. 68; *Burrardview Neighbourhood Assn. v. Vancouver (City)*, 2007 SCC 23, [2007] 2 S.C.R. 86 (S.C.C.), at paras. 77 and 81-82; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 53; *R. v. Smith*, [1960] S.C.R. 776 (S.C.C.), at p. 800, per Martland J.

…

25 If there is no conflict under the first branch of the test, one may still be found under the second branch. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.), the Court formulated what is now considered to be the second branch of the test. It framed the question as being "whether operation of the provincial Act is compatible with the federal legislative purpose" (p. 155). In other words, the effect of the provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions": *Western Bank*, at para. 73.

26 That said, the case law assists in identifying typical situations where overlapping legislation will not lead to a conflict. For instance, duplicative federal and provincial provisions will generally not conflict: *Marcotte c. Banque de Montréal*, 2014 SCC 55, [2014] 2 S.C.R. 725 (S.C.C.), at para. 80; *Western Bank*, at para. 72; *Multiple Access*, at p. 190; *Hall*, at p. 151. Nor will a conflict arise where a provincial law is more restrictive than a federal law: *Lemare Lake*, at para. 25; *Marine Services*, at paras. 76 and 84; *Laferrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) ("*COPA*"), at paras. 67 and 74; *Western Bank*, at para. 103; *Rothmans*, at paras. 18 ff.; *Spraytech*, at para. 35; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 964. The application of a more restrictive provincial law may, however, frustrate the federal purpose if the federal law, instead of being merely permissive, provides for a positive entitlement: *Bruyère c. Québec (Commission de la santé & de la sécurité du travail)*, 2011 SCC 60, [2011] 3 S.C.R. 635 (S.C.C.) ("*HRSD*"), at paras. 32-33 and 36; *Lafarge*, at paras. 84-85; *Mangat*, at para. 72; *Hall*, at p. 153. As will become evident from the discussion below, this appeal involves two laws that directly contradict each other, rather than a provincial law which does not fully contradict the federal one, but is only more restrictive than it: see *M & D Farm*; *Clarke v. Clarke*, [1990] 2 S.C.R. 795 (S.C.C.).

27 Be it under the first or the second branch, the burden of proof rests on the party alleging the conflict. Discharging that burden is not an easy task, and

the standard is always high. In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws: *Western Bank*, at paras. 74-75, citing *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) ("*Law Society of B.C.*"), at p. 356; see also *Rothmans*, at para. 21; *O'Grady v. Sparling*, [1960] S.C.R. 804 (S.C.C.), at pp. 811 and 820. Conflict must be defined narrowly, so that each level of government may act as freely as possible within its respective sphere of authority: *Husky Oil*, at para. 162, per Iacobucci J. (dissenting, but not on this particular point), referring to *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785 (S.C.C.), at pp. 807-8, per Wilson J.

…

29 In sum, if the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law: *Western Bank*, at para. 69; *Rothmans*, at para. 11; *Mangat*, at para. 74. In practice, this means that the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists: *Husky Oil*, at para. 81; E. Colvin, "Constitutional Law — Paramountcy — Duplication and Express Contradiction — Multiple Access Ltd. v. McCutcheon" (1983), 17 *U.B.C.L. Rev.* 347, at p. 348.

30 I now turn to the application of the doctrine to the facts of this appeal.

B. Application

(1) The Legislative Schemes at Issue

31 The first step of the analysis is to ensure that the impugned federal and provincial provisions are independently valid. Early in the proceedings, the parties recognized the validity of the relevant provisions of the *BIA* and the *TSA*. Before this Court, they again conceded the validity of both laws. The only question is whether their concurrent operation results in a conflict. This requires analyzing the legislative schemes at issue at the outset so as to reach a proper understanding of the provisions that are allegedly in conflict.

(a) *The Bankruptcy and Insolvency Act*

32 Parliament enacted the *BIA* pursuant to its jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the *Constitution Act, 1867*. The *BIA*, notably through the specific provisions discussed below, furthers two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation (*Husky Oil*, at para. 7).

33 The first purpose of bankruptcy, the equitable distribution of assets, is achieved through a single proceeding model. Under this model, creditors of the

bankrupt wishing to enforce a claim provable in bankruptcy must participate in one collective proceeding. This ensures that the assets of the bankrupt are distributed fairly amongst the creditors. As a general rule, all creditors rank equally and share rateably in the bankrupt's assets: s. 141 of the *BIA*; *Husky Oil*, at para. 9. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 22, the majority of the Court, per Deschamps J., explained the underlying rationale for this model:

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise.

