ECONOMIC TRIAGE: THE ABANDONMENT OF PROPERTY IN INSOLVENCY

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I. INTRODUCTION

For the last century, the primary purpose of the Canadian insolvency regime has moved steadily away from the criminal enforcement of debt towards facilitating the orderly restructuring of a debtor or the liquidation of its assets through the collective proceeding model.[1] The policy underlying this shift was twofold: (i) maximizing the proceeds available for distribution to the debtor's creditors; and (ii) providing the debtor with a fresh start.[2] The doctrine of abandonment originated in English jurisprudence but was later adopted in Canada to facilitate the efficient administration of insolvent estates by preventing the unnecessary expenditure of time and money on worthless or onerous property that decreased the potential return to creditors.[3] Despite the continuous evolution of this doctrine, a court officers' right to unilaterally abandon an interest in property is an exception to contract and property law and continues to be subject to much controversy when exercised by licensed insolvency trustees and court-appointed receivers.[4]

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[1] For an indepth review of the evolution of the Canadian insolvency regime prior to *The Bankruptcy Act*, 9-10 Geo V, c 36 (1919) ("*Bankruptcy Act*") see T. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919*, University of Toronto Press, 2014 ("*Ruin and Redemption*"). See also D. Baird, "A World Without Bankruptcy" 50 *L Cont Prob* 173 at 173-174 ("*World Without Bankruptcy*"), where the author notes that the primary objection at the Constitutional Convention of 1787 to the United States Congress passing laws on the subject of bankruptcy was the fear that the practice of putting bankrupts to death in England would develop in the United States.

[2] *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at 88 ("*Moloney*"): "The single proceeding model is focused on ensuring the orderly distribution of assets and reducing inefficiencies, and ultimately on maximizing global recovery for creditors." Only individuals are eligible to obtain a discharge from bankruptcy without satisfying all claims, corporations cannot: Sections 168.1 to 182 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*") and *Orphan Well Assn v Grant Thornton Ltd,* 2017 ABCA 124 at 44 *("Orphan Well Assn*").

[3] One of the seminal papers on the right to abandon property in insolvency is the "Abandonment of Assets by a Trustee in Bankruptcy." (1953) 53:3 Col L Rev 415 at 415-416 ("*Abandonment of Assets*"). While it refers to abandonment rights under the U.S. Code ("*Bankruptcy Code*"), the underlying purpose of the right is similar across jurisdictions. Further, while much commentary refers to the abandonment of "assets", such a label has an inherent association with value. Assets are property with net value, whereas the primary target of abandonment rights will be property that is a net liability. As a result, the neutral "property" has been adopted in this paper to avoid such associations, where appropriate.

[4] This debate is not restricted to Canada. See J. Ellsworth, "On Disclaimers: Let's Renounce IRC Section 2518" (1993) 38:3 Vill L Rev 693 at 694, where the author notes that the "law of disclaimer is founded on two basic property law concepts: (i) a gratuitous transfer is not complete until its acceptance by the recipient, and (ii) no person can be forced to accept property against their will". Further, where real property is not being transferred or conveyed to another party, a solvent party cannot simply divest themselves of the registered interest in such property unless it escheats to the Crown. For the purposes of this paper, references to a court officer will primarily refer to trustees in bankruptcy under the *BIA* and court-appointed receivers under section 243 of the *BIA*. However, a reference to court officers may also include monitors appointed under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"), when specifically mentioned.

This concept has received scant consideration in Canada as compared to the insolvency regimes of England and the United States.[5] This lack of consideration has resulted in a unique resistance to the idea that abandonment rights are a tool designed specifically to facilitate the profitable administration of an insolvent debtor's estate by removing property that would result in a deterioration or negation of net value.[6] In effect, it is a liability management tool.

Despite recent jurisprudence, a dispute continues to exist as to whether a right to abandon property exists at common law and whether the policy underlying the abandonment of property is to maximize the value of the estate. If this misunderstanding continues, parties may persist in advancing positions that could expose court officers to liability for disclaiming property, reduce the potential recovery for creditors where onerous property is needlessly retained in the estate and reduce the incentive for lenders to appoint such court officers.[7]

This paper seeks to provide a comprehensive understanding of the abandonment rights afforded to court officers when engaged in proceedings under the Canadian insolvency statutes by answering the five primary questions related to the abandonment of property in insolvency: (i) who; (ii) when; (iii) why; (iv) what; and (v) how. As this paper will demonstrate, the Canadian insolvency framework has always been predicated on maximizing the value of the insolvent estate for the benefit of its stakeholders. While common law rights have developed in Canada, codification of these rights through amendments to the *BIA* would provide the basis for a uniform interpretation and more consistent application in Canadian jurisprudence.[8]

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[5] Both the United States and England have long accepted that the purpose of the doctrine of abandonment is to facilitate the economic administration of the insolvent estate. See the *Abandonment of Assets*, *supra* note 3 and P. Omar, "Disclaiming Onerous Property in Insolvency: A Comparative Study" (2010) 19:1 Int Insol Rev 41 ("*Disclaiming Onerous Property in Insolvency*").

[6] See *Vang Chanthavong v Aurora Loan Services*, *Inc*, 448 BR 789 (2011), which notes that "abandonment" in insolvency is a legal term of art referring to the formal relinquishment of property from a bankrupt's estate. For the purposes of this paper, the term "abandonment" is meant to encompass the disclaimer, renunciation and divestiture of property. However, "disclaimer" remains the most popular term to reference the abandonment of an interest in a contract by a court officer.

[7] See *Lamford Forest Products Ltd*, *Re*, 1991 CarswellBC 443 at 26, for the affirmation of the idea that it is unlikely that a receiver would accept an engagement where it may be liable for property that is not disclaimed and that a creditor would incur the expense of appointment and administration where the estate would be reduced to the point where such creditor may not be paid. The incentive for lenders to appoint court officers may also decline as the cost and risk surrounding realization and distribution increases.

[8] *Orphan Well Assn*, *supra* note 2, at 57.

The remainder of this paper is divided into five parts. Part II will examine the history of abandonment rights in the Canadian insolvency regime. Part III will examine the role of court officers and their ability to abandon a debtor's interest in property. Part IV will examine the reason that property is abandoned. Part V will examine the process and options for the abandonment of various types of property. Part VI will summarize the paper's conclusions and provide a recommendation for clarifying the current state of Canadian abandonment rights.

II. HISTORY

It is difficult to understand the Canadian approach to abandonment rights without an understanding of how the doctrine of abandonment originated. The doctrine of abandonment originated in the English common law and was primarily focused on onerous contracts.[9] Lord Mansfield's 1794 decision in *Bourdillon v Dalton*, (1794) 1 Esp 233, is cited as one of the first reported decisions discussing the abandonment power of a trustee.[10] As noted by Lee Silverstein in *Rejection of Executory Contracts:*

> ….. the power of rejection was already familiar at that time. The power almost certainly originated in the law merchant, the international commercial law of which bankruptcy was a constituent part. During the fourteenth to sixteenth centuries when the merchants of various countries mingled at the fairs and markets, such bankruptcies as occurred were handled by the merchants themselves in *pied poudre* fashion. In this setting one can surmise that a practice developed of permitting a representative of the creditors to abandon worthless property of the bankrupt so as to speed up liquidation and distribution of the estate. The courts then moved from abandonment of a worthless chattel to rejection of an onerous executory contract or lease.[11]

Over the next hundred years, the English common law abandonment rights were further refined and then codified in the *Bankruptcy Act 1869*. As noted in *Disclaiming Onerous Property in Insolvency*, section 23 of the *Bankruptcy Act 1869* permitted a "trustee-in-bankruptcy to disclaim onerous property by including a provision within the section dealing with the trustee's dominion

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[9] See D. Carlson, "Bankruptcy: Restrictions on Abandonment of Burdensome Property - Midatlantic National Bank v New Jersey Department Of Environmental Protection" (198) 20 Creighton L Rev 165 at 171, which indicates that prior to the codification of 1978, the ability to of a United States trustee to abandon property was primarily developed through the common law and relied on English precedent. See also *American File Co v Garrett* (1884), 110 US 288, cited within, for the proposition that "it has long been a recognized principle of the bankrupt laws that the assignees were not bound to accept property of an onerous or unprofitable character."

[10] L. Silverstein, "Rejection of Executory Contracts in Bankruptcy and Reorganization" (1964) 31 Uni Chi L Rev 467 at 467 ("*Rejection of Executory Contracts*"). See also M. Andrew, "Executory Contracts in Bankruptcy: Understanding "Rejection"" (1988) 59 U Col L Rev 845.

[11] *Ibid*.

over property to that effect".[12] Typically, property disclaimed by English trustees during the administration of an estate fell within one of two groups: (i) leases of property; or (ii) executory contracts.[13] The common denominator was that the continued participation in or maintenance of such agreements either minimized or eliminated the value of the estate by diminishing the potential proceeds available for distribution.

The present English insolvency framework has evolved into the *Insolvency Act 1986*, c 45 which contains the English statutory regimes for both bankruptcy and corporate insolvency and provides general statutory abandonment rights at sections 178 and 315.[14] It is clear from the English jurisprudence that a liquidator or trustee should evaluate the debtor's property and abandon the property that directly or indirectly detracts from the value available for distribution to the creditors.

Court officers and creditors in Canada have not always had the benefit of codified, or even consistently understood, abandonment rights. Prior to the enactment of the *Bankruptcy Act*, there were few options for an insolvent debtor to escape its burdensome financial obligations through a statutory regime focused on collectivity and maximization.[15] Without such a statutory regime, Canada lost out on decades of judicial consideration of statutory abandonment rights experienced by its neighbours, which helped shape their understanding of the doctrine of abandonment. Further, upon proclamation of the *Bankrupcty Act*, the right of Canadian trustees to abandon property was primarily limited to executory contracts and leases.[16]

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[12] *Disclaiming Onerous Property in Insolvency*, *supra* note 5, at 42 citing *Enron Australia v TXU Electricity*, [2003] NSWSC 1169 at 62.
[13] *Disclaiming Onerous Property in Insolvency*, *supra* note 5, at 42.
[14] ("*Insolvency Act, 1986*") and the *Insolvency Rules 2016*, No 1024. Note that the powers afforded to liquidators and trustees under sections 178 and 315 are similar but differ in operation. There are also provisions applicable to specific types of property not included under the general provisions.
[15] *Ruin and Redemption*, *supra* note 1, at 172.
[16] See *The Bankruptcy Act* (1919), *supra* note 1, at section 52(5), which states "notwithstanding any provision or stipulation in any lease or agreement, where a receiving order or an authorized assignment has been made, the trustee may within one month from the date of any such receiving order or assignment, by notice in writing signed by him given to the landlord, elect to retain the premises occupied by the bankrupt or assignor at the time of the receiving order or assignment for the unexpired term of any lease under which such premises were held or for such portion of the term as he shall see fit, upon the terms of the lease and subject to payment of the rent therefor provided by such lease or agreement, or he may disclaim the lease or agreement. Should the trustee not give such notice within the time hereinbefore provided, he shall be deemed to have disclaimed the lease or agreement." Criticism of this section, both in its original form and as amended by the *Bankruptcy Amendment Act 1921*, 11-12

The primary abandonment right afforded to trustees in Canada was the ability to disclaim a leasehold interest under section 52(5) of the *Bankruptcy Act*.[17] This provision was commonly relied on by trustees in the early part of the twentieth century to disclaim unprofitable leases of real property.[18] These statutory abandonment rights were limited in scope and targeted (almost exclusively) at leases of real property.

