SASKATCHEWAN LAW REVIEW

Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law

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I. INTRODUCTION

A company pollutes a tract of land and then goes bankrupt. Does the bankrupt company's estate pay to clean up the land? A professional engages in misconduct and is disciplined by a regulator. Can the professional avoid disciplinary sanctions by starting insolvency proceedings? A company is investigated for breaching occupational health and safety regulations. Can the investigation continue once the company starts to restructure? These are some of the difficult questions that courts have been asked to answer about the intersection of provincial regulatory regimes and federal insolvency law. They are difficult questions because courts need to reconcile the public interests protected by regulatory regimes with the aims of the insolvency system.

Bankruptcy and insolvency law benefits private stakeholders. Individual debtors are able to release debts and make a fresh start. Corporate debtors can restructure and continue in business or wind up their operations in an orderly manner.[1] Coordinated insolvency proceedings may provide creditors with a greater and more equitable recovery than if each undertook to enforce obligations separately.[2]

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1 Madam Justice BE Romaine, "Conflicting Policy Objectives and the CCAA Court: Lessons Learned and Future Challenges" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2013* (Toronto: Carswell, 2014) 35 at 36-38 [Sarra, *Annual Review 2013*].

2 *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 22, [2010] 3 SCR 379 [*Century Services*], citing Roderick J Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009) at 2-3 [Wood, *Bankruptcy and Insolvency Law*].

The private benefits of insolvency can have positive impacts on the broader community. An individual whose debts have been released in bankruptcy may be motivated to work hard, spend money, and take entrepreneurial risk, all of which can contribute to economic growth.[3] By facilitating the liquidation of companies, insolvency law enables resources to be repurposed from inefficient uses to more valuable ones. Corporate restructuring serves the public interest by precluding "intangible losses, such as the evaporation of the companies' goodwill" and "facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs."[4]

Regulatory regimes serve important public interests too. They protect health, safety, and the environment. These goals can be incompatible with the goals of insolvency law.[5]

The conflict between these two sets of goals takes place in a constitutional framework: insolvency law is federal and many regulatory regimes are established by provincial legislation. In Canada, valid federal legislation takes precedence over provincial legislation.[6] The paramountcy ascribed to federal legislation means bankruptcy and insolvency laws have the potential to significantly interfere with provincial regulatory regimes unless courts enforce limits, such as those set out in the Canadian constitution,[7] on the reach of bankruptcy and insolvency law.

This paper examines how courts have responded to the conflict between regulatory and insolvency law. It analyzes the legal test used to determine when a debtor's regulatory obligations are subject to being stayed, compromised, and discharged by insolvency proceedings. It recommends that the existing test be reformulated. Part II of the paper describes the current state of the law on regulatory-insolvency conflicts by providing a short overview of important decisions. Part

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3 See Anna Lund, "*407 ETR*, *Moloney*, and the Contested Meaning of Rehabilitation in Canada's Personal Bankruptcy System" (2016) 79:2 Sask L Rev 265 at 274, n 49, the accompanying text and works cited therein [Lund, "Contested Meaning"].

4 *Century Services*, *supra* note 2 at para 18, citing SE Edwards, "Reorganizations Under the Companies Creditors Arrangement Act" (1947) 25:6 Can Bar Rev 587 at 592-93. See also Jassmine Girgis, "Corporate Reorganization and the Economic Theory of the Firm" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2010* (Toronto: Carswell, 2011) 467; Alfonso Nocilla, "The History of the *Companies' Creditors Arrangement Act* and the Future of Re-Structuring Law in Canada" (2014) 56:1 Can Bus LJ 73 at 96-97.

5 See generally Romaine, *supra* note 1. And see especially *ibid* at 61-62.

6 See generally Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2016) (loose-leaf updated 2016, release 1), vol 1, ch 16.

7 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

III of the paper sets out four critiques of the current state of the law—it is uncertain, it establishes perverse incentives, it avoids the key question, and it does not adequately safeguard provincial governments' legislative jurisdiction. Part IV of the paper articulates a modified test for resolving the conflict and provides direction on how it might be applied.

II. PROVABLE CLAIMS & REGULATORY MATTERS: A WHIRLWIND TOUR OF RECENT CASE LAW

Insolvency law conflicts with provincial regulatory regimes in a number of different areas, ranging from securities regulation to occupational health and safety to rodent control. This summary of case law focuses on the conflict between insolvency law and environmental regulations, and insolvency law and individual licensing regimes. These are two areas on which the Supreme Court of Canada has opined in recent years, and where recent case law strikes a different balance between provincial and federal powers than earlier precedents.

The decisions discussed in this section grapple with the question of when a regulatory obligation becomes a provable claim. The concept of a provable claim is central to insolvency law.[8] Once insolvency proceedings commence, a regulator with a provable claim is stayed from enforcing it. The debtor can compromise or release the provable claim in the insolvency proceedings. Conversely, a non-provable obligation is not stayed, compromised, or released by insolvency proceedings. A regulator to whom a non-provable obligation is owed can continue to enforce it notwithstanding the insolvency proceedings. It is crucial to determine whether or not a regulatory obligation is a provable claim, because it informs whether a regulator will be able to demand compliance with the obligation during and following insolvency proceedings.

A. *ABITIBIBOWATER*

The question in *Newfoundland and Labrador v. AbitibiBowater Inc*.[9] was whether environmental protection orders issued by the Government of Newfoundland and Labrador were provable claims in the debtor's *Companies' Creditors Arrangement Act*[10] restructuring proceedings.[11] If the claims were provable, then the government would be stayed from

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8 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 2, 121 [*BIA*].

9 2012 SCC 67, [2012] 3 SCR 443 [*AbitibiBowater* SCC], aff'g 2010 QCCS 1261, 68 CBR (5th) 1 [*AbitibiBowater* CS], leave to appeal to the CA refused, 2010 QCCA 965, 68 CBR (5th) 57.

10 RSC 1985, c C-36, s 11.8(9) [*CCAA*].

11 *AbitibiBowater* SCC, *supra* note 9 at para 1.

enforcing them and the debtor could compromise them in the restructuring proceedings. The government maintained they were not provable claims and therefore could be enforced against the debtor company, notwithstanding the insolvency proceedings. The Supreme Court of Canada disagreed. A seven-member majority concluded the orders were provable claims. It articulated a three-part test for what constitutes a provable claim ("the *AbitibiBowater* test"):

(1) "There must be a debt, liability or obligation to a creditor."[12] The threshold here is low, all that must be determined is whether or not "the regulatory body has exercised its enforcement power against a debtor."[13]
(2) The debt, liability or obligation usually must be incurred prior to the start of insolvency proceedings.[14] However, special provisions in the *Bankruptcy and Insolvency Act*[15] and the *CCAA* provide that environmental liabilities can be provable claims even if they arise during the insolvency proceedings.[16]
(3) "It must be possible to attach a monetary value to the debt, liability or obligation."[17] With regulatory obligations, this means that it must be sufficiently certain that the regulator will liquidate the obligation and seek to recover it from the debtor.[18]

The decision in *AbitibiBowater* turned on whether the third element of the test had been met. The majority concluded that it had. Although the motions judge had applied a different framework, his findings of fact supported the conclusion that the government would carry out the remediation work itself and seek to recover its costs from the debtor:

- The debtor company was reliant on interim financing that had been advanced on restricted conditions, and so lacked the means to comply with the orders.[19]

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12 *Ibid* at para 26 [emphasis omitted].
13 *Ibid* at para 27.
14 *Ibid* at para 26.
15 *Supra* note 8.
16 Subsection 14.06(8) of the *BIA* (*ibid*) and s. 11.8(9) of the *CCAA* (*supra* note 10) provide that environmental obligations can be provable claims, even if they arise after the commencement of insolvency proceedings, so long as they arise before "the time limit for inclusion in the insolvency process" (*AbitibiBowater* SCC, *supra* note 9 at para 29).
17 *AbitibiBowater* SCC, *ibid* at para 26 [emphasis omitted].
18 *Ibid* at para 37.
19 *Ibid* at para 53.

- The timelines provided in the orders were unrealistic, suggesting the government never really expected the debtor to comply with them.[20]
- The orders related to five parcels of land, three of which had been expropriated by the Government of Newfoundland and Labrador.[21] Not being in control of the lands made timely compliance with the regulatory orders difficult.[22]

Additionally, the debtor company had brought a claim under NAFTA[23] for compensation. The motions judge found that the provincial government issued the regulatory orders in an attempt to establish a set-off claim against the debtor company.[24] He noted that the orders targeted the debtor company, and the government had not sought to enforce compliance by any of the other parties who were potentially liable under provincial environmental law.[25] The motion judge's findings supported the Supreme Court's conclusion that the remediation orders were provable claims because it was sufficiently certain the provincial government would monetize them. Given the claims were provable, the only recourse left to the provincial government was to participate as a creditor in the restructuring proceedings: it could negotiate and vote on the debtor's restructuring plan, and have its claims compromised in accordance with the terms of the plan.

B. *NORTEL* & *NORTHSTAR*

The companion decisions of the Ontario Court of Appeal in *Nortel Networks Corporation (Re)*[26] and *Northstar Aerospace Inc. (Re)*[27] applied the three-part test set out in *AbitibiBowater* to determine whether or not remediation orders were provable claims. The Court reached opposite conclusions in the two cases.