Avoiding inefficiencies and chaos, and favouring an orderly collective process, maximizes global recovery for all creditors: *Husky Oil*, at para. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 3.

34 For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding. Section 69.3 of the *BIA* thus provides for an automatic stay of proceedings, which is effective as of the first day of bankruptcy:

69.3 (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

(See *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005 (S.C.C.), at pp. 1015-16.)

35 Yet there are exceptions to the principle of equitable distribution. Section 136 of the *BIA* provides that some creditors will be paid in priority. These creditors are referred to as "preferred creditors". There are also creditors that are paid only after all ordinary creditors have been satisfied: ss. 137(1), 139 and 140.1 of the *BIA*. Furthermore, the automatic stay of proceedings does not prevent secured creditors from realizing their security interest: s. 69.3(2) of the *BIA*; *Husky Oil*, at para. 9. A court may also grant leave permitting a creditor to begin separate proceedings and enforce a claim: s. 69.4 of the *BIA*. These exceptions reflect the policy choices made by Parliament in furthering this purpose of bankruptcy.

36 The second purpose of the *BIA*, the financial rehabilitation of the debtor, is achieved through the discharge of the debtor's outstanding debts at the end of the bankruptcy: *Husky Oil*, at para. 7. Section 178(2) of the *BIA* provides:

(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

From the perspective of the creditors, the discharge means they are unable to enforce their provable claims: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605 (S.C.C.), at para. 21. This, in effect, gives the insolvent person a "fresh start", in that he or she is "freed from the burdens of pre-existing indebtedness": Wood, at p. 273; see also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109 (S.C.C.),

at p. 120. This fresh start is not only designed for the well-being of the bankrupt debtor and his or her family; rehabilitation helps the discharged bankrupt to reintegrate into economic life so he or she can become a productive member of society: Wood, at pp. 274-75; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf), at p. 6-283. In many cases of consumer bankruptcy, the debtor has very few or no assets to distribute to his or her creditors. In those cases, rehabilitation becomes the primary objective of bankruptcy: Wood, at p. 37.

37 Although it is an important purpose of the *BIA*, financial rehabilitation also has its limits. Section 178(1) of the *BIA* lists debts that are not released by discharge and that survive bankruptcy. Furthermore, s. 172 provides that an order of discharge may be denied, suspended, or granted subject to conditions. These provisions demonstrate Parliament's attempt to balance financial rehabilitation with other policy objectives, such as confidence in the credit system, that require certain debts to survive bankruptcy: Wood, at pp. 273 and 289.

38 Discharge is the main rehabilitative tool contained in the *BIA*, but it is not the only one. As Professor Wood, at p. 273, observes:

The bankruptcy discharge is one of the primary mechanisms through which bankruptcy law attempts to provide for the economic rehabilitation of the debtor. However, it is not the only means by which bankruptcy law seeks to meet this objective. The exclusion of exempt property from distribution to creditors, the surplus income provisions, and mandatory credit counselling also are directed towards this goal.

39 Another means of rehabilitation is the automatic stay of proceedings contained in s. 69.3 of the *BIA*. The stay not only ensures that creditors are redirected into the collective proceeding described above, it also ensures that creditors are precluded from seizing property that is exempt from distribution to creditors. This is an important part of the bankrupt's financial rehabilitation:

The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence.

(*Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417 (S.C.C.), at p. 430.]

40 In many aspects, the *BIA* is a complete code governing bankruptcy. It sets out which claims are treated as provable claims and which assets are distributed to creditors, and how. It then sets out which claims are released on discharge and which claims survive bankruptcy. That said, the fact remains that the operation of the *BIA* depends upon the survival of various provincial rights: *Husky Oil*, at para. 85; *Hall*, at p. 155. In this regard, s. 72(1) of the *BIA* provides:

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all

rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

On the one hand, given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued existence of provincial substantive rights, and thus the continued operation of provincial laws: Wood, at pp. 7-8; *Husky Oil*, at para. 30. The ownership of certain assets and the existence of particular liabilities depend upon provincial law: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at p. 25-8. On the other hand, the *BIA* cannot operate without affecting property and civil rights. Section 72(1) confirms this by stating that, where there is a genuine inconsistency between provincial laws regarding property and civil rights and federal bankruptcy legislation, the *BIA* prevails: see *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.), at para. 47.