In 1921, Parliament amended the *Bankruptcy Act* to expand the power of a trustee to disclaim property through the creation of section 20(1)(k), which stated:

> The trustee may, with the permission of the inspectors, do all or any of the following things:
>
> > Elect to retain for the whole or part of its unexpired term, or to assign or disclaim, the whole pursuant to this Act, any lease of, or other temporary interest in any property forming part of the estate of the debtor.[19]

This new provision provided a limited abandonment right in respect of leases and temporary interests in property instead of the agreements referenced in the previous section 52(5) (even though the target subject matter was arguably broader than just leases of real property). In 1922, Justice Panneton of the Quebec Superior Court in Bankruptcy found that parts of section 52 were *ultra vires* the federal government resulting in the repeal and replacement of the section in 1923.[20] Parliament introduced this new section 52 as a replacement:

> When a receiving order or an assignment is made against or by any lessee under this Act, the same consequences shall ensue as to the rights and priorities of his landlord as would have ensued under the laws of the province in which the demised premises are situated if the lessee at the time of such receiving order or assignment had been a person entitled to make and had made an abandonment or a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province; and nothing in this Act shall be deemed to suspend, limit, or affect the legislative authority of any province to enact any law providing for or regulating the rights and priorities of landlords consequent upon any such abandonment or voluntary assignment; nor shall anything in this act be deemed to interfere or conflict with the operation of any such provincial law heretofore or

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Geo V, c 17, likely resulted in the passing of the *Bankruptcy Amendment Act 1923*, 13-14 Geo V, c 31, which repealed section 52: *Plamondon, Re,* 1959 CarswellQue 308 (QCSC) at 10.

[17] *Bankruptcy Act*, *supra* note 1, section 52(5).

[18] See *Kerr v Capital Grocery Ltd,* 1920 CarswellSask 2 (SKKB) and *West End Co-operative Society, Re,* 1921 CarswellOnt 8 (ONSC).

[19] *The Bankruptcy Act Amendment Act, 1921*.

[20] *Re Stober* (1923), 4 CBR 34 (QCSC).

> hereafter enacted insofar as it provides for or regulates the rights and priorities of landlords in such event.[21]

This provision provided that the rights of landlords were to be determined in conjunction with the applicable provincial legislation. It also repealed the recognition of a trustee's right to disclaim an interest in a lease or agreement under section 52(5), leaving trustees with only the rights provided for under section 20(1)(k).

Despite the turmoil related to the treatment of leased property, little attention was paid to the abandonment of ownership interests in real property. In 1931, Chief Justice Prendergast in *Jones v McClean*, [1931] 1 WWR 315 (MBCA) issued one of the first reported decisions in Canada contemplating the ability of a trustee to dispose of an interest in real property with the approval of the inspectors.[22] In that case, Jones and Bowman entered into an agreement governing the purchase of a lot of land. The agreement stipulated that Jones would purchase land from National Trust Company ("NTC") for the benefit of Bowman. The purchase price would be paid in installments with an initial cash payment being made by Jones and the balance of deferred payments being made by Bowman. On November 7, 1928, Bowman made an assignment under the *Bankruptcy Act* to Traders Trust Company ("TTC"). On March 25, 1929, TTC, in its capacity as trustee of Bowman, sold and conveyed all of Bowman's interest in the land to McClean.

Jones subsequently brought an application for an injunction restraining McClean from trespassing on the purchased lot and sought a declaration that McClean had no interest in the same. Alternatively, Jones claimed that, before assigning Bowman's interest in the lot to McClean, the trustee had abandoned all interest under the agreement for sale from NTC.

While the chambers justice held that the trustee had abandoned Bowman's interest in the agreement and the property, the Manitoba Court of Appeal allowed the subsequent appeal from that decision. Chief Justice Prendergast found that a trustee had no power to sell, abandon or renounce any interest of a debtor without the written permission of the inspectors under section

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[21] *Principal Plaza Leaseholds Ltd v Principal Group Ltd (Trustee of)*, 1996 CarswellAlta 676 (ABQB) at 59, 60. See also *An Act to Amend the Bankruptcy Act, 1923*, 13-14 Geo V, c 31.

[22] ("*Jones*") at 15-21. Under current section 116 of the *BIA*, at the first or a subsequent meeting of creditors, the creditors shall, by resolution, appoint up to five inspectors of the estate of the bankrupt or agree not to appoint any inspectors. Where no inspectors are appointed, the trustee, in the absence of directions from the creditors, may do all things that may ordinarily be done by the trustee with the permission of the inspectors pursuant to sections 30(3) and 155(e) of the *BIA*.

43 of *Bankruptcy Act*, or a direction of the creditors under section 88(4), neither of which had been obtained by the trustee.[23]

While *Jones* is often cited for the proposition that a trustee cannot abandon an interest in property outside of leases, the decision only stands for the proposition that a trustee cannot abandon an interest in property without the approval of the inspectors. As representatives of the bankrupt's creditors, inspectors are only likely to agree to such an abandonment where the subject property is detracting from the potential distribution or complicating the administration of the estate. At that time, there were no provisions similar to the current section 155 that would permit the trustee to take all actions it deemed necessary to give effect to the efficient administration of the estate in the absence of inspectors. For this reason, the directions of creditors from a meeting held under section 88(4) were especially important to the administration of the estate in *Jones*.

Such a conclusion is also consistent with the finding of Registrar Holmested in *York Beverages, Re* (1922), 3 CBR 531 (ONSC) where he confirmed that the original rights of abandonment were limited by the safeguards provided by the *Bankruptcy Act* so as to prevent the potential for "injudicious disposition of property of debtors by trustees" resulting in the release of an asset with value.[24] While appearing to be more restrictive on their face, these initial abandonment rights were similar to the common law rights of abandonment afforded to trustees under the English system at that time.[25]

While there is abundant evidence of the willingness of trustees to disclaim uneconomic leases (and other executory contracts), it appears that there was little impetus or Parliamentary desire to broaden the existing abandonment rights between 1921 and 1949, when section 8(11) was ultimately implemented.[26] Section 8(11) permitted a trustee, with the permission of the inspectors (if any), to divest all or any part of the trustee's right, title or interest in any real

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[23] See also *Elliott v Canadian Credit Men's Trust Assn*, 1933 CarswellMan 2 (MBKB) at 5, 15.
[24] *York Beverages, Re* (1922), 3 CBR 531 (ONSC) at 4.
[25] *New Skeena Forest Products Inc v Kitwanga Lumber Co,* 2005 BCCA 154 at 23 ("*New Skeena CA*"): The power to disclaim contracts has been included in statutes in other common-law jurisdictions, including the English *Bankruptcy Act, 1869* (32 & 33 Vic), now the *Insolvency Act, 1986* the Australian *Bankruptcy Act 1966*, (Cth) and the *Bankruptcy Code*.
[26] *An Act respecting Bankruptcy*, *1949*, 13 Geo VI.

property or immovable of the bankrupt by a notice of quit claim or renunciation by the trustee.[27] In addition to simply selling the bankrupt's property, this amendment also increased a trustee's ability to "otherwise dispose" of such property under section 10(1)(a) for such consideration as the inspectors may approve. These provisions recognized an exception to the traditional rules prohibiting an individual from unilaterally divesting themselves of an interest in real property (except by escheat) and facilitated the exercise of the abandonment rights in respect of real property considered by Chief Justice Prendergast's in *Jones*.[28]

After the 1949 updates, the abandonment provisions of the *Bankruptcy Act* saw few substantial amendments until 1997 when Parliament recognized the right of court officers to abandon contaminated real property, despite the operation of provincial regulatory regimes prohibiting such action.[29] Section 14.06(4) recognizes the power of a trustee or receiver to abandon property in certain prescribed circumstances where the court officer has determined it is not economical to comply with the terms of a regulatory order.[30] As section 14.06(4)(c) indicates, a trustee or receiver may abandon its interest in, or possession of, property both before an environmental

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[27] Prior to the amendment of the *Bankruptcy Code* in 1978, an American trustee did not have the statutory authority necessary to disclaim title to burdensome property of the debtor's estate and relied on its common law rights.

[28] For example, see the *Forfeited Corporate Property Act*, 2015, SO 2015, c 38, Sched 7, the *Escheat Act*, RSBC 1996, c 120, *The Escheats Act*, RSS, 1978, c E-11, *The Escheats Act*, CCSM, c E140, the *Escheats Act*, RSC 1985, c E-13 and "Property that Vests in the Crown in Right Of Alberta: A Discussion Paper" (Sept. 2005), online: <http://www.assembly.ab.ca/lao/library/egovdocs/2005/altd/150842.pdf>

[29] See Bill C-5, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, 1997, c 15. Section 14.06(4) is a liability limiting provision that offers court officers a choice. They can either remediate and sell the contaminated property (and pay for the rectification or compliance costs as costs of administration) or, where such property would make the administration of the remaining estate uneconomic, it could abandon its interest in the same. See also J. Marin and A. Ilchenko, "Amendments to the Bankruptcy and Insolvency Act - Bill C-5 Environmental Liabilities of Trustees and Receivers", (1997) 14:2 Nat Insol Rev 18 at 25-26, where the authors note that court officers should consider what is "commercially reasonable" when determining whether to rectify environmental obligations to the determinant of creditors' claims or whether to simply abandon such property. In many cases, this will depend on whether the particular piece of property poses an active risk to the public or whether it is simply detracting from the value of the estate. It is also important to note at this stage that section 14.06(4) does not grant an express right to abandon property, it assumes one already exists and that court officers may avail themselves of it in the appropriate circumstances. As an example of the divergence in the academic commentary regarding the understanding of section 14.06(4) and whether it does grant an express right of disclaimer see, D. Saxe, "Trustees' and Receivers' Environmental Liability Update", 49 CBR (3d) 138 ("*Trustees' and Receivers' Environmental Liability Update*").

[30] See *Orphan Well Assn, supra* note 2, at 72, where Justice Slatter stated "the timing of the trustee's disclaimer is also not critical. 'Ten days after an order' does not mean 'between when the order is made and 10 more days'; 'after' includes 'before the order is made'. As s. 14.06(4)(c) shows, the trustee can renounce or disclaim assets before or after the order is made, and can disclaim the assets in anticipation of a regulator imposing environmental obligations on the bankrupt estate."

order is contemplated or after an environmental order is issued, in anticipation of a regulator requiring rectification of environmental obligations by an insolvent estate or the court officer.