Both cases turned on the question of whether it was sufficiently certain that the Ministry of the Environment would carry out the remediation work itself, that is, part three of the *AbitibiBowater* test.

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20 *Ibid* at para 54.

21 *Abitibi Consolidated Rights and Assets Act*, SNL 2008, c A-1.01. One of the "sites" was actually a number of logging camps located throughout the province.

22 *AbitibiBowater* SCC, *supra* note 9 at para 54.

23 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994).

24 *AbitibiBowater* SCC, *supra* note 9 at paras 51-52.

25 *Ibid* at para 55.

26 2013 ONCA 599, 368 DLR 122 [*Nortel* CA], rev'g in part 2012 ONSC 1213, 88 CBR (5th) 111, Morawetz J [*Nortel* Sup Ct], leave to appeal to SCC refused, 35642 (17 April 2014).

27 2013 ONCA 600, 8 CBR (6th) 154 [*Northstar*].

The Court of Appeal determined that most of the remediation orders at issue in *Nortel* were not provable claims, because the orders made other current and former owners of the polluted properties jointly and severally liable for the cost of remediation. It was not sufficiently certain that the Ministry would incur the remediation costs, because it was possible that these other parties might incur the costs instead.[28] Conversely, the Ministry of the Environment had already commenced remediating the property subject to the orders in *Northstar*, and this made it easy for the Court of Appeal to conclude that the sufficiently certain threshold was met and the remediation orders constituted provable claims.[29]

C. *REDWATER*

The issue in the Alberta case of *Redwater Energy Corporation (Re)*[30] was whether regulatory orders made against the trustee and receiver of a bankrupt company were provable claims.[31] The orders required the trustee and receiver to properly abandon non-producing oil and gas wells. In this context, abandonment refers to the dismantling of a well so as to leave it in such a condition that it does not pose a risk to public safety or the environment.[32] The motions judge held that these orders were provable claims, and that compelling the trustee and receiver to comply with them would improperly reorder the priorities set out in the *BIA*.[33]

The motions judge determined it was sufficiently certain that the abandonment obligations would be transformed into a monetary claim, and therefore were provable claims:

- Like the debtor company in *AbitibiBowater*, the trustee for Redwater did not have control over the properties,

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28 *Nortel* CA, *supra* note 26 at paras 39-40. The Court of Appeal held one order issued against Nortel was provable because there were no other current or former owners to carry out the remediation, and so it was sufficiently certain that the Ministry of the Environment would incur the cost itself (*ibid* at para 41).

29 *Supra* note 27 at para 22.

30 2016 ABQB 278, 33 Alta LR (6th) 221, Wittmann CJ [*Redwater*]. For commentary on the case see Kelly Bourassa, Ryan Zahara & Chris Nyberg, "Restructuring Challenges in the Oil and Gas Sector: The Treatment of Regulatory Orders Post-*Redwater*" (2016) 54:2 Alta L Rev 383; Janice Buckingham, Melanie Gaston & Emily Paplawski, "Implications of the Redwater Decision: Where Does the Buck Stop?" (2016) 32:1 BFLR 183; Jeffery L Oliver & Tom Cumming, "Redwater Energy Corporation and the Evolution of Section 14.06: Balancing Insolvency and Regulatory Laws in the Oil Patch" in Janis P Sarra & The Honourable Barbara Romaine, eds, *Annual Review of Insolvency Law, 2016* (Toronto: Thomson Reuters, 2017) 387.

31 *Redwater*, *ibid* at paras 1-9.

32 *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 1(1)(a) [*OGCA*].

33 *Redwater*, *supra* note 30 at paras 179-85.

and the motions judge held that it consequently "ha[d] no ability to perform any kind of work on these assets."[34]

- The trustee lacked the financial means to comply with the abandonment order.[35]
- It was not feasible to reorganize Redwater, and the trustee advised there would be "no point" to the sales process if it was forced to comply with the abandonment orders.[36]
- The regulator could recover some, but not all, of the abandonment costs from other parties with an interest in the wells.[37]

Ultimately, the Court was concerned that if the claims were not deemed to be provable, the trustee would be forced to use the assets of the estate to comply with the orders, in essence giving the regulator a super-priority above and beyond the super-priority allowed for in the *BIA*.[38] The regulator appealed the decision to the Alberta Court of Appeal.[39] The matter was heard on October 11, 2016 and, as of the writing of this paper, the appellate court's decision has not yet been released.[40]

D. *MOLONEY* & *407 ETR*

The intersection of insolvency legislation and regulatory regimes has created significant confusion with respect to environmental liabilities; however, this is not the only context in which conflicts arise. In 2015, the Supreme Court heard two cases about how driving regulations apply to individuals once they have undergone bankruptcy proceedings.[41]

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34 *Ibid* at para 170.

35 *Ibid*.

36 *Ibid*.

37 *Ibid* at paras 145, 171-72; *OGCA*, *supra* note 32, s 30. See discussion of this point in the text accompanying notes 66-67.

38 The provincial and federal governments are given a limited super-priority for the costs of remediating real property. They get a first ranking claim against the property subject to the remediation order and any contiguous property (*BIA*, *supra* note 8, s 14.06(7); *CCAA*, *supra* note 10, s 11.8(8); *Redwater*, *supra* note 30 at para 173).

39 The Alberta Energy Regulator and the industry funded Orphan Wells Association appealed the initial decision. The Court granted intervener status to the governments of Saskatchewan and British Columbia, as well as two associations that represent the interests of insolvency professionals and petroleum producers (*Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238, 40 Alta LR (6th) 11).

40 Tracy Johnson, "Appeal over Redwater Energy's idle wells heard this week", *CBC News* (12 October 2016), online: <http://www.cbc.ca/news/canada/calgary/redwater-energy-appeal-1.3801837>.

41 *Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327 [*Moloney* SCC], aff'g 2014 ABCA 68, 370 DLR (4th) 267 [*Moloney* CA]; *407 ETR Concession Co. v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, [2015] 3 SCR 397 [*407 ETR*]. For commentary on these decisions, see Lund, "Contested Meaning", *supra* note 3; Anna Lund, "Insolvency Law's Limits on the Disciplinary Powers of Professional

These cases serve as an important reminder that insolvency law clashes with provincial regulatory regimes in a range of contexts. The licence denial cases are divorced from the (sometimes) antagonistic debate around environmental protection and economic development. It can be useful to consider the conflict between regulatory and insolvency law in a less fraught area.

The 2015 cases of *Moloney* and *407 ETR* concerned individuals who owed debts as a result of driving. One had caused a motor vehicle accident while driving without insurance. The other made regular use of a toll highway but did not pay the toll. In the provinces where the individuals resided, the provincial legislation authorized the motor vehicle regulator to deny individuals their driver's licences, or other authorizations needed to drive, unless they were making efforts to repay the debts. In both cases, the individuals made assignments into bankruptcy and received discharges. Notwithstanding the bankruptcies, the provincial regulators continued the suspensions of the individuals' driver's licences.

In *Moloney*, the Court applied the *AbitibiBowater* test and succinctly determined that the debts were provable claims. The regulator had exercised its enforcement power, the debt arose before the bankruptcy, and it was "clearly monetary in nature."[42] This point was conceded by the regulator in *407 ETR*.[43]

In both cases, the Court characterized the suspension of the driver's licence as a debt enforcement measure that had the effect of compelling a debtor to either pay the debt or forgo driving.[44] The suspension provisions conflicted with the bankruptcy stay—the *BIA* bars claimants from taking steps to enforce provable claims.[45] Because of this conflict, the provincial legislation was rendered inoperative under the doctrine of paramountcy and the regulator could not maintain the suspension once the debtor discharged the debt in bankruptcy.[46]

Regulators: An Update from Canada" (2016) 19:2 Leg Ethics 320 [Lund, "Insolvency Law's Limits"]; Roderick J Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word" (2016) 58:1 Can Bus LJ 27 [Wood, "The Paramountcy Principle"]. For commentary which predates the release of the Supreme Court's reasons, see Craig E Jones, "Taking the 'Fresh Start' Seriously: A Case Comment on *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Company Limited and Moloney v Alberta (Administrator, Motor Vehicle Accident Claims Act)*" in Janis P Sarra & Justice Barbara Romaine, eds, *Annual Review of Insolvency Law, 2014* (Toronto: Carswell, 2015) 405.

42 *Moloney* SCC, *ibid* at para 55. See also *Ontario (Finance) v Clarke and Superintendent of Insurance for Ontario*, 2013 ONSC 1920 at para 51, 115 OR (3d) 33.

43 *Supra* note 41 at para 19.

44 *Ibid* at para 21; *Moloney* SCC, *supra* note 41 at para 56.

45 *BIA*, *supra* note 8, s 178(2); *Moloney* SCC, *ibid* at para 65.

46 *407 ETR*, *supra* note 41 at para 33; *Moloney* SCC, *ibid* at para 133.

III. EVALUATING THE CURRENT APPROACH: FOUR CRITIQUES

Critics of the *AbitibiBowater* test contend that it foments uncertainty and creates perverse incentives. This section summarizes these criticisms and adds two additional criticisms. First, the test fails to directly engage the key question of how to balance competing regulatory and insolvency interests in an intellectually honest and open way. Second, the test does not adequately respect the division of powers between federal and provincial governments.