41 In the context of this appeal, we are specifically concerned with an alleged conflict between, on the one hand, one provision of the *BIA*, namely s. 178, the purpose of which is to ensure the financial rehabilitation of the debtor, and, on the other hand, one provision (s. 102) of the provincial scheme, to which I will now turn.

…

(2) The Conflict Between the BIA and the TSA

(a) Operational Conflict

…

63 One law consequently provides for the release of all claims provable in bankruptcy and prohibits creditors from enforcing them, while the other disregards this release and allows for the use of a debt enforcement mechanism on such a claim by precisely excluding a discharge in bankruptcy. This is a true incompatibility. Both laws cannot operate concurrently (*Sun Indalex*, at para. 60; *Lafarge*, at para. 82; *M & D Farm*, at para. 41; *Multiple Access*, at p. 191), “apply concurrently” (*Western Bank*, at para. 72) or “operate side by side without conflict” (*Marine Services*, at para. 76). The facts of this appeal indeed show an actual conflict in operation of the two provisions. This is a case where the provincial law says “yes” (”Alberta can enforce this provable claim”), while the federal law says “no” (”Alberta cannot enforce this provable claim”). The provincial law gives the province a right that the federal law denies, and maintains a liability from which the debtor has been released under the federal law. This conflict can hardly be characterized as “indirect” as my colleague suggests (paras. 92 and 128). Nor can I characterize as merely “implicit” the clear prohibition in s. 178(2) against enforcing provable claims that have been discharged. It is not in dispute that s. 178(2) is a prohibitive provision; considering the meaning of the words “order of discharge” and “releases”, what the provision “exactly” prohibits is the enforcement of discharged provable claims. There is no other “possible ramification” in terms of what this section prohibits.

64 There was indeed much discussion about the effect of a discharge in the parties’ submissions. To avoid a finding of conflict, Alberta submitted that in bankruptcy, the debt is not extinguished but merely “released”. It asserted that the

BIA precludes only the "civil enforcement" of the debt through "civil process"; it does not affect the province's ability to insist on licensing requirements.

65 In *Schreyer*, LeBel J. described the effect of discharge. While recognizing that the debt is not extinguished, he explained that a discharge prevents creditors from enforcing those claims that are provable in bankruptcy:
... every claim is swept into the bankruptcy and ... the bankrupt is released from all of them upon being discharged unless the law sets out a clear exclusion or exemption... .
The only reservation I have with the decision of the Court of Appeal in the case at bar relates to its numerous statements that the operation of s. 178(2) *BIA* has the effect of "extinguishing" the equalization claim. With respect, this provision does not purport to extinguish claims that are provable in bankruptcy pursuant to s. 121 *BIA*, but "releases" the debtor from such claims: see, on this point, *Re Kryspin* (1983), 40 O.R. (2d) 424 (H.C.J.), at pp. 438-39; and *Ross, Re* (2003), 50 C.B.R. (4th) 274 (Ont. S.C.J.), at para. 15. As is clear from the words of s. 178(2) *BIA*, the discharge operates to release the bankrupt from all claims provable in bankruptcy. For creditors, the discharge means that they "cease to be able to enforce claims against the bankrupt that are provable in bankruptcy". [Emphasis added; paras 20-21.]
(Citing Houlden, Morawetz and Sarra, at p. 6-283.)

66 This description is consistent with the term "releases" found in s. 178(2), which means "[l]iberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced": *Black's Law Dictionary* (10th ed. 2014), at p. 1480. As a result of s. 178(2), creditors are deemed to give up their right to enforce their provable claims. The verb "enforce", as used by LeBel J. and Houlden, Morawetz and Sarra, means "to compel obedience": *Black's Law Dictionary*, at p. 645. The non-extinguishment of the debt may be relevant in some cases, such as those involving the liability of a third party (see *Buchanan, Re*, 2007 NSCA 68, 255 N.S.R. (2d) 286 (N.S. C.A.); *Miller, Re* (2001), 27 C.B.R. (4th) 107 (Ont. S.C.J.)). This is, however, of no practical relevance to this appeal. Section 178(2) is clear: a creditor cannot compel the debtor to pay a debt that was released on discharge.