In *Trustees and Receivers Environmental Liability Update*, Ms. Dianne Saxe argues that these provisions were intended to provide court officers with a right to abandon an interest in contaminated property. In effect, they were part of a Parliamentary package intended to encourage court officers to accept mandates involving environmentally distressed property by ensuring that court officers would not be held personally liable by overzealous regulators for the liabilities of an insolvent debtor's estate:

> The most important substantive change is that trustees (including receivers) have acquired the qualified right to abandon contaminated property. When property has been abandoned, the trustee cannot be required to comply with any remedial order relating to that property.... [31] [Emphasis added]

The provision of a "qualified right to abandon" was consistent with the understanding of abandonment rights at the time and the policy behind Parliament's goal of early notification and issue rectification.[32] Section 14.06(5) complements section 14.06(4) by providing a court officer with the ability to seek a stay of an order so as to assess the economic viability of compliance with it.[33]

While the 1997 amendments provided court officers with the certainty they needed to ensure that they would not face liability for environmental claims, it also signaled a shift in the jurisprudence.[34] No longer could court officers be forced to incur liability in relation to the administration of such property. As a result, the nature of abandonment has tracked towards a regime where the maximization of value is paramount and is facilitated by the abandonment of onerous property.

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[31] *Trustees' and Receivers' Environmental Liability Update*, *supra* note 29, at 14.
[32] *Orphan Well Assn, supra* note 2, at 72.
[33] The corollary assumption is that, in the event that it is uneconomical to administer such property or comply with an order seeking rectification, a court officer is permitted to disclaim the interest in the onerous asset.
[34] R.G. Marantz & R.H. Chartrand, "Bankruptcy and Insolvency Law Reform Continues: The 1996-1997 Amendments" (1997-98), 13 BFLR 107 (WL): "The Bill provides that a trustee cannot be made personally liable for environmental conditions or damage that occurred or arose after its appointment unless such conditions or damage result from the trustee's "gross negligence" or "wilful misconduct". This is in contrast to existing provisions of the *BIA*, which provide that a trustee can be made personally liable for environmental conditions or damage that arose or occurred after its appointment if such conditions or damage result from the trustee's failure to exercise "due diligence"."

Together with the common law and section 11.8 of the *CCAA*, each as discussed in more detail below, these statutory provisions provide the framework for abandonment rights in Canada.[35] It is clear that abandonment rights in this country have not enjoyed the same level of codification as their English or American counterparts. They have therefore developed primarily through the common law. There continues to be significant uncertainty in respect of who can disclaim property other than leases, including real and personal property and executory contracts. In fact, it was only in 2017 that Justice Slatter issued an unconditional acknowledgement in his decision in *Orphan Well Assn* that it is common practice for court officers to "disclaim or abandon" onerous property (including real property) during the administration of a debtor's estate.[36]

III. WHO CAN ABANDON PROPERTY AND WHEN

Other than the statutory rights provided to a debtor to disclaim certain agreements in the event of a proposal under the *BIA* or proceedings under the *CCAA*, the common law right to abandon property is a special right afforded only to court officers.[37] The licensed trustees selected to act as court officers are highly trained and have specialized expertise in finance and restructuring. Due to this experience, Canadian courts typically offer significant deference towards decisions made by court officers when they are reasonable and made in good faith.[38] However, it is

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[35] There has been significant confusion in Canada as to whether abandonment rights are based in statute or the common law. A review of the evidence indicates that the answer is that both assertions are true. However, the primary right to abandon property is based in the common law (except for section 30(1)(k)): *KKBL No 297 Ventures Ltd v IKON Office Solutions Inc*, 2003 BCSC 1598 at 8 ("*Ikon*").

[36] *Orphan Well Assn*, *supra* note 2, at 47. Justice Slatter further found that it was ultimately irrelevant whether court officers formally abandon property, or simply leave it unrealized for return to the insolvent debtor. While there may be limited practical difference between an abandonment and a failure to realize on, or simply ignoring, a piece of property when exercised at the end of the administration of an estate, they differ in effect when property compromising the estate is onerous at the start, or becomes onerous during the course of, the administration of the estate. That being said, the abandonment of real property by court officers appears to have been primarily affected through this indirect method prior to the 1997 amendments to the *BIA*.

[37] See section 32 of the *CCAA* and sections 65.2 and 65.11 of the *BIA*. In either case the objective is the same; to rid the estate of onerous obligations in order to maximize its value for stakeholders. See *Target Canada Co, Re*, 2015 ONSC 1028 (ONSCJ) at 10 and *Aveos Fleet Performance Inc, Re,* 2012 QCCS 6796 at 39 for consideration of the factors necessary for a debtor to disclaim an agreement under section 32 of the *CCAA*. See *Golden Opportunities Fund Inc v Phenomenome Discoveries Inc,* 2016 SKQB 306 at 19-21 ("*Phenomenome*") for a consideration of section 65.11 of the *BIA*. See *Lindor Inc, Re,* 2012 QCCS 4701 at 32 for the test under section 65.2 of the *BIA*.

[38] *Ravelston Corp, Re ,* 2005 CarswellOnt 9058 (ONCA) at 40 ("*Ravelston*"): "If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision." See also *Hoque, Re* (1996), 1996 NSCA 30 at 35: "When it comes to making business decisions relating to the sale of the bankrupt's assets, a trustee, with the authorization of the inspectors, must exercise reasonable business judgment. The trustee must provide advice to the inspectors equivalent to the advice one would expect from a reasonably competent trustee in the circumstances. Both the trustee and the inspectors are entitled to rely on legal advice from counsel for the estate. And, of course, a trustee must act with

important to understand the differences between the types of court officers and the type of property when considering the effect of abandonment.

A. LICENSED INSOLVENCY TRUSTEE

A licensed insolvency trustee occupies a unique role in relation to the court, the debtor and the parties with an interest in the estate.[39] Within the confines of the *BIA*, trustees enjoy a quasi-judicial role and their decisions are traditionally afforded significant deference by the courts, so long as they have acted in good faith and in a commercially reasonable manner.[40] The trustee's power to abandon onerous property is, in most cases, discretionary but is only permitted insofar as it is exercised in good faith and with a commercially reasonable purpose (such as maximizing the value of the debtor's estate).

Administration of a debtor's estate by a trustee is the cornerstone of the collective proceeding model and takes place for the benefit of all stakeholders.[41] All of the bankrupt's property of every kind vests in the trustee, regardless of whether such property has value at the time of assignment or not.[42] The property that vests in the trustee includes the debtor's interest in all tangible, intangible, real, personal, contractual and intellectual property of all kinds and the trustee cannot, at the time of its appointment, refuse to assume any interest in the same.

Where a trustee wishes to divest itself of an interest in onerous property (that which has a net cost to the estate), it must take positive action through written notice to abandon its interest in such property (including obtaining approval of the inspectors, where necessary).[43] An act of

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honesty and integrity. Finally, the courts should show deference to business decisions made by those entrusted by the creditors and authorized by the *Act* to make such decisions."

[39] It is always an important question to consider which parties are truly stakeholders (i.e. those who have a tangible interest in the administration of the estate), as it is questionable as to whether those unlikely to receive a distribution are stakeholders: *Ravelston Corp, Re,* 2007 ONCA 268 at 17. See also *Ravelston*, *supra* note 38, at 33: "The Receiver is not obliged to protect the interests of stakeholders which are unrelated to the administration of a debtor's estate, such as the interest of a stakeholder to avoid alleged prejudice in criminal proceedings. The Receiver's role is to make business decisions in the best interests of the estate after a careful cost/benefit analysis and the weighing of competing interests."

[40] J. Auger & A. Bohémier, "The Status of the Trustee in Bankruptcy" (2003) 37 RJT 57 at 77 (WL).

[41] *Ibid* at 63.

[42] *BIA*, *supra* note 2, at section 71.

[43] Oral disclaimers are not sufficient. See *Fehr Estate (Trustee of) v Fehr*, 2008 NWTSC 70 at 46, where the court found that no renunciation had occurred as no quit claim or renunciation had been executed. There is no prescribed form and a letter from the trustee will suffice to affect an abandonment of its interest.

abandonment re-vests the trustee's interest in the particular property in the bankrupt and cannot be reversed, except in limited circumstances (i.e. fraud).[44]

While a trustee may proactively abandon an interest in onerous property, it may also choose to retain valueless property if the cost associated with its administration is minimal, or the trustee believes that it may increase in value during the proceedings.[45] Where such property is not divided among the creditors in its existing form, the trustee may simply return any unrealized property to the bankrupt upon its discharge.[46] Not abandoning valueless property may be preferred where the potential exists for such property to experience a subsequent increase in value. Abandoning property that experiences a subsequent increase in value may expose a trustee to a challenge by an aggrieved creditor where it could have released the property to the creditors.

B. RECEIVER

A receiver is usually a party who has taken possession of all or substantially all of a debtor's property for the benefit of all parties with a stake in the same.[47] While trustees have prescribed rules of operation set out in the *BIA*, court-appointed receivers derive their authority from the court order appointing the receiver and common law. Consequently, receivership is an inherently more flexible remedy than bankruptcy and provides a much more extensive toolbox for creditors and court officers to manage the possession, control and liquidation of a debtor's assets. Unlike trustees, the possession and control of property (i.e. collateral) by receivers is effected by three factors: (i) legislation;[48] (ii) the receivership order; and (iii) the common law.

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[44] See *Firestone*, *Re*, 2003 ABQB 417 at 16, 19 ("*Firestone*").

[45] See *Lepage, Re*, 2016 ONCA 403 at 25 ("*Lepage CA*"), where the court found that, while a trustee may decide to hold on to real property in the hope that its market value will rise, it must find a practical way to cover ongoing costs (i.e. interest, insurance, taxes and maintenance). The court also noted that, in many if not most cases, that will not be possible and a trustee is better off disposing of such property quickly or disclaiming any interest in it. See also *Rassell, Re*, 1999 ABCA 232 at 15 ("*Rassell*"): "It is often dangerous to sell for less than fair market value, though individual circumstances often dictate that, such as a thin market, an unusual asset, or heavy carrying costs or liabilities from continued possession."

[46] *Orphan Well Assn, supra* note 2, at 47 and section 40 of the *BIA*, *supra* note 2.

[47] See definition of "receiver" in "Inspectors' Handbook: For Inspectors Appointed Pursuant to the Bankruptcy and Insolvency Act", online: <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01479.html> and section 243 of the *BIA*.

[48] Receivers may be appointed under various provincial or federal legislation. Where a receiver takes possession of all or substantially all of a debtor's property, it may be deemed to be a receiver under section 243 of the *BIA*. Section 247 of the *BIA* requires that a receiver appointed under the *BIA* act in good faith and in a commercially reasonable manner. Acting in a "commercially reasonable" manner is straightforward and requires a receiver to obtain a fair price for the debtor's assets. See also *Bayhold Financial Corp v Clarkson Co* (1991), 10 CBR (3d) 159 (NSCA) at

Prior to 2004, there were no template receivership orders which established a standard set of rights and responsibilities for receivers and stakeholders in receivership proceedings.[49] However, there was a significant concern among the judiciary over the quality and content of receivership orders. These orders had grown in length and complexity due to the utilization of past precedents. The undesirable result of this practice was that receivers had varying levels of authority depending on the province and the form of precedent order chosen.

In May of 2002, the Ontario section of the Canadian Bar Association recognized this developing issue and initiated a process to develop a standard form of receivership order.