A. UNCERTAINTY

Insolvency and environmental scholars have criticized the *AbitibiBowater* test, likening it to a train wreck or, at least, a car accident.[47] Assessing whether or not a regulatory claim is provable is an unpredictable and fact-specific enterprise.[48] Moreover, courts developed the test in cases where environmental orders were at issue, and the test is "not easily translatable to the typical considerations applicable to other regulatory agencies."[49]

AbitibiBowater and *Nortel* illustrate the uncertainty of the test, even when just applied in the environmental context. In his dissenting opinion in *AbitibiBowater*, Justice LeBel accepted the majority's articulation of the three-part test.[50] The majority found that it was sufficiently certain that the Ministry of the Environment would transform the remediation obligation into a provable claim.[51] Looking at exactly the same findings of fact, LeBel J. reached the opposite conclusion. He could "find no support for a conclusion…that the court had evidence that would satisfy the test of sufficient certainty that the province of Newfoundland and Labrador would perform the remedial work itself."[52] Even as the Supreme Court articulated the test for when a regulatory obligation becomes a provable claim, its members could not agree on how it should be applied.

In *Nortel*, the Ontario Court of Appeal found that most of the remediation orders were not provable claims, with one exception.

47 See e.g. Richard Butler, "Wreckage Still Litters the Intersection: Comment on the Ontario Court of Appeal's Decision in *Nortel Networks* and *Northstar Aerospace* and Beyond" in Sarra, *Annual Review 2013*, *supra* note 1, 747.

48 Alexander Clarkson described it as a "highly subjective analysis that does not appear to operate on the basis of any underlying principles" ("In the Red: Towards a Complete Regime for Cleaning Up Environmental Messes in the Face of Bankruptcy" (2011) 69:2 UT Fac L Rev 31 at 45. See also Luc Béliveau & Guillaume-Pierre Michaud, "Insolvency and Environmental Law following the AbitibiBowater Case: Still a Murky Intersection" (2013) 2 J Insolvency Institute Can 247).

49 Michael MacNaughton, "Scope of the Regulatory Carve-out in the CCAA" in Sarra, *Annual Review 2013*, *supra* note 1, 1 at 31-32.

50 *AbitibiBowater* SCC, *supra* note 9 at para 98.

51 *Ibid* at paras 61-63.

52 *Ibid* at para 100.

Most of the remediation orders were not provable claims because there were other past or current owners who might be compelled to remediate the land and so it was not sufficiently certain that the Ministry would have to do the work itself.[53] The exception was a parcel of land where there were no other potentially liable owners. The Ministry would need to remediate the land itself so the Court held that the necessary threshold of certainty had been met, but only for this one property.[54] A small factual difference resulted in completely opposite legal outcomes, a state of affairs that creates uncertainty.

B. PERVERSE INCENTIVES

Critics allege that the *AbitibiBowater* test sets up perverse incentives for debtor companies, creditors, regulators, and governments.

To the extent that a debtor believes it can compromise or discharge regulatory obligations in insolvency proceedings, the *AbitibiBowater* test creates a moral hazard. It encourages a debtor to "neglect" its regulatory obligations prior to insolvency.[55] The costs of non-compliance are then externalized onto the public at large.[56] The public might be stuck footing the bill for environmental remediation, or they might be put at heightened risk because individuals undertaking licensed activities feel little obligation to comply with the rules governing that activity. A driver may take to the highway without insurance. A company involved in environmentally sensitive activities may adopt fewer safeguards. When environmental contamination occurs, early intervention can reduce the costs of remediation.[57] A legal system that creates an incentive to neglect the obligation may result in greater overall costs, as well as an increased risk of a negative impact on public health, safety, and environmental interests.

A creditor may prefer that a regulatory obligation be deemed to be a provable claim. The regulator is then stayed from enforcing the obligation. In most instances, the claim will be classified as an unsecured claim, subject to being discharged or compromised in the

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53 *Nortel* CA, *supra* note 26 at para 39.

54 *Ibid* at para 41.

55 Janis Sarra, "Of Paramount Importance: Interpreting the Landscape of Insolvency and Environmental Law" in Janis Sarra, ed, *Annual Review of Insolvency Law, 2012* (Toronto: Carswell, 2013) 453 at 507-508 [Sarra, "Interpreting the Landscape"; Sarra, *Annual Review 2012*]; Clarkson, *supra* note 48 at 41; Anna Lund, "*Newfoundland & Labrador v. AbitibiBowater Inc.*: Environmental Issues in Abitibi's Insolvency, Examining the Regulator-Creditor and Past-Operations Expense Tests" in Sarra, *Annual Review 2012*, *ibid*, 509 at 532 [Lund, "Environmental Issues"].

56 For an in-depth examination of the underlying justifications for imposing the costs of non-compliance on a regulated party (in the context of environmental legislation) see Nickie Vlavianos, "Creating Liability Regimes for the Clean Up of Environmental Damage: The Literature" (1999) 9 J Envtl L & Prac 145 at 150-55.

57 Sarra, "Interpreting the Landscape", *supra* note 55 at 462-63.

insolvency proceedings.[58] Secured and unsecured creditors will recover more than if the debtor company must pay for regulatory compliance before making a distribution to other creditors.

The *AbitibiBowater* test creates a perverse incentive, whereby creditors may push a debtor to liquidate, instead of restructuring, to increase the likelihood of a regulatory obligation being deemed to be a provable claim.[59] When a company liquidates, all the assets are sold off and there are no ongoing operations, only past ones. As discussed below, a claim is more likely to be deemed provable if it relates to past operations, rather than ongoing operations.[60] A strategic liquidation may benefit the creditors, but be an undesirable outcome for the broader community and the provincial regulator. Liquidation, especially of large companies, can create economic and social disruptions that could be avoided or mitigated in a restructuring.[61]

It can be to a regulator's advantage to have a regulatory obligation deemed non-provable. In a bankruptcy, the court may require the trustee to comply with the regulatory obligation prior to distributing funds to the creditors. In a restructuring, the regulator can continue to enforce the obligation notwithstanding the commencement or completion of insolvency proceedings. The *AbitibiBowater* test creates a perverse incentive, whereby a regulator may decline to take steps to enforce a regulatory obligation when insolvency proceedings are imminent, because interventions may lead a court to determine that the regulator crossed the sufficiently certain threshold.[62] Alternatively,

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58 In some instances, the regulatory claim may be accorded a higher priority. For example, there is a limited super-priority security interest granted to governments to secure the costs of remediating real property, however, it only attaches to the contaminated property and any contiguous property (*BIA*, *supra* note 8, s 14.06(7); *CCAA*, *supra* note 10, s 11.8(8)).

59 Tori Crawford, "The 'Collision Course' Continues: Recent Developments in the Intersection Between Insolvency Law and Environmental Law" (2014) Insolvency Institute of Canada—2014 Law Student Writing Awards Program—1st Place Prize Winner at 6, online: <https://www.insolvency.ca/en/iicresources/resources/CollisionCourse-ToriCrawford1stPlace_2014.pdf>, archived: <https://perma.cc/CDG5-P8RL>. See also Béliveau & Michaud, *supra* note 48 at 273 (arguing that a debtor might also argue against a finding that the property is a going concern).

60 See Parts IV-A, IV-B-1-a, below.

61 See *supra* note 4 and the works cited therein.

62 Dianne Saxe, "Why the Supreme Court Decision in AbitibiBowater Won't Work" (25 April 2013), *Siskinds Enviornmental Law* (blog), online: <http://www.siskinds.com/envirolaw/supreme-court-decision-abitibibowater-work/>, archived: <https://perma.cc/8AW2-WUZ8>; Clarkson, *supra* note 48 at 44; Crawford, *supra* note 59 at 5-6, cited in *Redwater*, *supra* note 30 at para 149; Romaine, *supra* note 1 at 61; Sean F Dunphy, Guy P Martel & Joseph Renaud, "Unstoppable Force Meets Immovable Object: The Supposed Clash Between Environmental Law and Insolvency Law After *AbitibiBowater*" (2012) 1 J Insolvency Institute Can 35. Béliveau & Michaud poetically liken the sufficiently certain threshold to the "Rubicon": once crossed, there is no return (*supra* note 48 at 254).

the regulator may try to disguise its intentions when undertaking regulatory activity. Such subterfuge threatens the regulator's and debtor's ability to work openly, transparently, and cooperatively toward a solution.[63]

Finally, the *AbitibiBowater* test might create perverse incentives for provincial legislators. Legislators may prefer to have regulatory obligations deemed non-provable, because it decreases the likelihood of the government being required to shoulder additional costs (e.g., environmental remediation costs). The sufficient certainty test penalizes governments who have enacted rigorous regulatory schemes. If the regulator has not been given the power to liquidate instances of non-compliance and collect the resulting debt, then there is no contingent monetary claim and the regulatory obligation is not provable.[64] On the other hand, these debt-creating provisions are desirable because they enable regulators to collect from non-compliant parties, thereby minimizing the costs that fall to the public purse. The public will be ill-served if governments avoid including such debt-creating provisions in legislation, with the aim of having regulatory obligations deemed non-provable.

C. ASKING THE WRONG QUESTION

The *AbitibiBowater* test fails to engage the central issue at stake when insolvency law and provincial regulatory regimes conflict, namely, how to balance competing interests. Insolvency law promotes important private and public interests: debtor relief, creditor recovery, economic growth, and prosperity. Public regulatory regimes protect important public interests including health, safety, and the environment. Instead of asking a court to balance these competing interests, the *AbitibiBowater* test asks if a monetary value can be attached to a regulatory obligation. A court that wishes to take account of the competing interests cannot do so in a transparent and intellectually honest fashion, but rather must relate its analysis back to the likelihood that the regulatory obligation is going to be monetized.