67 In this appeal, the payment which the province seeks to recover is a provable claim. In substance, the purpose and effect of s. 102 are to compel payment of that provable claim. That claim was properly released, since neither the province's judgment debt, nor the resulting regulatory charge, is exempt from discharge under s. 178(1). As a provable claim is subject to s. 178(2), the province is precluded from compelling payment of the judgment debt.

…

76 Although this conclusion makes it unnecessary to discuss the second branch of the test, I will nonetheless address it in order to respond to the province's arguments.

(b) Frustration of Federal Purpose

(i) Financial Rehabilitation

77 Like the lower courts, I find that the province's use of its administrative powers relating to driving privileges to burden the respondent until he repays a discharged debt frustrates the financial rehabilitation of the bankrupt. The effect of s. 102 directly contradicts and defeats the purpose of the discharge provided for in s. 178(2):

The *BIA* permits an honest but unfortunate debtor to obtain a discharge from debts subject to reasonable conditions. The *Act* is designed to permit a bankrupt to receive, after a specified period a complete discharge of all his or her debts in order that he or she may be able to integrate into the business of life of the country as a useful citizen free from the crushing burden of debts... .

[Emphasis added.]

(Houlden, Morawetz and Sarra, at p. 1-2.1)

As explained already, the language of s. 178(2) makes it clear that the purpose of this provision is to give effect to one of the goals underlying the *BIA* regime — the financial rehabilitation of the debtor — by releasing "the bankrupt from all claims provable in bankruptcy". In other words, s. 178(2) is aimed precisely at providing the bankrupt with a fresh start. The facts of this case establish that the province's use of s. 102 despite the respondent's discharge undermines this purpose.

78 The respondent was a truck driver. In 1996, after the accident, the province was assigned the judgment rendered against him in the amount of $194,875. In 2008, after attempting to pay the debt in instalments for about 12 years, he made an assignment in bankruptcy. At that time, the outstanding amount of the debt had increased to $195,823; it was, by far, the largest of the respondent's financial liabilities. In 12 years, the respondent had not been able to keep up with his interest payments. The crushing burden of the province's claim against him was the main reason for his bankruptcy. In 2012, at the time his application for discharge was heard, the respondent had only managed to pay the judgment debt down to $192,103.79. By the effect of s. 102, he was exiting bankruptcy while carrying the same financial burden that had caused his bankruptcy four years earlier. If s. 102 is allowed to operate despite the respondent's discharge, the respondent is not offered the opportunity to rehabilitate that Parliament intended to give him. This is particularly compelling in the respondent's case. As a truck driver, his ability to gain a livelihood is tied to his ability to drive. But more generally, inability to drive can constitute a significant impediment to any person's capacity to earn income: see *Lucar, Re* (2001), 32 C.B.R. (4th) 270 (Ont. S.C.J.), at paras. 22-23.

79 In furthering financial rehabilitation, Parliament expressly selected which debts survive bankruptcy and which are discharged: s. 178(1) and (2). It did so having regard to competing policy objectives. This is a delicate exercise, because the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate: *AbitibiBowater*, at para. 35; *Schreyer*, at para. 19. In 1970, the Study Committee on Bankruptcy and Insolvency Legislation emphasized this concern:

... much of the rehabilitative effect of his discharge and release from debts is lost, when a bankrupt is left with substantial debts after his discharge. Indeed, in some cases, it may almost be regarded as a mockery of the bankruptcy system to take all

of the sizable property of a debtor, distribute it among the creditors and then leave the debtor to cope with some of his largest creditors from whose debts he has not been released.

(*Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970), at para. 3.2.085)

When operating in the context of bankruptcy, s. 102 undermines this balancing exercise and imperils the bankrupt's ability to rehabilitate. In effect, s. 102 creates a new class of debts that survive bankruptcy. As such, it leaves the debtor with a substantial financial liability that was not contemplated by Parliament. Had Parliament intended judgment debts arising from motor vehicle accidents, or the resulting regulatory charges, to survive bankruptcy, it would have stated so expressly in s. 178(1) of the *BIA*. It did not. Together, s. 178(1) and (2) are comprehensive. It is beyond the province's constitutional authority to interfere with Parliament's discretion in that regard.