In June of 2002, Justice Slatter (as he then was) of the Alberta Court of Queen's Bench noted a similar issue occurring in Alberta in his decision in *Re Big Sky Living Inc*, 2002 ABQB 659.[50] In that case, the party was seeking the appointment of an interim receiver and an order which provided limits on liability and broad prospective rights affecting third parties who were not served with the application. In considering the scope of the order, and in response to submissions that similar orders had been granted in Ontario, Justice Slatter granted the application but refused to grant the proposed order finding that:

> …..the order tendered for signature is overly broad, and overly declaratory and legislative in nature. It purports to affect in general terms the rights of broad and undefined classes of parties who have not received notice of this application.[51]

As the initial attempt to create a template order was unsuccessful in 2003, the Ontario Commercial List Users' Committee of the Ontario Superior Court of Justice again initiated a process to create a standard form of receivership order. A template order was eventually finalized in late 2004.[52] British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Quebec followed suit adopting their own forms of template receivership orders shortly thereafter (collectively, the "Model Orders").[53] While these Model Orders have, in some instances, been

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15, *Textron Financial Canada Ltd v Beta Ltée/Beta Brands Ltd* (2007), 36 CBR (5th) 296 (ON SCJ) at 21 and *Royal Bank v Penex Metropolis Ltd*, 2009 CarswellOnt 5202 (ONSCJ) at 26.

[49] "The New Standard Form Template Receivership Order", Explanatory Notes for Version No 1, September 14, 2004 at 1, online: <http://www.ajohnpage.com/PDF/Companion_Piece.PDF> ("*Ontario Explanatory Notes*").

[50] ("*Big Sky*").

[51] *Ibid* at 57.

[52] *Ontario Explanatory Notes*, *supra* note 49, at 1.

[53] See the forms of Model Orders on the province's respective court websites. Newfoundland and New Brunswick appear to not have expressly adopted the form of Model Order but similar orders have been recently granted. See the

revised, they have provided a relatively consistent basis for interpreting the authority granted to a receiver to abandon an interest in property.[54]

Unlike a trustee, ownership of property does not vest in a receiver upon appointment. There are three primary options for minimizing the exposure of a receivership estate to onerous property: (i) tailoring the definition of "property" in the proposed order to exclude particular property; (ii) the receiver choosing to only take possession or control of certain property upon appointment; (iii) the abandonment of an interest after taking possession.

The first option is an indirect form of abandonment and has been commonly employed by secured creditors in Alberta to avoid paying for the administration of suspended or abandoned oil and gas wells that may be, or may develop into, onerous property due to their attendant environmental liabilities.[55] Alberta courts have traditionally been amenable towards granting such limited appointments, leaving regulators, or other creditors, entitled to enforce on such excluded property.

The second option has been the subject of much recent debate among the insolvency community and arose as a subject of contention in the *Redwater* and *Orphan Well Assn* matter, discussed in greater detail below.[56] The Model Orders authorize, but do not direct, a court-appointed receiver to "take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property".[57] Further, the Model Orders also authorize a receiver to "cease to perform any contracts of the Debtor".[58] It was common practice that a receiver could rely on these provisions to select which property of a debtor it was going to

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receivership order granted on June 29, 2016 in *Business Development Bank of Canada v Wabush Hotel Limited*, Court File No. 2016 01TG 2428 and the receivership order granted on March 31, 2010 in *GE Canada Equipment Financing GP v Action Plywood Inc*, Court File No: N/M/25/10

[54] *Ontario Explanatory Notes*, *supra* note 49, at 2: "The profession seems to have emerged from the struggle to understand the integration of the various forms of relief that are available to assist in dealing with the problems caused by insolvent debtors. Indeed, the state of the art has evolved to the extent that a consensus has developed among many, and perhaps most insolvency professionals, at least as to certain fundamental principles."

[55] For example, see the receivership orders of *Alberta Treasury Branches v Edge Resources Inc*, Action No.: 1601-11381 (ABQB) and *Alberta Treasury Branches v Northpine Energy Ltd*, Action No.: 1601-11380 (ABQB) ("*Northpine*").

[56] *Redwater Energy Corporation, Re*, 2016 ABQB 278 ("*Redwater*").

[57] Section 3(a) of the Model Orders.

[58] Section 3(c) of the Model Orders.

take possession and control of, and seek to liquidate, and that which it was going to leave in the debtor's estate for enforcement by other stakeholders.[59]

Lastly, both 14.06(4)(a) and (c) of the *BIA* stand as recognition that a receiver is permitted to disclaim any interest in real property at any time, including where it has taken possession and control of the same. Unlike the abandonment of an interest by a trustee, which sees title to the abandoned property vest from the trustee back to the debtor, the receiver only has possession and control of the property in the debtor's name and does not have title to, or a personal interest in, such property. Thus, the "abandonment" of property by a receiver is more akin to relinquishing possession and control, to the extent it took possession and control, rather than a direct abandonment of an interest in property.[60] Section 14.06 results in a separation of liability in respect of abandoned property, as a regulator cannot require a court officer to use the estate's remaining property to comply with an order directed at the abandoned property.[61] Where a receiver has made a determination that property has no value and abandons its interest in the same, it is at this time that regulators can move to rectify or seize such property.[62]

Due to the position taken by the Alberta Energy Regulator ("AER") in the *Redwater* proceedings, and prior to the release of the Alberta Court of Appeal's decision in *Orphan Well Assn*, secured creditors and receivers were either seeking amendments to the Model Orders specifically carving out property in provinces where disputes with regulators were foreseeable or recognizing that they were permitted to take possession of only that property which had value.[63] After the release of *Orphan Well Assn*, the practice has returned to the original language in section 3(a) of the Model Orders given the affirmation of a receiver's abandonment rights in that

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[59] This assumes that there would be value in the property justifying enforcement by creditors. Otherwise, a regulator would usually only enforce where it intended to rectify the debtor's environmental obligations through its internal processes or sought to bring a claim against contiguous property under section 14.06(7) of the *BIA*.

[60] The property remains in the debtor's name but does not form part of the "receivership estate" (i.e. the property under the control of the receiver). While it is a legal nuance, there are real consequences for parties with claims against the property abandoned from such estate.

[61] *BIA*, *supra* note 2, at section 14.06(6). Note that this only applies to orders that constitute "claims provable" and the Model Orders contain exceptions for orders of a purely regulatory nature.

[62] Arguably, such written abandonment by a receiver has the effect of excluding the abandoned property from the protection of the stay of proceedings thereby leaving it open to enforcement by stakeholders.

[63] See K. Bourassa, R. Zahara & C. Nyberg, "Canadian Regulator Adds More Uncertainty to the Oil & Gas Market" (Sept 2016), 29:7 J Corp Ren 10 at 10-14 ("*Canadian Regulator Adds More Uncertainty*") for examples of popular amendments to section 3(a) of the Model Order. Further, in *Orphan Well Assn*, *supra* note 2, at 46, Justice Slatter noted "to be able to renounce assets, [a] receiver or trustee must first have control of them. If the receivership order had not given the Receiver control of the non-producing assets, there would be nothing to renounce."

decision. It is important to note that where a receiver is appointed and either abandons or refuses to take possession of various onerous property, and then is subsequently appointed as trustee, it must also take steps to disclaim the onerous property to ensure that the property continues to be excluded from the bankruptcy estate.[64]

C. MONITOR

A court-appointed monitor provides independent oversight of a debtor company's activities while engaged in proceedings under the *CCAA*.[65] Its role, among other things, is to ensure that a debtor does not engage in any conduct that will prejudice the interests of stakeholders and also assist the debtor with complying with the terms of the *CCAA* initial order.

A monitor's primary responsibility is supervision, but the increased usage of *CCAA* proceedings to liquidate a debtor's assets has resulted in a number of monitors being granted "super-monitor" status.[66] As such, there is some uncertainty as to whether a super-monitor could administer property and whether it would have a common law right to disclaim onerous property in such a case. Section 11.8 of the *CCAA* mirrors section 14.06(4) of the *BIA* and recognizes that a monitor is permitted to abandon property in prescribed circumstances. This supports the idea that a monitor has access to abandonment rights where it is acting in a similar capacity to a trustee or a receiver in a *CCAA* proceeding and there would be no entity merging from the proceedings to continue as a going concern.[67] As section 14.06(4) has been found to grant no express right to abandon property, it is reasonable to conclude that a monitor must also have a common law right to abandon property where it is administering the final stages of a *CCAA* proceedings and it

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[64] Pursuant to section 71 of the *BIA*, such property will re-vest in the trustee along with any other property in the possession of the receiver at the time of the petition necessitating another disclaimer. A disclaimer by a receiver does not transfer title from the debtor's name.

[65] *Lutheran Church Canada, Re,* 2016 ABQB 419 at 48.

[66] For a discussion of the increasing role of liquidations in *CCAA* proceedings, see generally R. Wood, "Rescue and Liquidation in Restructuring Law", (2013) 53 CBLJ 407 (WL).

[67] J. Oliver and T. Cumming, "Redwater Energy Corporation and the Evolution of Section 14.06: Balancing Insolvency and Regulatory Laws in the Oil Patch", 2016 An Rev Insol 11 (WL). Contrast to the Order (re Abandonment of the Silica Fumes Property) granted on September 13, 2013 by Justice Mesbur in the *CCAA* proceedings of Timminco Limited And Becancour Silicon Inc., Court File No.: CV-12-9539-00CL. The Order permitted the debtor and the monitor to abandon an interest in a silica mine pursuant to articles 934 ff. of the *Civil Code of Quebec*, CCQ-1991, at such time as they deemed appropriate, as the property was of "no value to the company". However, the motion record indicated that the applicants attempted to rely on section 36 of the *CCAA*.

becomes necessary to do so.[68] However, there appear to be no reported decisions considering the application of section 11.8 and no jurisprudence recognizing such a common law right.

It is also unlikely that there will be consideration anytime soon, as the typical approach is to sell the *CCAA* debtor's valuable property to a purchaser, leaving the onerous or valueless property behind with the debtor, which is then usually bankrupted at the appropriate time. In such a case, the trustee, not the monitor, would ultimately be responsible for either abandoning the property or returning it to the debtor upon obtaining its discharge.

IV. WHY IS PROPERTY ABANDONED

The abandonment of property in insolvency is inherently an act of economic triage. This concept means that court officers are meant to assess which pieces of property are, or will be, a net drain on the estate and take action to abandon, disclaim or refuse to take possession of such property in furtherance of the objectives of the *BIA*.