For example, in *Redwater*, the heart of the issue was whether the amounts realized from selling the valuable assets of the debtor company should be distributed to the creditors or used to comply

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63 Béliveau & Michaud, *ibid* at 273. Neil Narfason expresses a concern that regulators may try to game the system ("The Mesh Between Canada's Federal Insolvency Regime and Provincial Environmental Protection Laws" in Sarra & Romaine, *supra* note 41, 311 at 316).

64 For example, in *Re Lamford Forest Products (In Bankruptcy)* ((1991), 86 DLR (4th) 534, 63 BCLR (2d) 388 (SC) [cited to DLR]), the Court cited the fact that there was no "debt creating provision" in the regulatory legislation as support for its finding that the regulator was not acting as a creditor (*ibid* at 539-40).

with the debtor company's obligation to properly abandon non-producing oil wells. The debtor company was being liquidated and so the bankruptcy proceedings did not raise the type of public interest in preserving jobs and minimizing social and economic disruption as would be implicated in a restructuring. Nonetheless, private and public interests were still at stake. The creditors wanted to maximize their recovery and their ability to do so could have repercussions for the willingness of lenders to advance credit to other oil and gas companies. But if the debtor company's assets were not used to pay for the abandonment of oil and gas wells, the costs would be passed along to the public and other oil and gas producers—the latter of whom fund an organization that abandons "orphan" wells.[65] Additionally, until properly abandoned, the wells posed a risk to public safety and the environment.

Instead of requiring the *Redwater* Court to balance these competing interests, the *AbitibiBowater* test deflected judicial attention to other, less salient matters. In *Nortel*, most of the remediation orders had been deemed not to be provable claims because there were other owners, who might be compelled to carry out the cleanup. In *Redwater*, Alberta legislation provided that other parties with an interest in the wells could be compelled to pay a portion of the abandonment costs. Parties other than the debtor owned a 20 per cent interest in the wells and therefore could be forced to pay up to 20 per cent of the abandonment costs.[66] The Court distinguished *Redwater* from *Nortel* on the basis that in *Nortel* the other, potentially liable, third parties could be held responsible for the entire amount of the remediation costs, whereas in *Redwater* the other, potentially liable, third parties could only be held responsible for a portion of the abandonment costs.[67] This type of analysis is consistent and appropriate under the framework articulated in *AbitibiBowater* and developed in subsequent cases, but it sidesteps the key question of what balance should be struck between important, competing interests.

D. NOT SO CO-OPERATIVE FEDERALISM

Courts are not blind to the fact that the clash between regulatory obligations and insolvency law raises difficult policy issues. In fact, a common refrain in *AbitibiBowater*, *Moloney*, and *Redwater* is for the court to note that Parliament has undertaken a careful balancing act when deciding what obligations survive bankruptcy, or which ones

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65 Clarkson, *supra* note 48 at 51. For a description of the orphan well fund program see Bourassa, Zahara & Nyberg, *supra* note 30 at 385-86.

66 *Redwater*, *supra* note 30 at para 145.

67 *Ibid* at para 171.

are accorded priority in distribution.[68] The courts then conclude that this legislative balancing act demands deference. This conclusion is true and yet incomplete. The provincial regulatory obligations are created by legislation that reflects the provincial legislatures' attempts to balance competing interests. When courts seek to respect the balance struck by Parliament, they often do so by rendering provincial legislation inoperative. The constitutional doctrine of paramountcy provides that when a conflict arises between valid provincial and federal legislation, the latter should prevail.[69] At the same time, courts are urged to be restrictive when applying the doctrine of paramountcy, so as "to avoid unnecessary constraints on provincial legislative action."[70] The *AbitibiBowater* test does not sufficiently respect the legislative will of provincial governments, nor safeguard their constitutionally-entrenched jurisdiction to legislate on certain subjects.

1. The Limits of the Bankruptcy and Insolvency Power

A regulator could argue that there is a constitutional limit on the degree to which insolvency law can interfere with regulatory obligations. The federal government passed the *BIA* and the *CCAA* pursuant to its "bankruptcy and insolvency" power.[71] A regulator could argue that the definition of a provable claim is invalid to the extent it includes regulatory obligations, because such a definition extends

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68 *Ibid* at para 176; *AbitibiBowater* SCC, *supra* note 9 at paras 32, 47; *Moloney* SCC, *supra* note 41 at para 37. See also Romaine, *supra* note 1 at 62; Bourassa, Zahara & Nyberg, *supra* note 30 at 406; Dunphy, Martel & Renaud, *supra* note 62.

69 The paramountcy doctrine provides that when there is a conflict between validly enacted provincial legislation and validly enacted federal legislation, the former will be inoperative to the extent of the conflict. The paramountcy doctrine recognizes two different types of conflicts: "(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" (*Moloney* SCC, *ibid* at para 18). If either the federal or provincial legislation is invalid, the doctrine of paramountcy has no applicability (Sarra, "Interpreting the Landscape", *supra* note 55 at 464, citing *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 3, [2010] 2 SCR 453).

70 *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at para 17, [2015] 1 SCR 693, cited in Hogg, *supra* note 6, vol 1, ch 5 at 46, n 177a.

71 *Constitution Act, 1867*, *supra* note 7, s 91(21). The division of powers is set out in the *Constitution Act, 1867*, primarily in ss. 91 and 92. Section 91 enumerates classes of subjects over which the federal government has exclusive jurisdiction and ss. 92 and 92A(1)(b) enumerate classes of subjects over which provincial governments have exclusive jurisdiction. For example, regulatory regimes are passed pursuant to a provincial government's power over "property and civil rights in the province" and the "development, conservation and management of non-renewable natural resources" (*ibid*, ss 92(13), 92A). Additionally, the federal government is granted residual power to legislate with respect to classes of subjects not assigned to the provinces (see Patrick J Monahan & Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law, 2013) at 112).

beyond the scope of the federal bankruptcy and insolvency power, and into the classes of subjects over which the provincial governments have exclusive jurisdiction. Courts will deem a law to be invalid if it is passed by one government with respect to a matter that falls under the classes of subjects that the *Constitution Act, 1867* assigns to the other level of government.[72] Alternatively, the regulator could argue that the definition of provable claim should be interpreted narrowly. Courts will prefer an interpretation of a law that results in it being characterized as constitutional over one that results in it being deemed unconstitutional. Where a law could be read broadly or narrowly, and the broad construction of the law appears to extend to matters outside of the enacting government's jurisdiction, the court will "read down" the law "so as to keep it within the permissible scope of [the enacting legislative body's] power."[73]

A regulator contesting the validity of the definition of provable claim, or seeking to have it read down, would need to define the scope of the bankruptcy and insolvency power and explain how this definition of the federal power limits the degree to which insolvency legislation can interfere with provincial regulatory obligations. A regulator mounting such a constitutional challenge faces a significant hurdle. There is no agreed upon definition of the bankruptcy and insolvency power. Courts and scholars have attempted to articulate one. For instance, in a concurring opinion in the 1955 Supreme Court decision of *Canadian Bankers' Association v. Attorney-General of Saskatchewan*,[74] Justice Rand offered the following definitions of bankruptcy and insolvency:

> Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors. To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.
>
> Insolvency, on the other hand, seems to be a broader term that contemplates measures of dealing with the

72 Courts undertake a two-part analysis: "the first step is to identify the 'matter' (or pith and substance) of the challenged law; the second step is to assign the matter to one of the 'classes of subjects' (or heads of legislative power)" (Hogg, *supra* note 6, vol 1, ch 15 at 6). If the matter of the law fits within one of the classes of subjects over which the government that passed the law has jurisdiction, the law is valid. Otherwise, the law is invalid (*ibid*, vol 1, ch 15 at 9-10).

73 *Ibid*, vol 1, ch 15 at 26; Sarra, "Interpreting the Landscape", *supra* note 55 at 459.

74 [1956] SCR 31, [1955] 5 DLR 736 [cited to SCR].

> property of debtors unable to pay their debts in other modes or arrangements as well. There is the composition and the voluntary assignment, devices which, in appropriate circumstances, may avoid technical bankruptcy without too great prejudice to creditors and hardship to debtors.[75]

A regulator might point out that these definitions contemplate interfering with financial claims, not regulatory obligations, to suggest that interfering with the latter falls beyond the scope of the bankruptcy and insolvency power. But the definition is not static; bankruptcy and insolvency are evolving concepts.[76] In dissenting reasons in the 1978 Supreme Court case of *Robinson v. Countrywide Factors Ltd.*,[77] Chief Justice Laskin noted that bankruptcy and insolvency "is a power…whose ambit, did not and does not lie frozen under conceptions held of bankruptcy and insolvency in 1867."[78] Arguably, the conceptions of bankruptcy and insolvency have expanded to include a greater focus on rehabilitation that extends well beyond the release of debtors' financial claims. Many legislative provisions allow for additional forms of relief. For example, a court can stay and compromise financial claims against third parties, in addition to those against the debtor.[79] Likewise, insolvency legislation authorizes courts to stay non-monetary regulatory claims against a debtor when it is not contrary to the

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75 *Ibid* at 46. In *BC (Attorney General) v. Canada (Attorney General)* ([1937] 1 DLR 695, [1937] 1 WWR 320 (PC) [*BC v Canada* cited to DLR]), the Privy Council defined insolvency as meaning "inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a [c]ourt, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration" (*ibid* at 700). See also John Honsberger, "The Nature of Bankruptcy and Insolvency in a Constitutional Perspective" (1972) 10:1 Osgoode Hall LJ 199.