80 Notwithstanding this, Alberta asserts that, like any creditor, the province is allowed to form a new binding contract with the discharged bankrupt for the repayment of the debt. In its view, the respondent's driving privileges can serve as fresh consideration for such a contract. I disagree. Like the Court of Appeal, I conclude that this alleged fresh consideration is neither genuine nor consistent with the purpose of s. 178(2).

81 As a general rule, a creditor cannot cause a debtor to revive an obligation from which the debtor was released, unless the creditor offers fresh consideration: Wood, at p. 301. Between private parties, it is arguable that a debtor may freely agree to revive a discharged debt in exchange for the creditor's provision of goods or services. The province, however, is unlike any private creditor. While a private creditor is under no obligation to provide goods or services, the province cannot withhold the respondent's driving privileges arbitrarily. Suspension of privileges by administrative bodies must be based on a legal rule: see *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at pp. 141-42; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.), at para. 59; *Secession Reference*, at para. 71; *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.), at para. 10. In the case at bar, the effect and purpose of s. 102 are to compel payment of a discharged debt, which conflicts with s. 178(2). As a result, s. 102 is, to that extent, inoperative and cannot ground the province's authority to withhold the respondent's privileges. If those privileges are being suspended on the sole basis that the respondent refuses to satisfy a judgment debt that was released in bankruptcy, the province is acting without authority. The province's promise to refrain from doing what it has no authority to do cannot constitute fresh consideration capable of supporting any contract. This includes a contract for the repayment of a discharged debt. More importantly, the respondent need not enter into such a contract in order to recover his driving privileges, because the province has no authority to withhold them.

82 Finally, Alberta's other assertion, to the effect that Parliament's power over bankruptcy and insolvency matters does not extend to the regulation of driving privileges, does not entail that the province can withhold those privileges on the basis of an unpaid released debt. In my view, the province is conflating the scope of

Parliament's authority and the consequences of the conflict between the *BIA* and the *TSA*. The financial responsibility of drivers is a valid matter of provincial concern and jurisdiction, and the province can set the conditions for driving privileges with this consideration in mind. Nonetheless, when the province denies a person's driving privileges on the sole basis that he or she refuses to pay a debt that was discharged in bankruptcy, the province's condition conflicts with s. 178(2) of the *BIA* and is, to that extent, inoperative. To so conclude does not transfer the power to regulate driving privileges to Parliament. The obligation to grant those privileges flows from the provisions of the provincial law that remain operative.

83 The rehabilitative purpose of s. 178(2) is not meant to give debtors a fresh start in all aspects of their lives. Bankruptcy does not purport to erase all the consequences of a bankrupt's past conduct. However, by ensuring that all provable claims are treated as part of the bankruptcy regime, the *BIA* gives debtors an opportunity to rehabilitate themselves financially. While this does not amount to erasing all regulatory consequences of their past conduct, it is certainly meant to free them from the financial burden of past indebtedness.

…

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407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)
2015 SCC 52 (S.C.C.)

Per Gascon J.:

V. Analysis

16 In the companion appeal, I fully discuss the principles of the doctrine of federal paramountcy, as well as the purposes and relevant provisions of the BIA. Like in the companion appeal, there is no dispute here concerning the independent validity of the provincial and federal laws. Section 22 of the 407 Act and s. 178 of the BIA were validly enacted by their respective governments. The only question before the Court is whether their concurrent operation results in a conflict. Building on my comments in the companion appeal, I need only examine s. 22(4) of the 407 Act and ascertain its true meaning and substantive effect in the context of bankruptcy before applying the doctrine of paramountcy.

A. The 407 Act

17 There is no question that the 407 Act creates, in substance, a debt enforcement scheme. This was the legislative purpose identified by the motions judge and the Court of Appeal. Section 13(3) of the 407 Act is also unequivocal:

13. . . .
(3) Sections 16 to 25 apply to the enforcement and collection of tolls and related fees and interest payable under this Act by a person described in subsection (1) but do not apply to the enforcement and collection of such tolls, fees and interest if,
(a) the person is responsible for the payment of such tolls, fees and interest under clause (1) (b); and
(b) the toll device that was affixed to the vehicle in question was obtained without providing information identifying the plate portion of a vehicle permit.