In *Principles of Corporate Insolvency Law*, Professor Goode explains the reasoning underlying the abandonment of property by a court officer:

> The purpose of the disclaimer provisions is twofold: first, to allow the liquidator (whether in a solvent or an insolvent liquidation) to complete the administration of the liquidation without being held up by continuing obligations on the company under unprofitable contracts, or continued ownership and possession of assets which are of no value to the estate; and, secondly, in an insolvent liquidation to avoid the continuance of liabilities in respect of onerous property which would be payable as expenses of the liquidation to the detriment of unsecured creditors.[69] [Emphasis added]

Further, in *UNCITRAL Legislative Guide to Insolvency Law 2004,* the United Nations Commission on International Trade Law considered the purpose behind the abandonment of property in various member insolvency regimes, stating:

> It may be consistent with the objective of maximizing value and reducing the costs of the proceedings to allow the insolvency representative to relinquish the estate's interest in certain assets, including land, shares, assets subject to a valid security interest, contracts and other property, where the insolvency representative determines relinquishment to be in the interests of the estate …….. Situations in which this approach may be appropriate include where assets are of no or an insignificant value to the estate (e.g. the security

[68] *Orphan Well Assn*, *supra* note 2, at 47.
[69] R. Goode, *Principles of Corporate Insolvency Law,* 4th ed (London: Sweet & Maxwell, 2011) at 200.

> interest exceeds the value of the encumbered asset); where the asset is burdened in such a way that retention would require excessive expenditure that would exceed the proceeds of realization of the asset or give rise to an onerous obligation or a liability to pay money; or where the asset is unsaleable or not readily saleable by the insolvency representative, such as where the asset is unique or does not have a readily apparent market or market value….[70] [Emphasis added]

Consistent with the statements above, the insolvency regime in Canada has been designed to facilitate the maximization of value by incentivizing the efficient administration and liquidation of debtors' property. The collective proceeding model was developed to facilitate this aim and is overseen by a court officer, who has an obligation to act in good faith and in the best interest of all stakeholders.[71] This model avoids the inefficiency and free-for-all that is likely to occur if each creditor is required to individually recover its debts. It places all creditors on an equal footing and facilitates the collective goal of maximizing global recovery for all creditors.[72]

A court officer's role in the collective proceeding model is unique. Court officers are experts in liquidation and are specifically appointed to take action to stop the deterioration of collateral.[73] In effect, they are appointed as custodians of value, tasked with maximizing distributable value, including through the mitigation of the debtor's liabilities. Keeping this purpose in mind, it becomes clear that the exercise of abandonment rights by a court officer is fundamentally an act of economic triage to remove property from the estate that will detract from otherwise realizable value capable of distribution to creditors.[74] The ability to abandon property is designed to hasten the procedural administration of the estate and to produce a benefit for both the estate and any stakeholders with an interest therein.[75]

If a trustee or receiver were unable to "cut off a foot to save the leg" as it were, creditors would only seek to appoint a court officer where it is clear that the value of the estate is greater than the

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[70] United Nations Commission on International Trade Law,*UNCITRAL Legislative Guide to Insolvency Law 2004* at 109, online: <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf > ("*UNCITRAL Guide*").
[71] *Moloney*, *supra* note 2, at 87-88.
[72] *Moloney*, *supra* note 2, at 33.
[73] *Rassell, supra* note 45, at 13. A "trustee in bankruptcy has a duty to maximize the yield from all the assets legally available to the trustee, subject to practicalities and honesty."
[74] See *Celtic Extraction Ltd (In Liquidation), Re*, [2001] Ch 475 (CA) at 42 ("*Celtic Extraction*"): "The affirmative reasons for disagreeing with the judge start with the consideration of the very considerable and oft-repeated public policy requirement that the property of insolvents should be divided equally amongst their unsecured creditors. An important aspect of the implementation of that policy is the ability to disclaim onerous property; otherwise the available assets are, in practice, appropriated to the future or prospective creditor who holds the right corresponding to the onerous property."
[75] *UNCITRAL Guide*, *supra* note 70, at 88.

cost of funding the same. Without the power to abandon, there would be no incentive for a creditor to do so and it may instead literally cut its losses or wait to see if a subordinate creditor is willing to fund the proceeding (as unlikely as this may be).[76]

In addition, without a creditor to fund the administration of the estate, in many cases the delinquent debtor would continue to manage the property in a potentially negligent manner or, where the debtor has absconded, there may be no party with control over the same. Such a situation can easily create a risk to the public and was expressly considered by Parliament prior to the implementation of section 14.06(4).[77]

As was recognized nearly 70 years ago in *Abandonment of Assets*, and which is consistent with the UNCITRAL model, an interest in property is typically only abandoned by a court officer in one of four instances:

> (1) Worthless property—property which has no intrinsic value but which may have been held by the bankrupt for reasons of sentiment;
>
> (2) Encumbered property—property not expected to sell for a price sufficiently in excess of the mortgage or judgement liens to offset the interest and costs of administration;[78]
>
> (3) Doubtful choses in action—claims upon which the possibility of obtaining, or collecting upon, a judgment is not sufficiently substantial to justify the expense involved in litigation or where despite the validity of the claim there are not sufficient funds in the estate with which to litigate; and
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> (4) Unprofitable executory contracts, - contracts which cannot be performed by the trustee, or where performance will not provide an economic benefit to the creditors.[79] [Emphasis added]

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[76] While this calculation is always considered when determining whether to appoint a court officer, the ability to abandon onerous property may assist in lowering the threshold for appointment. See the proceedings in *Northpine* for an example of creative options of enforcement. In that case, the lender only appointed a receiver over the non-operated working interests leaving the operated properties to be orphaned. The non-operated interests could be conveyed by the receiver without the consent of the provincial regulator whereas the operated properties could not.

[77] See House of Commons Debates, Evidence of the Standing Committee on Industry, 35th Parl, 2nd Sess, No 16 (11 June 1996). In the context of regulated property, it is especially important to consider that, until relatively recently, government bodies refrained from seeking the appointment of court officers over licensed debtors due to the cost associated with administration. Thus, if no court officer were to be appointed, there may be no third party taking possession of the operating assets and the regulator may have to deal with the entire estate's licensed property, instead of those that would be otherwise sold.

[78] It is important to note the differences between the *Bankruptcy Code* and the *BIA*. Although trustees take property subject to the rights of secured creditors, such creditors may have previously or concurrently appointed a receiver or may wish for the trustee to liquidate the assets. Further, since a receivership is primarily a remedy of a secured creditor, all property in a receivership is likely to be encumbered by security.

For simplicity's sake, all four categories can be classified as property of an onerous or burdensome nature, insofar as the continued administration of the same would result in the deterioration of the current or future value of the estate. As a court officer, a trustee or receiver should only seek to abandon property where its continued administration would result in a deterioration of the estate.[80] As commercial reasonableness would dictate, court officers have a positive obligation to abandon such property rather than allowing it to detract from distributable value.[81]

Parliament has arguably recognized that an act of abandonment is inherently an economic decision. Although there is little express consideration of abandonment in the *BIA*, section 14.06(5) of the *BIA* contemplates a stay of proceedings to allow a trustee or receiver time to determine whether it is "economically viable" to comply with an order of a regulator or ministry.[82] Where compliance would result in a benefit to the estate, a court officer would be bound to maximize value and comply with such order. Of course, the corresponding conclusion is that, where it does not make economic sense to comply, the property should be abandoned.[83]

In order for an abandonment to be an act of economic triage, it is important that such an act results in an outcome that is more beneficial than retaining the property in the estate. A court officer should consider the net cost of administration when determining whether it makes fiscal

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[79] *Abandonment of Assets*, *supra* note 3, at 416.

[80] See *Lepage, Re,* 2015 ONSC 4525 at 27 (overturned on other grounds, *Lepage CA*, *supra* note 45, where a trustee concludes that property has no value to the estate, it should take a positive steps to formally divest itself of any interest in the property. In this case, the real property was properly characterized as onerous rather than valueless, since it required upkeep and the expenditure of funds to maintain the property. See also *Garneau v Caisse populaire Desjardins de Thetford Mines,* 2002 CanLII 63724 (QCCS) at 34 ("*Garneau*"): "So the trustee must divest himself of an asset that incurs unnecessary costs for the masses, since it does not represent a feasible interest. This is the goal that emerges from the renunciation of a good." (translation).

[81] *Ibid*. See also *In re Rich*, 510 BR 366 (Bankr D Utah 2014), where Judge Mosier stated that the "failure to administer property that is of value and benefit to the estate is not an acceptable option and failure to abandon property that is burdensome is not an acceptable option." While such statement was made in the context of an application under § 554(b), it is reasonable to assume that a Canadian trustee could face a similar challenge by a creditor under section 37 of the *BIA* where it either abandons property of value or does not abandon onerous property.

[82] As noted by G. Marantz, legal advisor for the Department of Industry prior to the 1997 amendments, section 14.06 of the *BIA* was intended to allow court officers to consider whether there is environmental damage after taking possession of property and determine whether it makes economic sense to rectify such condition without incurring the risk of incurring significant liability.

[83] Both sections 14.06(4)(b) and 14.06(5) of the *BIA* contemplate a court officer considering the "economic viability" of the debtor's property, which goes well beyond a consideration of the court officer's personal liability for the administration of the estate. Further, section 14.06(6) prohibits the court officer from applying the remaining assets of the estate towards the rectification of abandoned property: *Orphan Well Assn*, *supra* note 2, at 57, 63.

sense to abandon such property. Such an analysis should consider all costs, such as those incurred through continued operation, storage, transport or even legal or financial advisory fees.[84] This reasoning is true for all acts of abandonment. It is important that a court officer document its reasoning and be able to justify the exercise of its rights in case of a challenge by an aggrieved stakeholder or third party.[85]

If a court officer can maintain or increase the value of the estate by releasing an interest in property, it arguably has an obligation to do so notwithstanding any effect on non-stakeholders of the debtor.[86] Despite the lack of formal consideration of the economic triage theory, Canadian jurisprudence has developed in such a manner that implicitly assumes it occurs during the administration of insolvent estates.

V. WHAT PROPERTY CAN BE ABANDONED AND HOW

A. REAL PROPERTY

The controversy over the extent of a court officer's ability to abandon an interest in real property has been thrust to the forefront of Canadian legal circles in recent years. This has been due to the sustained financial difficulties in both the oil and gas and manufacturing industries in Canada. Despite this recent inflection, there has been opposition to the abandonment of property by court officers for decades. The main source of contention concerns the abandonment of contaminated real property.

This issue arises primarily with respect to contaminated real property, such as oil and gas properties or mines, where the respective provincial legislation does not provide for an

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[84] It is important for a court officer to consider the type of property (i.e. perishable items or foodstuffs), storage costs, sale fees, legal fees etc. when making the determination of whether property is worth administering or continuing to administer. There will often be a diminishing return for the continued administration of perishable property.

[85] See *Firestone*, *supra* note 44, at 18. While abandonments are commonly challenged by regulators and counterparties to contracts, aggrieved creditors may also seek to challenge a trustee's decision not to abandon onerous property under section 37 of the *BIA*. This scenario highlights why it is important that trustees develop a firm basis for abandoning property prior to doing so.

[86] A court officer's duty is to act in the interest of the stakeholders of the debtor. It is unlikely that fulcrum creditors would permit a court officer to spend estate funds on onerous property (that had no hope of increasing in value) or that which had already been disclaimed to satisfy the interests of a non-stakeholder unless a net benefit was realized: *Orphan Well Assn*, *supra* note 2, at 57.

unconditional surrender of the real property interest by the court officer.[87] This right of court officers to abandon property is not restricted only to property subject to environmental obligations, but is the underlying justification for allowing a court officer to disclaim all onerous property that would otherwise negatively impact the administration of the estate.