76 See e.g. Honsberger, *ibid*.

77 [1978] 1 SCR 753, 72 DLR (3d) 500 [cited to SCR].

78 *Ibid* at 760. As authority for this proposition, Laskin C.J.C. cited *BC v. Canada*, where the Privy Council noted that the terms insolvency and bankruptcy should not be limited by the scope of the legislation that existed in 1867 (*supra* note 75 at 700).

79 The *BIA* provides for the stay and compromise of claims against directors (*supra* note 8, ss 50(13), 69.31). See also *CCAA*, *supra* note 10, ss 5.1(1), 11.03(1). For an example of restructuring proceedings where claims against a non-director third party were stayed, see *Montréal, Maine & Atlantique Canada Co. (Arrangement relatif à)* (2013 QCCS 4039 at paras 56-66). The claims were later released (*Montreal, Maine & Atlantic Canada Co. (Montréal, Maine & Atlantique Canada Cie) (Arrangement relatif à*), 2015 QCCS 3235, 29 CBR (6th) 287; Montreal, Maine & Atlantic Canada Co. (*Montréal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 4773).

public interest.[80] The terms "bankruptcy" and "insolvency" might mean something quite different nowadays than they did in 1867 or 1955. The federal government's powers to enact legislation that stays and compromises a broad range of obligations may have likewise expanded.

On the other hand, if the bankruptcy and insolvency power is defined too broadly, it could render the division of powers contemplated in the *Constitution Act, 1867* meaningless by giving the federal government *carte blanche* to interfere with provincial heads of power including property, civil rights, and non-renewable natural resources.[81] If the division of powers means anything, there must be a constitutional limit to the types of obligations that can be stayed, compromised, or released by insolvency legislation.

2. Examples of the Limits: *Northern Badger* and *Hover*

Courts have recognized that there must be an outer limit to the federal government's bankruptcy and insolvency power. This section will focus on two decisions of the Alberta Court of Appeal that predate *Redwater* and *Moloney*, but deal with similar questions. In the earlier set of decisions, the Alberta Court of Appeal reached conclusions that placed limits on the federal government's bankruptcy and insolvency power.

(a) *Northern Badger*

The precursor to *Redwater* is the 1991 decision of the Alberta Court of Appeal in *PanAmerican de Bienes y Servicios v. Northern Badger Oil & Gas Ltd.*[82] Like in *Redwater*, the debtor company had a licence to operate oil wells and was required by its licences to properly abandon the wells. The secured creditor applied to appoint a receiver over the debtor company's assets, and the debtor company was subsequently petitioned into bankruptcy. The receiver sold off the valuable wells,

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80 *BIA*, *ibid*, s 69.6(3); *CCAA*, *ibid*, s 11.1(3).

81 In the context of applying the paramountcy doctrine to resolve the clash between the *CCAA* and provincial legislation, Janis Sarra has noted that given "the very broad mandate of the [*CCAA*] articulated through the case law, it seems that virtually all provincial legislation could be in conflict with the CCAA's broad objectives" ("The Evolution of the Companies' Creditors Arrangement Act in Light of Recent Developments" (2011) 50: Can Bus LJ 211 at 213-14 [Sarra, "Evolution"]). See also Wade K Wright, "Courts as Facilitators of Intergovernmental Dialogue: Cooperative Federalism and Judicial Review" (2016) 72 SCLR (2d) 365 at 411 (discussing the need to safeguard provincial governments jurisdiction from federal government overreach in the context of the paramountcy doctrine); Wade K Wright, "The Political Safeguards of Canadian Federalism: The Intergovernmental Safeguards" (2016) 36:1 NJCL 1 (outlining some of the political mechanisms that operate as safeguards against federal overreach).

82 1991 ABCA 181, 81 DLR (4th) 280 [*Northern Badger*].

and wanted to distribute the proceeds of the sale to the secured creditor, without incurring the cost of abandoning the remaining wells.

The regulator issued an order requiring the receiver to abandon the wells and then applied for a court order to compel compliance. The Court of Appeal granted the application. As a result, the receiver had to use the proceeds from the sale to comply with the abandonment orders before any distributions could be made to the secured creditor.

In reaching its conclusion in *Northern Badger*, the Court of Appeal determined that the abandonment obligations were not provable claims. It articulated a two-part test for what constitutes a provable claim: the debtor must have a liability and it must be owed to a creditor. The Court of Appeal held that Northern Badger had a liability, but it was not owed to a creditor. The Court distinguished between situations where "some actual impost had been levied against the citizen and a sum of money was due and owing to the specific public authority involved" and a case, like this one, where the individual may simply be required to expend money to "obey the general law."[83] Here the regulator was seeking to enforce part of the general law of Alberta. Northern Badger's abandonment obligations were not debts owed to the regulator, but rather "a public duty [owed] by all citizens of the community to their fellow citizens."[84] Insolvency law could not relieve the receiver from the obligation to fulfill this duty on behalf of the debtor.

The Court of Appeal determined that there was no conflict between the provincial legislation and the federal *BIA*. It held that the former was a "general law" and "not aimed at subversion of the scheme of distribution under the [*BIA*]."[85] It characterized the impact of the provincial legislation on the *BIA* as being incidental.[86]

(b) *Hover*

One precursor to the *Moloney* decision is a 2005 Alberta Court of Appeal decision about a dentist named Dr. Hover, *KPMG Inc. v. Alberta Dental Association*.[87] The regulator of dentists found Dr. Hover had engaged in misconduct and sanctioned him with fines. Provincial legislation authorized the regulator to suspend Dr. Hover's professional licence until the fines were paid. Dr. Hover started insolvency proceedings. The regulator continued to suspend Dr. Hover's licence. Dr. Hover argued that the continued suspension of his licence violated the stay found in the federal insolvency legislation. The Court of Appeal disagreed.

83 *Ibid* at para 35.
84 *Ibid* at para 33.
85 *Ibid* at para 63.
86 *Ibid*.
87 2005 ABCA 101, 251 DLR (4th) 263 [*Hover*].

It held that the suspension did not violate the stay because it was not being imposed to reorder priorities in insolvency proceedings, but rather to sanction Dr. Hover.[88]

At a number of points throughout the decision in *Hover*, the Court of Appeal expressed discomfort with the idea that insolvency law could be used to compel a regulator to lift a suspension on a professional licence. For example, it held that "[t]he power to reinstate a professional licence is beyond the scope of the *BIA*."[89] It was touching on the same point outlined above: there must be some limit on the ability of the federal government's bankruptcy and insolvency power to interfere with provincial regulatory schemes.

In both *Hover* and *Northern Badger*, the Alberta Court of Appeal reached decisions that safeguarded the provincial government's legislative jurisdiction; however, neither of these cases provide clear guidelines for how to approach future cases. The Court in *Hover* eloquently defended the idea that the *BIA* is limited in the extent to which it can interfere with provincial legislation, but it did not articulate generalizable principles that could be used to resolve other conflicts. The criteria used by the *Northern Badger* Court to distinguish between duties and debts are uncertain, but the Court's focus on the public nature of regulatory obligations opens a door to developing a principled standard for resolving these conflicts. This standard is explored below, but first, the next section starts by examining the efforts made by courts to articulate a bright line rule.

IV. A BETTER TEST FOR PROVABLE CLAIMS

The clash between provincial regulatory obligations and federal insolvency law implicates the division of powers. Neither level of government, acting alone, can be entrusted with policing the division of powers—this role falls to the courts. Certainty is valued in insolvency law, and courts may be inclined to develop a bright line rule to resolve the regulatory-insolvency clash. However, a principled standard can better respond to the criticisms levied in the previous section. This section starts by outlining and critiquing one permutation of a bright line rule. Next, it articulates a principled standard for determining when regulatory obligations become provable claims. The section explains how the test would be implemented and then illustrates as much by applying the standard to resolve three recent disputes.

A. A BRIGHT LINE RULE

Courts have sought to avoid the uncertainty of the *AbitibiBowater* test—and before it the *Northern Badger* test—by adopting a bright line

88 *Ibid* at paras 66-76.
89 *Ibid* at para 63.

rule. Justice Morawetz, in the first instance decisions in *Nortel* and *Northstar*, held that a regulatory claim should be provable if the claim relates to past, as opposed to ongoing, operations of the company and requires the debtor "to react or respond to a step taken by the [regulator] and in doing so, incur a financial obligation."[90] Morawetz J. was concerned that imposing such an expense on the debtor would result in funds being "directed away from creditors participating in the insolvency proceedings."[91] In *Redwater*, Chief Justice Wittmann made a similar point. He opined that the abandonment orders must be provable claims, because otherwise the trustee and receiver would be required to expend funds to abandon the wells, resulting in reduced recovery for the other creditors.[92] This bright line rule would result in a broad swath of regulatory obligations being treated as provable claims.