18 In 407 ETR Concession Co. v. Ontario (Registrar of Motor Vehicles) (2005), 82 O.R. (3d) 703 (Ont. Div. Ct.), the Ontario Divisional Court analyzed the 407 Act in detail, describing its purpose as well as the nature of the process it establishes:
As noted above, the purpose of the Act was to privatize the operation of Highway 407 and, given its open-access character, to provide the owner an effective method of toll collection. The legislature recognized that plate denial is a necessary feature of an open-access toll highway given the exceptionally large number of transactions, the small balances and the cost of other means of debt collection... .
. . . . .
Sections 16 to 25 of the Act describe the process by which tolls and other charges are collected and enforced. [Emphasis added; paras. 27 and 29.]

19 The appellant concedes that s. 22(4) is a debt collection and enforcement mechanism. The appellant also does not dispute that, in the context of this appeal, the toll debt being enforced is a claim provable in bankruptcy. However, the appellant argues that the Court of Appeal erred in its analysis of the purpose of s. 22 and the merits of the public-private partnership that the provision implements. It says the purpose of the provincial law, and thus the merits of the public-private partnership, are irrelevant to the paramountcy analysis, which focuses on the operation of the provincial law. In its opinion, the provincial purpose is relevant only at the division of powers stage of the analysis.

20 I disagree with the appellant's assertions. In the companion appeal, I explain that, while the focus of paramountcy is the effect of the provincial law, its purpose cannot be ignored. It forms part of the interpretative exercise that allows the substantive effect of the provincial law to be ascertained. In any event, I do not think the Court of Appeal considered the "merits" of the public-private partnership themselves to be "inadequate". The Court of Appeal merely stated that the "introduction into the mix of a private commercial participant in a public-private enterprise is inadequate ... to remove the evident inconsistency with ... the BIA" (para. 111 (emphasis added)). Before the Court of Appeal, ETR was arguing that the enforcement scheme was in the public interest, in that it ensured that the private-public partnership for the operation of the highway flourished. Responding to that argument, the Court of Appeal held that the purpose and effect of s. 22(4) were to enforce the collection of toll debts (para. 108). It rejected the appellant's argument that the private-public partnership, and the fact that it could further the public interest, could somehow erase the conflict caused by the substantive effect of the scheme. It was in that sense that the public-private partnership was "inadequate ... to remove the evident inconsistency" between the provincial scheme and the BIA.

21 I consequently agree with the Court of Appeal that the purpose and the effect of s. 22(4) of the 407 Act are to allow a creditor, ETR, to enforce the collection of toll debts, which in the context of this appeal constitutes a claim provable in bankruptcy. The remaining issue is whether this enforcement scheme conflicts with s. 178(2) of the BIA.

B. Operational Conflict

…

24 In my view, the respondent is correct on this issue of operational conflict. Pursuant to s. 178(2) of the BIA, creditors cease to be able to enforce their provable claims upon the bankrupt's discharge: Schreyer v. Schreyer, 2011 SCC 35, [2011] 2 S.C.R. 605 (S.C.C.), at para. 21. As I indicate in the companion appeal, it is undisputed that a discharge under s. 178 of the BIA releases a debtor, thus preventing creditors from enforcing claims that are provable in bankruptcy. They are deemed to give up their right to enforce those claims. This includes both civil and administrative enforcement. In this case, ETR, the creditor, is faced with a clear prohibition under s. 178(2) of the BIA. It cannot enforce its provable claim, which has been released by an order of discharge. Since the debt collection mechanism put in place by s. 22(4) provides the creditor with an administrative enforcement scheme, it is impossible for ETR to use that remedy while also complying with s. 178(2): Canadian Western Bank v. Alberta, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at para. 72; Husky Oil Operations Ltd. v. Minister of National Revenue, [1995] 3 S.C.R. 453 (S.C.C.), at para. 46. Indeed, ETR's toll debt is not listed as an exemption under s. 178(1), and the resulting financial liability of the debtor cannot survive his or her discharge. As a result, the 407 Act says "yes" to the enforcement of a provable claim, while s. 178(2) of the BIA says "no", such that the operation of the provincial law makes it impossible to comply with the federal law.