As aptly stated by Professor Anna Lund in *A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law*, allowing court officers 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".[88] However, there continues to be an argument over the source of the right to abandon an interest in real property.[89]

(i) SECTION 20 OF THE BIA

Section 20 of the *BIA* provides that a trustee may, with the permission of the inspectors, divest any estate or interest in real property, and that the registrar of the appropriate land titles office must accept such disclaimer, resulting in a reversion of title back into the name of the bankrupt.

Section 20 does not provide a trustee with the ability to abandon property; it assumes that such a right exists at common law.[90] Section 20(1) directs the registrar of the appropriate land titles office to register an abandonment of property and section 20(2) sets out the effect of doing so. One purpose of this provision is to ensure that other interested parties are notified through the registry that the property no longer forms part of the bankrupt's estate and has been returned to the debtor (and is open to enforcement). The few decisions considering the application of section

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[87] *Redwater*, *supra* note 56, at 155.

[88] A. Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law", (2017) 80:1 Sask L Rev 157 at 183 ("*A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law*").

[89] Despite section 30(1)(k) specifically empowering a trustee to abandon its lessee interest in both real and personal property.

[90] *Orphan Well Assn*, *supra* note 2, at 48, 68 and the Oral Decision ("*Nordegg Decision*") of Justice Jones on March 23, 2017 in *Alberta Treasury Branches v Nordegg Resources Inc*, Action No.: 1601-07435 (ABQB) ("*Nordegg*"). See also *Lichtenfeld v Conifer Contracting Ltd*, 2005 CarswellOnt 3585 (ONSCJ) at 23.

20 mostly indicate that the release of the property is primarily based on an analysis of realizable value (i.e. where there is no equity capable of realization).[91]

In *Jones*, Chief Justice Prendergast found that a trustee could not divest itself of an interest in real property by mere inaction or by an oral abandonment. In order for an abandonment to be enforceable, he found that there had to be a quit claim or disclaimer and that it had to be approved by the inspectors.[92]

In *Firestone*, Registrar Waller considered an abandonment of an interest in a residential dwelling by a trustee under section 20 and came to a similar conclusion. In that case, the trustee examined the real property of the debtor at the date of bankruptcy and found that there was no non-exempt equity capable of realization for the creditors. The bankrupt requested the trustee issue a notice of renunciation and the trustee provided it with one. Notwithstanding that the bankrupt failed to register the notice at a land titles office, the abandonment was found to be valid as against the trustee.[93] This decision is important as it indicates that an act of abandonment does not need to be registered pursuant to section 20 to take effect.[94] An abandonment is effective from the date it is issued by a trustee.

This finding is also consistent with the approach taken by Justice Slatter in *Orphan Well Assn* where he acknowledged the abandonment of the onerous property by the court officer in that case could be affected by a written notice, regardless of whether it was registered.[95] He also found that section 20 of the *BIA* provided no statutory right in and of itself to abandon an interest

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[91] See *Firestone*, *supra* note 44, at 4. See also *Eska v Eska*, 2001 MBQB 267 at 5 citing Houlden & Morawetz, in *Bankruptcy and Insolvency Law of Canada*: "during the administration of an estate, a trustee should be careful about giving a disclaimer or quit claim, if no consideration is being received by the bankrupt estate. It is more satisfactory if the trustee permits the interest of the bankrupt estate to be terminated by foreclosure or sale under power of sale." See also *Garneau*, *supra* note 80, at 20-31. The effect of registering the notice of renunciation or quit claim is to discharge any registrations against the property by the trustee.

[92] Inspectors, if any, are only required to approve the act of abandonment not the vehicle for doing so.

[93] Houlden & Morawetz, Bankruptcy and Insolvency Analysis - C§38 - Disclaimer of Property. See also *Banque Laurentienne du Canada v Caron, Bélanger, Ernst & Young Inc*, Court File No.: 500-09-008257-990 (6 May 2002) (QCCA) and *Munkittrick, Re,* 2011 QCCS 239 at 28-33.

[94] Contrast this finding with *Marathon Pulp Inc, Re,* 2009 CarswellOnt 4570 (ONSC) where a trustee obtained a "divestiture order" pursuant to section 20 permitting it to disclaim certain property instead of relying on its common law rights. Also contrast to *In re Ménard; Shink v Gingras*, (1962) 3 CBR (ns) 309 (CSQC) where the court found that a written abandonement by a trustee was a "dead letter" unless the trustee registered the same under subsection 20(1).

[95] *Orphan Well Assn*, *supra* note 2, at 6-7.

in real property.[96] These decisions provide further evidence that the Canadian judiciary has been content to implicitly accept a common law right of trustees to abandon real property of a bankrupt.

(ii) SECTION 14.06(4) OF THE BIA

As discussed above, section 14.06(4) was implemented to encourage court officers to accept mandates where they feared incurring liability from the administration of contaminated sites.[97] The section recognizes that court officers already have the tools necessary to facilitate the abandonment of property, but it does not create an express right of abandonment. Much like section 20, it assumes that such a right already exists at common law. While there has not been a consistent understanding of whether this provision provides a statutory right to abandon property, the discussion below posits that *Orphan Well Assn* has clarified the application of section 14.06.[98]

Notwithstanding the section has been in force for nearly 20 years, there is surprisingly little reported jurisprudence considering its application prior to 2012. Since the release of the Supreme Court of Canada's ("SCC") decision in *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67, Courts have had guidance on its application and have issued a number decisions considering its application. The most recent of these are *Redwater* and *Orphan Well Assn*, which provide some of the first in depth consideration of section 14.06(4). The facts underlying these decisions follow.

Redwater Energy Corp. ("Redwater") was a publicly listed junior oil and gas producer in Alberta that held 127 oil and gas properties (wells, pipelines and facilities) licensed by the AER under the *Oil and Gas Conservation Act*, RSA 2000 c O-6 ("*OGCA*") and the *Pipeline Act*, RSA 2000 c P-15 ("*Pipeline Act*").

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[96] This is contrary to the finding of Justice Lederman in *Thomson Kernaghan & Co, Re,* 2003 CarswellOnt 1937 (ONSCJ) at 14 ("*Thomson Kernaghan*"), who, in *obiter*, found that section 20 was an empowering provision.
[97] See generally *Trustees' and Receivers' Environmental Liability Update*, *supra* note 29.
[98] See *Baker v Director, Ministry of the Environment*, 2013 CarswellOnt 6508 (Ont Env Rev T) at 9: Where Northstar Aerospace (Canada) Inc.'s trustee gave notice of its abandonment of contaminated site pursuant to section 14.06(4)(a)(ii) of the *BIA*. The Chief Justice in *Redwater*, *supra* note 56, at 127 also assumed that section 14.06(4) provided a statutory right to abandon property. Justice Slatter provided clarification of this provision in *Orphan Well Assn*, *supra* note 2.

In May 2015, after Redwater failed to consummate an out-of-court sale of its assets in order to repay its lender in full, a receiver was appointed over Redwater's property pursuant to section 243 of the *BIA*. Upon its appointment, the receiver conducted an assessment of Redwater's licensed property and advised the AER by letter that it would only be taking possession and control of approximately 20 of the 127 wells, facilities and associated pipelines owned by Redwater.

Shortly thereafter, the AER issued closure and abandonment orders ("AER Orders") in respect of the licensed property abandoned by the receiver and filed an application to compel the receiver to comply with the closure and abandonment orders and to fulfill all of Redwater's statutory obligations in relation to abandonment, reclamation and remediation of the licensed property. Compliance with the AER Orders would have required the receiver to use the remaining assets of the estate to rectify the environmental conditions associated with the abandoned property in contravention of section 14.06(6) of the *BIA*.

In late October 2015, an order was granted assigning Redwater into bankruptcy and appointing the receiver as trustee of Redwater's estate (collectively, the "Receiver/Trustee"). No inspectors were appointed in respect of the estate. On November 2, 2015, the Receiver/Trustee disclaimed any interest in the onerous property by letter to the AER. The Receiver/Trustee relied on section 14.06(4)(a) and (c) which it argued provided it with the authority to disclaim the property prior to the AER Orders being issued to it.[99] Neither provision prescribes a particular form of notice for an act of abandonment.[100]

The Receiver/Trustee brought a cross-application seeking the approval of a sales process that excluded the abandoned property and directing the AER to exclude the abandoned property for the purpose of its licence transfer process. It also sought a determination of the constitutionality of the AER's licensing regime under the *OGCA* and the *Pipeline Act* to the extent that it prevented the Receiver/Trustee from abandoning onerous property and imposed an obligation on

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[99]Although section 14.06(4) does not: (i) prescribe a form of notice; (ii) require written notice; or (iii) require that such notice specifically identify the property abandoned, common law principles would seem to indicate that the notice would need to be in writing and should specify the property being abandoned in sufficient detail to allow for registration in the appropriate land titles office.

[100] As opposed to section 20 of the *BIA* which requires the registrar of the appropriate land titles registry to register a notice of quit claim or renunciation upon receipt.

the Receiver/Trustee to expend estate funds to comply with the AER Orders as a condition precedent to the AER approving a transfer of Redwater's AER licences.

One of the main issues before the Chief Justice was whether the Receiver/Trustee was permitted to disclaim an interest in certain licensed property. The AER took the position that the Receiver/Trustee had no authority to disclaim any of the licensed property, as it was appointed as receiver and manager of all property owned by Redwater (despite never taking possession as receiver). The thrust of the AER's argument was that the Receiver/Trustee was not permitted to "pick and choose" the property with value over the property without value and thereby minimize the liability of the estate for the statutory licensing obligations relating to the onerous property. The AER also went one step further and argued that the Receiver/Trustee had a duty to the public over and above its duty to the stakeholders of the estate that overrode its ability to disclaim the onerous property, unless there was a significant risk that the Receiver/Trustee would be personally liable for the environmental condition and for failure to comply with any order requiring it to remedy the same.

Chief Justice Wittmann ("Chief Justice") (as he then was) dismissed the AER's application and granted the Receiver/Trustee's application to commence a sales process and authorized the abandonment of the onerous property after the fact. The Chief Justice found that section 14.06(4)(a) and (c) authorized the abandonment of any interest in any real property both before or after an order was issued.[101] Further, he found that personal liability was not a pre-requisite for an act of abandonment by a court officer.[102] As a result, the Chief Justice held that court officers are permitted to "pick and choose" which property of the estate to administer under section 14.06(4) (subject to the overriding obligation to maximize the value of the estate) and further found that they could not be responsible for any abandonment and remediation required by an order issued in respect of the same.[103]

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[101] See *Redwater*, *supra* note 56, at 134. This includes any interest in any real property. This is not limited to fee simple ownership but extends to leases and any and all other interests in real property.
[102] *Redwater*, *supra* note 56, at 158.
[103] Compare to *Midlantic Nat Bank v New Jersey Dept. of Environmental Protection,* 474 US 494 (1986), where the United States Bankruptcy Court held that abandonment by an American trustee was proper only if the contamination did not pose an immediate and identifiable threat to public health or safety. See also *World Without Bankrupcty*, *supra* note 1, at 187, where Professor Baird argues that "a decision to keep property or abandon it should have no effect on obligations that have arisen as a result of past ownership of the property. Abandonment should affect only

In doing so, the Chief Justice found it clear from the wording of section 14.06, that Parliament took into account environmental policy considerations when creating the provision and held that the ability to abandon property in furtherance of the maximization of an estate had primacy over other considerations. For example, the Chief Justice noted:

> …. under section 14.06(3), the trustee must make any report or disclosure required by federal or provincial legislation. However, Parliament did not choose to make these considerations prevail over the right to abandon or renounce contaminated property.[104] [Emphasis added]

The Chief Justice held that the Receiver/Trustee lawfully disclaimed the onerous property and rightfully exercised its rights provided for under the *BIA*. The AER and the Orphan Well Association ("OWA") both appealed *Redwater* shortly thereafter, arguing, among other things, that section 20 of the *BIA* was the only provision that permits a court officer to disclaim property and that any other exercise was unjustified.