A bright line rule does not strike the right balance when it deems any regulatory obligation a provable claim if the obligation relates to a past operation and would require the debtor or insolvency professional to incur an expense. Such broad-based relief gives the debtor too much leeway to disregard the general law, putting important public interests at risk. It creates too much of a moral hazard. The insolvency system risks eroding public support if it allows debtors to use insolvency proceedings as a "car wash" to avoid regulatory obligations.[93]

Faced with such a wide-reaching approach to defining regulatory obligations as provable claims, regulators may take preventative measures to compel compliance. These measures may impose additional costs on debtors and impede economic activity. For instance, environmental regulators may require companies to post significant security before undertaking potentially polluting activities. The affected regulator responded to the *Redwater* decision by increasing the solvency threshold a licencee must meet before the regulator will approve a transfer of licences.[94] This change is expected to restrict

90 *Nortel* Sup Ct, *supra* note 26 at paras 105-106, 116. For commentary on Morawetz J.'s decision in *Nortel* Sup Ct, see Shari Elliott & Hayley Valleau, "Nortel Walks from Millions in Clean-up Costs" (2013) 28:2 BFLR 297.

91 *Nortel* Sup Ct, *ibid* at para 107. This test has been described as the past-operations-expense test (see generally Lund, "Environmental Issues", *supra* note 55).

92 *Redwater*, *supra* note 30 at para 173.

93 The term "regulatory car wash" is borrowed from Dunphy, Martel & Renaud (*supra* note 62).

94 Alberta Energy Regulator, "Licensee Eligibility: Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision", Bulletin 2016-16 (Calgary: AER, 20 June 2016), online: <https://www.aer.ca/documents/bulletins/Bulletin-2016-16.pdf>, archived: <https://perma.cc/AE8Q-4H27>, as revised by Alberta Energy Regulator, "Revision and Clarification on the Alberta Energy Regulators Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision", Bulletin 2012-21 (Calgary: AER, 8

economic activity in Alberta's oil and gas industry.[95] Regulators of individual licences (e.g., driving or professional) may impose harsher measures—such as the complete revocation of a licence—if they are concerned that less harsh sanctions may be avoided using insolvency proceedings.[96] Regulators would not be prone to such stifling reactions if courts adopted a narrower view of which regulatory obligations are provable claims.

B. A PRINCIPLED STANDARD

Writing about the clash of insolvency law on the one hand, and environmental or pension law on the other, Justice Romaine of the Alberta Court of Queen's Bench opined that "[t]here are no bright-line answers to these balancing issues."[97] This observation applies broadly to the clash between provincial regulatory obligations and federal insolvency law. Instead of seeking a bright line rule, courts need to develop a principled standard for determining when regulatory obligations should be treated as provable claims and when they should not. This standard should require the courts to engage with the key question of balancing the competing public interests advanced by insolvency legislation and regulatory regimes, and do more to safeguard provincial governments' constitutional powers.

The idea of a court considering the public interest to resolve the conflict between provincial regulatory and federal insolvency law is already contemplated by federal insolvency legislation. In insolvency proceedings, a regulator is automatically stopped from pursuing monetary claims against a debtor. In a Division I Proposal or *CCAA* proceedings, the debtor can apply to have this stay extended to cover a regulator's non-monetary claims if it can show that such an order is necessary for a viable restructuring and would not otherwise be contrary to the *public interest*.[98] This test recognizes that interfering with a regulator's powers may not be justified in some cases because of the concomitant risk to important public interests like health, safety, and the environment.

The *AbitibiBowater* test could be modified to include public interests as a key consideration when determining whether or not a regulatory obligation should be treated as a provable claim. In

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July 2016), online: <https://www.aer.ca/rules-and-regulations/bulletins/bulletin-2016-21>, archived: <https://perma.cc/7R75-U4LN>. For a discussion of the impact of this change see Bourassa, Zahara & Nyberg, *supra* note 30 at 410-11.

95 See Buckingham, Gaston & Paplawski, *supra* note 30 at 190.

96 *Hover*, *supra* note 87 at para 46.

97 Romaine, *supra* note 1 at 63.

98 *BIA*, *supra* note 8, s 69.6; *CCAA*, *supra* note 10, s 11.1. See generally MacNaughton, *supra* note 49.

AbitibiBowater, the Supreme Court articulated a three-part test for determining whether or not a regulatory obligation is a provable claim. The Court's analysis, in that case, focused on the third part of the test, that is, whether or not it is possible to attach a monetary value to the claim. Most courts applying *AbitibiBowater* have adopted a similar focus on the third part.[99] Very little has been said about the first part of the test, that is, whether or not there is a debt, liability, or obligation owed to a creditor. In *AbitibiBowater*, the Supreme Court indicated that this part was satisfied as soon as the regulator has "exercised its enforcement power against a debtor."[100] This interpretation of the first part of the test sets a very low bar that is easily surpassed.

And yet, another interpretation of the first part of the *AbitibiBowater* test is possible. The first part of the *AbitibiBowater* test borrows language from the *Northern Badger* case, which distinguished between debts owed to the Crown and duties owed to the public. A court could read this distinction back into the first part of the *AbitibiBowater* test, and consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor. I propose that the court should then weigh the public interest protected by the regulatory obligation (i.e. health, safety, or the environment) against the impact of compliance on the viability of the insolvency proceedings, and the public interests advanced by the insolvency proceedings.

Under the reformulated test, the second and third parts of the *AbitibiBowater* test would still be relevant to the analysis, but courts would place less emphasis on them than they currently do. An obligation would not be provable if it "has not arisen as of the time limit for inclusion in the insolvency process."[101] Usually this means the obligation must have arisen prior to the commencement of insolvency proceedings, but there are exceptions which allow for the inclusion of environmental remediation obligations that arise later.[102] Where a regulatory obligation has been turned into a debt, it

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99 An exception is the recent Quebec Court of Appeal decision in *Chambre de la sécurité financière c. Thibault* (2016 QCCA 1691, 42 CBR (6th) 8) where the question before the Court related to the second part of the *AbitibiBowater* test: whether the debt, liability, or obligation had been incurred prior to the start of insolvency proceedings.

100 *Supra* note 9 at para 27.

101 *Ibid* at para 29.

102 *BIA*, *supra* note 8, s 14.06(8); *CCAA*, *supra* note 10, s 11.8(9). Section 121 of the *BIA* purports to include debts, liabilities to which the debtor is subject on the date insolvency proceedings begin, and debts or liabilities that arise before discharge because of "any obligation incurred before the" insolvency proceedings begin. This construction has created some confusion in its application (see Wood, *Bankruptcy and Insolvency Law*, *supra* note 2 at 244-46).

would be subjected to the scheme of distribution set out in the insolvency proceedings. To hold otherwise would create too much scope for litigation over the competing public values underlying different Crown debts. However, where the obligation remains unliquidated, the court's focus would shift from determining the likelihood of the obligation being monetized to weighing the competing public interests.

The first benefit of this test is that it would refocus the discussion onto relevant considerations. As compared to the *AbitibiBowater* test, this approach would invite the court to make the decision about what gets stayed, compromised, or discharged in insolvency proceedings with respect to the relevant competing policies as opposed to seemingly arbitrary details, such as whether or not a piece of property is jointly owned, or whether the legislation provides a mechanism to liquidate an obligation. The test would also remove some of the perverse incentives created by the current test. Debtors could not be certain whether their regulatory obligations will be deemed provable and therefore would have little incentive to purposefully avoid complying with them. Regulators would not delay enforcing obligations. Instead, if a regulator thought an obligation should not be impacted by the insolvency, it would have to articulate what public interest was at stake and why it outweighed the benefits derived from facilitating a successful restructuring or liquidation.

This reformulated test also better reflects the division of power between federal and provincial governments. The *AbitibiBowater* test allows the federal government to interfere with any regulatory power if it is sufficiently certain that the regulator will liquidate the obligation and enforce it against the debtor company. The Canadian legal system is extremely adept at monetizing obligations, and so the scope for federal intrusion into provincial regulatory regimes could be very large. The federal insolvency power trumps, regardless of the importance, or lack thereof, the public interest protected by provincial regulations. The reformulated test would require a court to consider provincially protected public interests, instead of automatically preferring public interests advanced by federal insolvency legislation. The jurisdiction of provincial legislatures should be safeguarded when public interests protected by provincial regulatory regimes outweigh the benefits of successful insolvency proceedings.

The reformulated test is not a bright line rule, but rather a flexible standard. It will create some uncertainty. This uncertainty can be (partially) dispelled by articulating the types of factors a court should consider. The following sections articulate these factors and illustrate how they might be applied to resolve recent disputes.

1. Continuity with the Case Law: Ongoing Operations & Means to Comply

Adoption of a modified test for when regulatory obligations will be deemed provable does not require a complete break with the *AbitibiBowater* line of cases. A court may wish to take account of some of the factors identified in the *AbitibiBowater* line of cases, including the distinction drawn between past and ongoing operations, and the debtor's financial capacity to comply with orders.

(a) Ongoing and Past Operations

In *AbitibiBowater*, the Supreme Court suggested that regulatory orders related to ongoing claims may not be provable because "the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim."[103] Morawetz J., in his initial decisions in *Nortel* and *Northstar*, also emphasized the importance of this distinction.[104] Under the reformulated test, a court would be cautious about deeming a regulatory order to be a provable claim when it related to ongoing conduct, because immunizing future actions from regulatory control could pose a risk to the public. For example, staying the suspension of a professional's licence would allow the professional to resume practice. If the licence was suspended for reasons that raise legitimate questions about the professional's fitness to practice, the public interest would militate against deeming the regulator's actions a provable claim.