25 In other words, while the provincial scheme has the effect of maintaining the debtor's liability beyond his or her discharge, the federal law expressly releases him or her from that same liability. Both laws cannot "apply concurrently" (Western Bank, at para. 72) or "operate side by side without conflict" (Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate, 2013 SCC 44, [2013] 3 S.C.R. 53 (S.C.C.), at para. 76); a debtor cannot be found liable under the provincial law after having been released from that same liability under the federal law: Burrardview Neighbourhood Assn. v. Vancouver (City), 2007 SCC 23, [2007] 2 S.C.R. 86 (S.C.C.), at para. 82; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961 (S.C.C.), at para. 41; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161 (S.C.C.), at p. 191. I respectfully disagree with my colleague that this conflict is "indirect" or concerns something that is merely "implicitly" prohibited by s. 178(2) of the BIA (Moloney, para. 92), or that I am resorting to a broad interpretation of s. 178(2) in order to find that an operational conflict exists (para. 36). Under the federal law, the debt is not enforceable; under the provincial law, it is. The inconsistency is clear and definite. One law allows what the other precisely prohibits.

Orphan Well Association v. Grant Thornton Ltd.
2019 SCC 5 (S.C.C.)

This case deals with an issue relevant to both bankruptcy and environmental law.

Redwater Energy Corp. was an Alberta-based public company in the oil business and, amongst its assets, were 107 non-producing oil wells, and 20 productive wells. The Alberta Energy Regulator had issued licenses for these wells which included remediation and reclamation obligations. In 2014, the principal (secured) creditor of Redwater forced it into bankruptcy with an accounting firm (Grant Thornton) first appointed as a liquidator and then as its trustee in bankruptcy.

Grant Thornton determined that satisfying the remediation and reclamation obligations was not feasible as the cost would exceed the market value of the oil wells. Accordingly, it sought to disclaim the licenses to sell them, and then use the proceeds to pay creditors. Presumably the purchaser could determine whether to deal with the reclamation issues ancillary to whatever purpose it hand in mind for the land. The Regulator issued abandonment and reclamation orders, respecting the renounced wells. Grant Thornton disclaimed the licenses and asserted that it was not obligated to comply and the matter proceeded to litigation. Essentially the formal question was whether the Alberta Energy Regulator was a "creditor" with a "claim provable in bankruptcy" under the statute.

Ultimately the majority of the SCC held:

1. The two statutes could be read together without any jurisdictional problem arising.

2. The Regulator was a "creditor" and Grant Thornton was a "licensee".

3. Grant Thornton, as a trustee in bankruptcy, would not be personally liable regardless of the result.

4. The license obligations were not "claims provable in bankruptcy"; i.e. they would not be done away with through the bankruptcy process.

5. The assets of the bankrupt were available to the trustee to be used to satisfy the reclamation and remediation orders ahead of the (secured and unsecured) creditors.

In effect, the environmental obligations were recognized as more important than the claims of conventional creditors for policy reasons. The dissent recognized the policy impact of the decision would be to make credit harder to obtain for such licensees.

Per Wagner CJC:

[Paramountcy]

I. Introduction

1 The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain unavoidable

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

2 The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority are spent and burdened with abandonment and reclamation liabilities that exceed their value.

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

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

…

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

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

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

35 The definition of “claim provable” is completed by s. 121(1):
All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

36 A claim may be provable in a bankruptcy proceeding even if it is a contingent claim. A “contingent claim is ‘a claim which may or may not ever ripen into a debt, according as some future event does or does not happen’” (*Peters v. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273 (Alta. C.A.), at para. 23, quoting *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.) , at p. 281). Sections 121(2) and 135(1.1) provide guidance on when a contingent claim will be a provable claim:
121 (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
. . . . .
135 (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

37 In *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.) (”*Abitibi*”), at para. 26, this Court interpreted the foregoing provisions of the *BIA* and articulated a three-part test for determining when an environmental obligation imposed by a regulator will be a provable claim for the purposes of the *BIA* and the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (”*CCAA*”):
First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original.]

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

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

40 The *BIA* establishes a comprehensive priority scheme for the satisfaction of the provable claims asserted against the bankrupt in the collective proceeding. Section 141 sets out the general rule, which is that all creditors rank equally and share rateably in the bankrupt’s assets. However, the rule set out in s. 141 applies “subject to [the *BIA*]”. Section 136(1) lists the claims of preferred creditors and the

order of priority for their payment. It also states that this order of priority is "[s]ubject to the rights of secured creditors". Under s. 69.3(2), the stay of proceedings does not prevent secured creditors from realizing their security interest. The *BIA* therefore sets out a priority scheme for paying claims provable in bankruptcy, with secured creditors being paid first, preferred creditors second and unsecured creditors last (see *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at paras. 32-35).