The majority ("Majority") of the Alberta Court of Appeal upheld the Chief Justice's reasoning in *Redwater* finding that it is "commonplace for trustees and receivers to disclaim or abandon assets during the administration of the estate". Specifically, the Majority noted that:

> If a trustee decides that an oil and gas well has no net realizable value, either because it is depleted or because it has attached to it liabilities in excess of its value, the trustee can effectively ignore the asset. As discussed *infra*, paras. 57, 63 the *BIA* recognizes the ability of a trustee to abandon assets that are subject to environmental obligations.[105] [Emphasis added]

Consistent with the previous case law, the Majority also found that section 20 is not a limit on the ability of a trustee to abandon an interest in real property.[106] It is simply a direction to the appropriate registrars to register an abandonment in the applicable land titles office.[107] As it is

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those obligations that would arise in the future through continued ownership. Much of the discussion of the abandonment issue has been based upon the erroneous assumption that if the trustee could abandon a toxic waste site, he could relieve the estate of any obligations associated with the site that had already arisen. The abandonment of property is completely different from the "abandonment" of a liability that may have resulted from ownership of that asset." In this case, the liability remains with the estate at all times. However, pursuant to section 14.06(6), the assets available to satisfy the liability change upon an abandonment.

[104] *Orphan Well Assn*, *supra* note 2, at 133.

[105] *Orphan Well Assn*, *supra* note 2, at 47.

[106] *Orphan Well Assn*, *supra* note 2, at 48.

[107] Such a direction is necessary for a trustee because its appointing order is devoid of the substantive provisions typically found in a receivership order. As a result, trustees rely more heavily on the *BIA* for their authority and ability to require cooperation from third parties.

clear that a failure to register a notice of abandonment does not affect the validity of the act itself, any notice of abandonment or quit claim (in whatever form) issued by the trustee with intention to abandon the subject property is valid and enforceable as at the date of issuance.

The Majority found that section 14.06(4) relies on external abandonment rights (whether common law or statutory).[108] The Majority's decision confirmed industry's understanding that a court officer is permitted to abandon certain property encumbered with environmental obligations, so long as the cost associated with compliance (including past, future, contingent or crystallized costs) outweighs the value expected to be realized from same.

While adverse in the result, the reasons of the dissenting justice ("Dissent") did not dispute that receivers and trustees could abandon an interest in real property.[109] The Dissent simply disputed the circumstances in which court officers are permitted to do so, favouring an interpretation that only permits disclaimer in circumstances where it is "necessary for the trustee to avoid personal liability for complying with an environmental order".[110] The Dissent concluded that permitting court officers to abandon property affected by any environmental order required an impermissibly broad reading of section 14.06(4).[111]

The Dissent took no issue with the Majority's interpretation of section 20, although its conclusion on section 14.06(4) appears to be inconsistent with the purpose and plain language of the *BIA* which provides court officers with the ability to abandon property in order to maximize the value of the estate. Specifically, as a result of the amendments in the 1990s, liability of court officers for the administration of an estate involving contaminated property was limited by section 14.06 (2).[112] Any provincial statute that imposes environmental liability on a court officer in spite of these sections most likely engages the doctrine of paramountcy.

There is no circumstance outside of gross negligence or willful misconduct whereby a court officer would need to abandon property in order to limit its liability. The abandonment provisions are intended to provide court officers with a tool to minimize the debtor's liabilities,

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[108] *Orphan Well Assn*, *supra* note 2, at 63.
[109] *Orphan Well Assn*, *supra* note 2, at 210. The Dissent also took no issue with the Majority's interpretation of section 20 of the *BIA*.
[110] *Orphan Well Assn*, *supra* note 2, at 203.
[111] *Orphan Well Assn*, *supra* note 2, at 201.
[112] *Orphan Well Assn*, *supra* note 2, at 57.

not liability that has accrued through the court officer's own gross negligence or willful misconduct.

It is now clear that court officers are permitted to conduct an economic assessment of an insolvent debtor's assets and disclaim those interests in real property that are, or have the potential to become, onerous by issuing a notice of renunciation to other parties who may have an interest in the same (or the registry where the trustee is unaware of such parties). Upon such abandonment, the estate (either bankruptcy or receivership) is no longer responsible for any costs accruing in respect of or attributable to the same.[113] The AER and OWA have sought leave to appeal the Majority's decision to the SCC; however, their application to stay the effect of *Orphan Well Assn* was denied.[114]

(iii) COMMON LAW

It is clear that both sections 20 and 14.06(4) rely on an external right of court officers to abandon an interest in property. Other than the statutory right to disclaim leases in section 30(1)(k) discussed in more detail below, there is relatively little reported jurisprudence considering the application or even existence of a common law right to abandon property. This lack of clarity has contributed to the substantial uncertainty that exists in the practice today.

Prior to the introduction of section 14.06(4), the concept of a common law right allowing the abandonment of property received little attention outside of the exercise of rights under section 20 which was primarily thought to be restricted to trustees. Most abandonment of property was done indirectly by court officers through obtaining a discharge and returning the property to the debtor. It was only when regulatory regimes began affecting a court officer's ability to maximize the value of licensed assets that widespread reliance on common law abandonment rights to mitigate the liability of the insolvent estate became necessary.

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[113] B. Bolea, "Bankruptcy Abandonment Power and Environmental Liability", (2001) 106 Com L J 83 at 86. Upon its abandonment, property ceases to be a part of the bankruptcy estate and the remaining assets of the estate should not be used to pay for liabilities attached to the abandoned property.

[114] The SCC is expected to determine the leave application possibly in early 2018. In the interim, the AER and OWA had applied for a stay of *Orphan Well Assn*, including the Majority's conclusion in respect of abandonment rights and the precedential effect of the decision. The Alberta Court of Appeal denied the application for a stay in *Alberta Energy Regulator v Grant Thornton Limited*, 2017 ABCA 278.

In *Panamericana de Bienesy Servicios SA v Northern Badger Oil & Gas Ltd,* 1989 CarswellAlta 372 (ABQB), which was in many respects the precursor to *Redwater*, the issue before Justice MacPherson was whether the *BIA* prevented the court-appointed receiver and manager of an bankrupt oil company from complying with an order of the Energy Resources Conservation Board ("ERCB"), the predecessor to the AER.[115] In that case, the receiver and manager sold the bankrupt's property to a purchaser. The purchase and sale agreement provided a back out clause for the return of licensed properties to the receiver in certain circumstances. This resulted in a fractional interest in seven suspended wells being returned by the purchaser to the receivership estate.[116] Upon learning of the return of properties to the estate, the ERCB ordered the environmental abandonment of the seven wells in the interest of environmental safety.[117] The chambers justice concluded that the receiver did not have to comply with the ERCB order, as it would have been at the expense of the recovery of the secured creditor.[118]

On appeal, Chief Justice Laycraft reversed the decision of the chambers justice and required that the remaining assets of the estate (the sale proceeds which were being held in trust by the court officer) be used to comply with the ERCB's orders.[119] Implicit in the reasoning of the Alberta Court of Appeal is that such a strategy would be otherwise permitted as long as there were no statutory environmental obligations to be rectified by the receiver and manager in its capacity as licensee. As noted in *Orphan Well Assn*, there is little difference between directly abandoning property and releasing it to a bankrupt and seeking a discharge.[120] The decision in *Northern Badger CA* provides evidence of a long standing practice by court officers to indirectly affect the abandonment of onerous property through an assignment into bankruptcy.

Since *Northern Badger CA* was issued, section 14.06 of the *BIA* was introduced resulting in a number of instances where receivers have not had to rely on indirect forms of abandonment and have successfully relied on either the rights afforded to them at common law or through their appointing court order (or statute in some cases).

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[115] ("*Northern Badger QB*") at 18.
[116] *Ibid* at 4 and *Redwater*, *supra* note 56, at 188.
[117] *Ibid* at 6.
[118] *Ibid* at 32.
[119] *Panamericana de Bienesy Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181 at 66 ("*Northern Badger CA*").
[120] *Orphan Well Assn, supra* note 2, at 47.

In 2002, Justice Slatter in *Big Sky* first noted that sections 14.06(4)(c) and 14.06(6) of the *BIA* contemplated the abandonment of contaminated property by a court officer and, should it become necessary, set out the process for exercising such a right.[121] Justice Slatter appeared to contradict this assertion, and highlighted the risk associated with off-template orders, when he stated:

> The initial problem with the proposed environmental provisions in the Order is that they contradict other provisions of the Order. Paragraph 2 of the Order places all of the assets of the debtor under the power of the Interim Receiver. Paragraph 28 then provides that the Order does not vest in the Interim Receiver care or control of any property which "may be" environmentally polluted. This latter clause is unacceptable, because at best it creates great uncertainty as to which properties are under the control of the Interim Receiver, and at worst it gives the Interim Receiver some sort of *ex post facto* right to elect whether it has been in control of property or not.[122] [Emphasis added]

This statement highlights the importance of the Model Orders and the subsequent interpretations of section 3(a), which now address this circumstance. In *Big Sky*, Justice Slatter was faced with a provision in a form of order which would have had the effect of terminating the possession and control of property upon the discovery of contamination, thereby creating significant uncertainty as to which property the receiver would have control over:

> Nothing herein contained shall vest in the Receiver the care, ownership, control, charge, occupation, possession, responsibility or management, nor require the Receiver to take care, ownership, control, charge, occupation, possession, responsibility or management, of any of the Property which may be environmentally polluted or contaminated or where a pollutant or contaminant, is or may become present or from which any spill, discharge, release or deposit of a substance emanates, contrary to any Environmental Legislation or which is the subject of any Adverse Environmental Condition. [123]

This type of provision creates both uncertainty regarding possession and also restricts a receiver's ability to determine whether value would be realizable upon rectification of the condition. The subsequent jurisprudence, including the reasoning of Justice Slatter in *Orphan Well Assn*, has now clarified that the abandonment of property by a receiver may occur after possession and control is establish (though a relinquishment of the same). However, such abandonment must be

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[121] *Big Sky*, *supra* note 50, at 10, 43, 48.
[122] *Big Sky*, *supra* note 50, at 48.
[123] *Big Sky*, *supra* note 50, at Appendix (28).

affected through written notice, not a provision in a court order immediately terminating possession upon the discovery of contamination.