(b) Financial Means

Another factor the Supreme Court considered in *AbitibiBowater* was whether or not the debtor had the means to comply with the regulatory order.[105] Under the *AbitibiBowater* test this consideration was relevant because if the debtor could not comply with the order, it became more certain that the regulator would carry out the work itself and seek to recover the cost of doing so from the debtor. This line of reasoning enables an interim financing lender to influence the outcome of the provable claims analysis.[106] When providing financing for restructuring, interim lenders will restrict the types of expenses on which borrowers can spend money. For example, in *AbitibiBowater* the interim lender had limited the debtor's "access to

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103 *AbitibiBowater* SCC, *supra* note 9 at para 37.

104 *Nortel* Sup Ct, *supra* note 26 at paras 105-106, 116; *Northstar Aerospace, Inc. (Re)*, 2012 ONSC 4423 at paras 52-67, 91 CBR (5th) 268. See also Dunphy, Martel & Renaud, *supra* note 62.

105 *AbitibiBowater* SCC, *supra* note 9 at paras 37-38.

106 For other examples of interim lenders using the terms of the loan to shape the insolvency proceedings, see Sarra, "Evolution", *supra* note 81 at 217.

funds…to ongoing operations."[107] The funds could not be used to pay for environmental remediation and this fact was relied on to support the determination that the regulatory orders were provable claims.

Under the reformulated test, the court would put little weight on the terms of the interim financing agreement, which can be manipulated by the parties to avoid complying with regulatory obligations. Instead, the court would consider the impact of compliance on the viability of the insolvency proceedings, and the benefits anticipated to follow if the proceedings succeed. Evidence showing that no lender would be willing to provide financing unless regulatory obligations were deemed provable would be one consideration. However, it would not be determinative. The court might still deem the obligations to be non-provable where the risk to the public from non-compliance outweighs the anticipated benefits of a successful insolvency proceeding.

2. Breaking from the Case Law: Imminence, Control, Expectations, and Efforts

While maintaining a degree of continuity with the previous case law, the modified test would require a partial change in direction. When the court's focus is shifted from determining the likelihood of a regulatory obligation being liquidated to weighing the competing public interests at stake, the import of the factors identified in the *AbitibiBowater* line of cases needs to be re-evaluated.

(a) Imminence of Harm

One factor that needs to be re-evaluated is the imminence of harm. When the risk of harm to the public is imminent, the regulator is likely to take action. Under the *AbitibiBowater* test, a regulatory obligation is likely to be deemed a provable claim when the regulator has already incurred the expense of fulfilling the obligation.[108]

In *AbitibiBowater*, the provincial government had started remediation work on one of the sites under dispute, the Buchans site. The work was necessary because the "high levels of lead and other contaminants in the soil, ground water, surface water and sediment" at the site "posed immediate risks to human health."[109] In her dissent, Chief Justice McLachlin would have found that most of

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107 *AbitibiBowater* SCC, *supra* note 9 at 53.

108 For criticism of this result, see Dianne Saxe, "Perverse Abitibi Test Produces Perverse Results in Nortel, Northstar Appeals" (3 October 2013), *Siskinds Environmental Law* (blog), online: <http://www.siskinds.com/envirolaw/perverse-abitibi-test-produces-perverse-results-nortel-northstar-appeals>, archived: <https://perma.cc/6VJX-BCG3>.

109 *AbitibiBowater* SCC, *supra* note 9 at para 89.

the regulatory orders were not provable claims, because it was not sufficiently certain that the government would carry out the work itself and seek to recover the cost of doing so from the debtor. Conversely, she would have found the regulatory orders issued with respect to the Buchans site were provable claims. Because the government had already started work, McLachlin C.J.C. was prepared to hold that the sufficient certainty threshold had been met.

In Northstar, the province had commenced remediation work prior to the hearing before the Court of Appeal. The province expressly undertook the remediation work without prejudice to its position that the remediation orders were not provable claims.[110] Notwithstanding this proviso, the fact the government had undertaken remediation work satisfied the sufficient certainty test, and therefore the Court of Appeal held that the orders were provable claims.[111]

Under the reformulated test, imminent risk of harm will have the opposite effect on the determination of whether or not a claim is provable. Imminence of harm increases the importance of the public interests protected by regulatory orders. An order protecting the public from an imminent risk of harm is unlikely to be deemed provable, and the debtor will be required to comply with the order. If there is no imminent risk of harm to the public, courts would be more likely to characterize regulatory obligations as provable claims.

(b) Control of Regulated Property

A second change under the reformulated test is the conclusion a court should draw from the fact a debtor controls property subject to a regulatory order. Under the *AbitibiBowater* test, a regulatory obligation is more likely to be deemed provable if the debtor does not control the property subject to the order.

In *AbitibiBowater*, the motions judge was concerned with the unfairness of the Government of Newfoundland and Labrador requiring the debtor company to carry out remediation of land that the government had expropriated. He summed up the government's position as attempting to "hav[e] your cake and eat it too."[112] Additionally, the motions judge noted that it was "doubtful" whether the debtor company would be able to access the properties to carry out remediation.[113] The Supreme Court accepted that not having control over (some of) the properties posed an obstacle to the debtor company complying with the remediation orders, and this factor militated in favour of deeming the orders provable claims.[114]

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110 *Northstar*, *supra* note 27 at para 20.
111 *Ibid* at paras 21-22.
112 *AbitibiBowater* CS, *supra* note 9 at para 168.
113 *Ibid* at para 200.
114 *AbitibiBowater* SCC, *supra* note 9 at paras 38, 53-54.

In *Redwater*, the motions judge relied on the fact that the wells were no longer in the trustee's control as one factor supporting his determination that the abandonment orders were provable claims. Unlike *AbitibiBowater*, where the land has been expropriated, in *Redwater* the trustee and receiver had "exercised the choice not to take possession" of the wells that were subject to abandonment orders.[115]

Allowing trustees, and other insolvency professionals, to disclaim an interest in real property subject to an expensive environmental remediation order is desirable because it ensures that insolvency professionals will be willing to take on restructuring and liquidation files where the debtor is facing environmental claims.[116] To this end, Parliament has specifically authorized insolvency professionals to avoid personal liability by disclaiming their interest in environmentally contaminated property.[117] In other instances of regulatory and insolvency law clashing, insolvency professionals should not be required to use personal resources to comply with a debtor's regulatory obligations, unless an insolvency professional has engaged in misconduct. To hold otherwise would result in insolvency professionals being unwilling to administer insolvency proceedings of debtors with expensive regulatory obligations.

It is desirable to allow insolvency professionals to limit their personal liability, but given that trustees have some latitude to decide what property they have control over, making this a factor in the test for what constitutes a provable claim gives trustees too much power to shape the outcome of the legal analysis. More importantly, the degree of control a debtor or insolvency professional has over property seems like a proxy for the important issue of how difficult (or easy) it will be for the debtor or insolvency professional to comply with a regulatory obligation. Ease of compliance factors into the reformulated test, because the more difficult it is to comply with the order, the more likely it is that requiring compliance will negatively impact the viability of the insolvency proceedings. Whether or not a debtor controls property subject to a regulatory order is not a relevant factor, unless the debtor can show that its lack of control over the property creates real obstacles to compliance, and thereby threatens the viability of the insolvency proceedings.

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115 *Redwater*, *supra* note 30 at para 170.

116 See e.g. *Lamford Forest Products Ltd. (RE: Bankruptcy of)* (1993 CanLII 2091 (BCSC)), where the Court described the debtor's inability to find a trustee to administer its bankruptcy until the 1992 amendments, which limited a trustee's personal liability, were passed. See also Dianne Saxe, "Trustees' and Receivers' Environmental Liability Update" (1998) 49 CBR (3d) 138 at 143-47 (discussing the case) [Saxe, "Environmental Liability Update"]; George C Kinsman & Maurice P Chiasson, "Distressed Assets: What to Do, What to Do?" (2016) 5 J Insolvency Institute Can 19.

117 *BIA*, *supra* note 8, s 14.06(4); *CCAA*, *supra* note 10, s 11.8(5).

(c) Party Expectations

A third change under the reformulated test is that a court should consider the expectations of the parties. The conflict between provincial regulatory legislation and federal insolvency law should be resolved in a manner that provides some certainty to commercial actors, such as secured lenders, whose interests often compete with those of regulators. It may work an unfairness on the creditors to diminish their recovery by requiring the debtor to comply with a regulatory order. In *AbitibiBowater*, Justice Deschamps characterized this as a "'third-party-pay' principle," because compliance with the orders would "shift the costs of remediation to third-party creditors."[118] Reducing creditor recovery in insolvency may have a chilling effect on the credit market.[119] On the other hand, it works an unfairness on the public when debtors and their creditors are able to manipulate insolvency rules to avoid complying with regulatory obligations, which they knew about or should have anticipated because of the nature of the debtor's operations.