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

42 Section 14.06(2) reads as follows:

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

43 Section 14.06(4) reads as follows:

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

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

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

…

A. The Doctrine of Paramountcy

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

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

65 Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191). The second is *frustration of*

purpose, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) , at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) , at para. 66).

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

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

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

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

the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

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

71 I will consider each alleged conflict in turn.

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

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

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

74 I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose very different interpretations of s. 14.06(4). However, s. 14.06(4) is clear and unambiguous when read on its own: where it is invoked by a trustee, the result is that "the trustee is not personally liable" for failure to comply with certain environmental orders or for the costs incurred by any person in carrying out the terms of such orders. The provision says nothing about the liability of the "bankrupt" or the "estate" — distinct concepts referenced many

times throughout the *BIA*. Section 14.06(4), on its own wording, does not support the interpretation urged upon this Court by GTL.

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

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

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

…

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

102 The operational conflicts between the *BIA* and the Alberta legislation alleged by GTL arise from its status as a "licensee" under the *OGCA* and the *Pipeline Act*. As I have just demonstrated, s. 14.06(4) does not empower a trustee to walk away from all responsibilities, obligations and liabilities with respect to "disclaimed" assets.

Rather, it clarifies a trustee's protection from environmental personal liability and makes it clear that a trustee's "disclaimer" does not affect the environmental liability of the bankrupt estate. Regardless of whether GTL effectively "disclaimed" the Renounced Assets, it cannot walk away from them. In light of the proper interpretation of s. 14.06(4), no operational conflict is caused by the fact that, under Alberta law, GTL, as a "licensee", remains responsible for abandoning the Renounced Assets utilizing the remaining assets of the Redwater estate. Likewise, no operational conflict is caused by the fact that the end-of-life liabilities associated with the Renounced Assets continue to be included in the calculation of Redwater's LMR.

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

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

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

106 Importantly, the situation in this case is completely different from the one before the Court in *Moloney* . In that case, Gascon J. rejected the argument that there was no operational conflict because the bankrupt could voluntarily pay a provincial debt post discharge or could choose not to drive. He noted that "the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law" (para. 60). In the instant case, GTL retains both the protection afforded to it under

the federal law (no personal liability) and the privilege to which it is entitled under the provincial law (ability to operate the bankrupt's assets in a regulated industry). GTL is not being asked to forego doing anything or to voluntarily pay anything. Nor is it urged that the Regulator could avoid conflict by declining to apply the impugned law during bankruptcy, as in *Moloney* , at para. 69. This is not a situation in which the Regulator might decline to apply the provincial law, but a situation in which the provincial law can be — and has been — applied during bankruptcy without conflict.

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

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

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

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

111 This purpose is not frustrated by the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. The Regulator's position is that it would never attempt to hold a trustee personally liable. Trustees have been considered

licensees under these Acts for over 20 years, and they have yet to face the scourge of personal liability. To find an essential part of Alberta's regulatory regime inoperative based on the theoretical possibility of frustration of purpose would be inconsistent with the principles of paramountcy and cooperative federalism. To date, Alberta's regulatory regime has functioned as intended without frustrating the purpose of s. 14.06(2) or s. 14.06(4) of the *BIA*.

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

113 Regardless, even if it is assumed that such broader goals are part of the purpose of s. 14.06(2) and s. 14.06(4), the evidence does not show that they are frustrated by the inclusion of trustees in the statutory definition of "licensee". Relying on statements made by GTL in the Second Report, ATB asserts that, if trustees continue to be considered licensees and if environmental claims continue to be binding on estates, then, in situations akin to that of the Redwater insolvency, trustees will refuse to accept appointments. The fact that, prior to this litigation, it had been settled in Alberta since at least *Northern Badger* that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency professionals personally liable for such obligations. As noted by the Canadian Association of Petroleum Producers, there is nothing to suggest that this well-established state of affairs has led insolvency professionals to refuse to accept appointments or has increased the number of orphaned sites. There is no reason why the Regulator and trustees cannot continue to work together collaboratively, as they have for many years, to ensure that end-of-life obligations are satisfied, while at same time maximizing recovery for creditors.