The foreseeability of a regulatory obligation should impact whether or not it is deemed to be a provable claim. If the obligation is unforeseeable, that should weigh in favour of it being provable. If a debtor and creditor could have anticipated that the obligation would arise, that should weigh in favour of it being non-provable. Creditors can and should factor in the costs of reasonably foreseeable regulatory obligations when they advance funds. For example, in *Redwater*, the regulatory obligation to abandon the wells was "inchoate in licences from the date the wells [were] drilled,"[120] and was characterized as "an incident of the property itself."[121] When the debtor began its oilfield operations, it knew that it would be required to incur the cost of properly abandoning the well. There is no unfairness to the creditor if a debtor's assets are used to cover the costs of complying with a reasonably foreseeable regulatory obligation. That is not to say an anticipated liability would never be deemed provable (or an unanticipated liability deemed not provable). The expectation of the parties would be one factor for courts to weigh.

(d) Efforts to Comply

A fourth and final change under the reformulated test is that the efforts of the debtor to comply with the regulatory obligation prior to insolvency would matter. Courts must not enable debtors to

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118 *AbitibiBowater* SCC, *supra* note 9 at para 40. See also *Redwater*, *supra* note 30 at para 173.

119 See Bourassa, Zahara & Nyberg, *supra* note 30 at 406-407.

120 *Supra* note 30 at para 41.

121 *Ibid* at para 52.

purposefully avoid compliance, secure in the knowledge that the consequences of non-compliance can be stayed and released in insolvency proceedings. Where a debtor has made legitimate efforts to comply with the regulatory obligation, this concern regarding a potential moral hazard is reduced. For instance, in *Moloney*, the debtor did not make an assignment until twelve years after a court granted judgment against him. During the interim, he attempted to pay down the judgment, but made little headway because the sizeable judgment continued to incur interest.[122] Such a history of attempted compliance addresses the concern that insolvency law may put important public interests at risk by creating too great a moral hazard.

This list of considerations is incomplete. A broad range of regulatory obligations can conflict with insolvency law, and different considerations may apply to each type of obligation. The modified test will undoubtedly need to be refined as it is applied to this range of provincial regulatory obligations. Courts will examine potential considerations to see what they reveal about the relative importance of the competing interests advanced by insolvency law and regulatory law.

3. Applying the Principled Standard: *Moloney*, *Hover*, and *Redwater*

It is perilous to speculate about how recent and current legal controversies would be decided under the new test, because the parties have not had the opportunity to put their best foot forward. They presented cases intended to respond to the *AbitibiBowater* test and not to speak to the competing public interests. With this proviso in mind, one can hazard a guess.

The outcome in *Moloney* would likely be the same. The debt owed to the provincial regulator would be a provable claim, as it was liquidated prior to insolvency. The suspension of the debtor's driver's licence pending repayment of that debt could be conceived of as a separate regulatory obligation, but it too would likely be provable under the modified test. The debtor had made efforts over a long period of time to repay the debt. The Court did not view the public interest protected by the suspension provision as being very weighty. Traffic safety legislation generally aims to "[ensure] road safety,"[123] but the Supreme Court saw only a tenuous connection between the suspension provision and public safety.[124] It was "plausible" that

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122 *Moloney* CA, *supra* note 41 at paras 4-5. Likewise, AbitibiBowater had a history of environmental remediation that would be one factor weighing in favour of a court holding the remediation orders to be provable claims (see *AbitibiBowater* CS, *supra* note 9 at para 49).

123 *Moloney* SCC, *supra* note 41 at 42.

124 *Ibid* at para 49.

such a provision might deter drivers from driving without insurance, but that was "neither its main purpose, nor its main effect."[125] The "deterrent effect only materialize[s] if the uninsured driver causes an accident," a third party is injured in the accident, sues, and obtains a judgment which the debtor is "incapable of satisfying."[126] One reading of *Moloney* is that the Supreme Court found the public interest promoted by insolvency law—the economic recovery of debtors—outweighed the tenuous public safety benefits of the provincial regulatory law.

Under the current *AbitibiBowater* test, a court is likely to find that provincial legislation allowing a regulator to suspend a professional licence based on non-payment of a fine is inoperative. It is difficult to distinguish a *Hover*-type scenario from *Moloney*.[127]

Under the reformulated test, a *Hover*-type scenario could be distinguished from *Moloney*. Again, the fine owed to the professional regulator would be a provable claim, as it was liquidated prior to insolvency. The suspension of the professional licence pending repayment could be conceived of as a separate regulatory obligation. This suspension provision would likely be deemed not provable. The deterrent impact of such a suspension is straightforward: the professional engages in misconduct, the professional is fined, and the professional's licence is suspended until the fine is paid off. The public interests protected by the provincial regulation are compelling: the regulator's ability to discipline its members enables it to ensure that only qualified, competent professionals provide services to the public.[128] In *Hover*, the dentist had a long history of attempting to avoid compliance with the regulator's dictates, raising moral hazard concerns.[129] On these facts, a court would likely find that protection of the public from substandard dentistry outweighs the benefits flowing from financially rehabilitating the dentist.

A court applying the modified test to the *Redwater* case could point to a number of reasons to hold that the abandonment orders were not provable claims. It could start its analysis by noting that the insolvency proceedings in question are a liquidation, as opposed to a restructuring. Promoting equitable recovery among creditors remains an important public interest in liquidation, but unlike a restructuring proceeding, a successful bankruptcy will not stave off serious economic and social disruption. As compared to a restructuring, the court may

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125 *Ibid*.
126 *Ibid*.
127 See Lund, "Insolvency Law's Limits", *supra* note 41 at 320-23; Wood, "The Paramountcy Principle", *supra* note 41 at 39-41.
128 *Hover*, *supra* note 87 at para 28.
129 *Ibid* at paras 4-8.

be less concerned that compliance with regulatory obligations could derail the bankruptcy proceedings, because of the limited public interests advanced by the bankruptcy proceedings. The regulatory obligations did not take the creditor by surprise; rather, the abandonment obligations had been inchoate since the wells were drilled and creditors could have accounted for them in their lending decisions. Although the trustee and receiver did not have control over the wells, this is because the trustee and receiver refused to take control of them. There was no evidence that the lack of control would be an obstacle to the trustee and receiver carrying out the abandonment obligations, if ordered to do so by the court. The orders related to past, as opposed to ongoing, obligations, but improperly abandoned wells continued to pose an environmental and safety risk to the public. On these facts, a court would likely find that the safety and environmental interests advanced by provincial regulations outweigh the importance of maximizing creditor recovery.

V. CONCLUSION

This paper has suggested rethinking the test used to determine when a regulatory obligation becomes a provable claim. Rather than focusing on the likelihood that the obligation will be monetized, the reformulated test would direct courts to weigh the competing interests at stake. This flexible standard could be applied to the range of different regulatory obligations that can clash with insolvency legislation.

The reformulated test may be criticized for being too discretionary, and therefore too uncertain. Certainty is a cherished value in insolvency law, because it promotes economic stability and growth.[130] But uncertainty might not always be a bad thing. Parties, uncertain of how they would fare in litigation over whether or not an obligation is provable, might feel compelled to negotiate a resolution. The parties may be able to reach a more creative and beneficial resolution through negotiation than the adversarial process of litigation, and they may also save on costs. A regulator may agree that a resolution providing for partial compliance is better than nothing. Likewise, creditors may prefer a settlement that provides them with some payout, rather than risking a loss in litigation.

In some quarters there is concern that public entities, such as the Crown and its regulatory bodies, are prone to take uncompromising

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130 Wood, *Bankruptcy and Insolvency Law*, *supra* note 2 at 4, citing *UNCITRAL Legislative Guide on Insolvency Law* (New York: United Nations, 2005) at 10, online: <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>, archived: <https://perma.cc/3JDB-LSJL>. For a discussion of certainty, and the related values of predictability and clarity, see Clayton Bangsund, "PPSL Values" (2015) 57:2 Can Bus LJ 184 at 196-98.

positions and to litigate rather than negotiate practical settlements.[131] Finding ways to encourage constructive dialogue with regulators and government is a topic worthy of further exploration and discussion. Both sides may be able to draw important lessons from situations where such negotiations have succeeded, such as the practice of regulators and lenders entering into agreements to address environmentally contaminated property,[132] or the recent agreement struck between a company with *Redwater*-like abandonment obligations and the affected regulator.[133]

The reformulated test is uncertain, but principled in its uncertainty. The *AbitibiBowater* test is highly uncertain, but the sources of uncertainty in the test hinge on factors that seem irrelevant to the question of who should actually bear the loss. The reformulated test allows the court to engage in an exercise of discretion that is relevant to competing public interests at stake—and with the division of powers in the Canadian constitution. The modified test presented here is a "first effort" and will undoubtedly be refined and revised, if adopted by Canadian courts. The goal of this paper has been to map a course for modifying the *AbitibiBowater* test. The next step—a significantly more ambitious one—is for lawyers and judges to embark on the journey.

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131 Insolvency practitioners have expressed this concern to me in conversations about regulatory claims. See also Butler, *supra* note 47 at 767 (urging regulators to avoid taking an "all or nothing" approach); Oliver & Cumming, *supra* note 30 at 464-66 (criticizing the Alberta Energy Regulator's approach in insolvency) and 467-68 (arguing in favour of "meaningful collaboration and co-operation").

132 See Saxe, "Environmental Liability Update", *supra* note 116 at 154-56.

133 See Bourassa, Zahara & Nyberg, *supra* note 30 at 409-410 (discussing the negotiated agreement between Spyglass Resources Corp. and the Alberta Energy Regulator).