Another example is *Harbert Distressed Investment Fund, LP v General Chemical Canada Ltd*, 2006 CarswellOnt 4675 (ONSCJ [Comm List]), where an interim receiver was appointed over General Chemical Canada Ltd. after it failed to restructure under the *CCAA* due, in part, to significant pre-filing environmental liabilities.[124] In that case, the order appointing the interim receiver specifically excluded the contaminated properties from the receivership estate (due to the appointing creditor's security not extending to the same) resulting in an effective abandonment by the receiver of such property.[125]

In *Alberta Treasury Branches v Nordegg Resources Inc* (ABQB), Justice Strekaf (as she then was) granted a receivership order on June 16, 2016 and a subsequent receivership amendment order on July 13, 2017 permitting the receiver to "divest its interest in any of the Debtor's real property, or any right in any immovable, including a licence or other authorization issued by the Alberta Energy Regulator, pursuant to section 14.06(4) of the *BIA*".[126]

On February 23, 2017, the receiver of Nordegg Resources Inc. ("Nordegg") provided written notice to the AER that it had disclaimed certain oil and gas wells and the respective licences which had been held by Nordegg. Subsequently, the receiver sought an order that, among other things, approved a sale transaction conveying Nordegg's producing assets to a purchaser. The AER opposed the sale taking the position that the receiver was not entitled to an unrestricted ability to disclaim Nordegg's interest in the AER licences associated with the disclaimed property.[127] Contrary to its position in *Orphan Well Assn* where it argued that section 20 of the *BIA* provided the only right to abandon property, its position in respect of Nordegg was that a

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[124] ("*Harbert*") and N. Chaput, *Environmental Clean-up in Bankruptcy and Insolvency: What Priority for the Environment*? (LLM, University of Toronto, 2012) at 18-20, online: <https://tspace.library.utoronto.ca/bitstream/1807/33370/5/Chaput_Nicolas_201211_LLM_thesis.pdf>

[125] *Ibid* at 55.

[126] *Nordegg*, *supra* note 90, section 1 of the receivership amendment order granted on July 13, 2016 by Justice Strekaf.

[127] *Nordegg Decision*, *supra* note 90, at 2, lines 16-19.

receiver's ability to disclaim property is limited to the prescribed circumstances set out in section 14.06(4).[128]

Given the Majority's reasoning in *Orphan Well Assn*, the AER's position regarding the disclaimer of permissive licences was likely correct in part. A court officer cannot disclaim an interest in a permissive licence because it is not "property" capable of being disclaimed.[129] Justice Jones, who heard the AER's application, found that the receiver was capable of disclaiming any interest in real property and was not limited by section 14.06(4).[130] Additionally, Justice Jones found that the effect of the disclaimer and section 14.06(4) was that the receiver could not be forced to use the remaining value in the estate to comply with orders directing the remediation of disclaimed property.[131]

Justice Jones' reasoning in *Nordegg* makes it clear that section 14.06(4) is primarily a liability limiting provision directed at the separation of claims against abandoned property.[132] It is reasonable to conclude that, upon abandonment, the target property is removed from the receivership estate and any orders in respect of the property or claims in respect of such property are unsecured claims against the estate to the extent they are not satisfied by the abandoned property.[133]

Interestingly, in *Alberta Energy Regulator v Lexin Resources Ltd et al* (ABQB), the AER, in its capacity as a secured creditor of Lexin Resources Ltd. ("Lexin") under section 103 of the *OGCA*, sought the appointment of a receiver pursuant to section 243 of the *BIA*.[134] On March 22, 2017,

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[128] *Nordegg Decision*, *supra* note 90, at 2, lines 27-29.
[129] *Orphan Well Assn*, *supra* note 2, at 41: "A permissive AER licence is neither "property" nor "real property"." Contrast to the English decision in *Celtic Extraction*, *supra* note 74, where Justice Neuberger found that a waste management licence was "onerous property" capable of being abandoned under section 178 of the *Insolvency Act*, *1986*. A waste management licence is more akin to the AER licences than the quota-based fishing licences considered in *Saulnier v Royal Bank of Canada*, 2008 SCC 58 which were effectively a *profit-a-prendre*.
[130] *Nordegg Decision*, *supra* note 90, at 4, lines 11-18: "As I have already noted, section 14.06(4) is not an empowering section, it does not delineate the receiver's powers to disclaim. The common law and the provisions of the *BIA* generally confer those powers."
[131] *Nordegg Decision*, *supra* note 90, at 2, lines 31-36: "Section 14.06(4) does not operate to empower or disempower disclaimer, rather in my respectful opinion it addresses a receiver's personal liability in connection with remediation in relation to various temporal considerations. Indeed, the section implicitly acknowledges a receiver's right to disclaim through references to abandonment and renunciation."
[132] *Nordegg Decision*, *supra* note 90, at 4, lines 11-18.
[133] See also *Alberta Treasury Branches v Regent Resources Ltd*, Action No. 1601-16147 (ABQB).
[134] *Alberta Energy Regulator v Lexin Resources Ltd et al*, Action No.: 1701-03460 (ABQB) ("*Lexin Resources*").

prior to the release of *Orphan Well Assn*, the receivership order was granted and the receiver was provided with the following authority:

> (a) to take possession of and exercise control over the Property, with the exception of taking possession of or exercising physical control over any Lexin oil or gas wells, pipelines, facilities or sites regulated by the AER (the "Sites and Abandoned Sites"), and any and all proceeds, receipts and disbursements arising out of or from the Property, and for greater clarity, while the Receiver shall have limited powers with respect to the Property as it relates to the Sites and Abandoned Sites as more particularly set out herein, the Receiver shall not have the power to take possession of and exercise physical control over the Sites and the Abandoned Sites;
>
> (b) to exercise any powers it has under section 14.06 of the BIA;[135]

After the release of *Orphan Well Assn*, the receiver obtained an "expanded" receivership order amending section 5(b), which granted the receiver the unconditional ability to "disclaim, abandon or renounce the Debtors' interest in any of the Property".[136] To date, the receiver has not abandoned any of Lexin's properties, as most were "orphaned" by the AER prior to its appointment.

Pending the ongoing appeal of *Orphan Well Assn* to the SCC, and notwithstanding the deviance from the template language in the Model Orders, the receivership order granted in the *Lexin Resources* proceedings is formal recognition by the Alberta courts that receivers are permitted to abandon an interest in any property, not just real property.

B. CONTRACTS

In addition to the abandonment of real property, arguably the second most contentious type of property abandonment is the disclaimer of an interest in, or an obligation under, an executory contract. Despite the power to disclaim an agreement existing since at least 1794, a consistent rationale for its exercise has not yet been developed.[137] As a practical matter, courts in Canada, England and the United States have usually been content to sanction the exercise of the disclaimer power without considering its "underlying policy basis".[138] The uniform policy underlying an act of disclaimer is to free the estate from the performance of contractual

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[135] *Ibid* at section 3 of the receivership order granted on March 20, 2017 by Justice Jeffrey.
[136] *Ibid* at section 5(b) of the consent receivership order granted on June 13, 2017 by Justice Eidsvik. See also *Canadian Regulator Adds More Uncertainty*, *supra* note 63.
[137] *Rejection of Executory Contracts*, *supra* note 10, at 467.
[138] *Rejection of Executory Contracts*, *supra* note 10, at 467.

obligations that currently do, or in the future will, detract from the value of the estate otherwise distributable to stakeholders in accordance with their entitlements to the same.

The likelihood that a contract will be disclaimed is directly linked to its net cost of compliance.[139] While court officers have long been entitled to disclaim an interest in unprofitable or otherwise onerous leases, a significant dispute arose in the Canadian insolvency practice as to whether a trustee was permitted to abandon a burdensome executory contract in the absence of a statutory provision authorizing such action.[140] Whether a court sanctioned a particular disclaimer varied by province and presiding justice, thereby creating considerable uncertainty as to a trustee's entitlement to do so.

For example, in *Erin Features No 1 Ltd, Re*, 1991 CarswellBC 498 (BCSC), Modern Cinema Marketing Ltd. ("MCM") entered into a marketing agreement with Erin Features #1 Ltd. ("EFL") prior to EFL's bankruptcy and had made a substantial investment in the production of the film that was the subject of a related agreement.[141] The trustee sought to disclaim the marketing agreement by relying on an interpretation of the common law, as the *Bankruptcy Act* at the time contained no express provision permitting a trustee to disclaim a contract (other than a lease).[142]

The common law authority relied on for the disclaimer was the *dicta* of Justice Wilson in *Salok Hotel Co, Re*, 1967 CarswellMan 4 (MBQB), where he stated:

> Bankruptcy, of itself, does not discharge a contract. The property of the bankrupt vests in the trustee in bankruptcy, and as to those executory contracts of the bankrupt which the trustee is able to perform (which of course would include an unexpired lease term) he

[139] See A. McKnight, "Insolvency of a Group of Companies Under English Law: Disclaimer of Unprofitable Contracts, Subordination of Claims, Restrictions Upon Proving and the Rule in Cherry v Boultbee" (2006) 2 J Bank L 165 at 169-170, which discusses the concept of an onerous contract under english law. For example, to be onerous, a contract should impose continuing financial obligations, give rise to prospective liabilities, or require performance over a substantial period of time. Simply disadvantaging the interests of creditors without more is not enough.

[140] See *Armadale Properties Ltd v 700 King Street (1997) Ltd*, (2001), 25 CBR (4th) 198 (ONSCJ [Comm List]) at 11 ("*Armadale*"): "As to the second argument, the circumstances under which a trustee can disclaim a contract entered into by a bankrupt prior to its bankruptcy have long been the subject of uncertainty". Contrast to *Bayhold Financial v Clarkson* (1991), 10 CBR (3d) 159 (NSCA), which states that the law is clear that a receiver is not bound by existing contracts made by the debtor. See also *Potato Distributors Inc v Eastern Trust Co* (1955), 35 CBR 161 (PEICA) and *North America Steamships Ltd, Re*, 2007 BCSC 267 at 16-18 ("*Steamships*"). Contrast to *Alberta Health Services v Networc Health Inc*, 2010 ABQB 373 at 49-51 ("*Networc Health*"), where Justice Romaine found that *Steamships* "does not establish a general rule that a receiver must affirm or disclaim a contract previously entered into by a debtor."

[141] ("*Erin Features*") at 2.

[142] *Ibid* at 4.

> may elect either to adopt or disclaim them: *Stead Lumber Company Limited v Lewis* (1957), 37 CBR 24 at 34, 3 Can Abr (2nd) 1001 and the Bankruptcy Act, R.S.C. 1952, c. 14, s. 41(5), (6). [Emphasis added]

Additionally, Justice Donald found that a passage in *Bankruptcy in Canada* supported the trustee's argument:

> There is no section in the Canadian Act corresponding with section 54 of the English Act which gives the trustee the right to disclaim onerous contracts or property. The law under the *Bankruptcy Act* in this respect will be the same as the law in England before the Act of 1869 was passed ... The law under the *Bankruptcy Act* would seem to be that a trustee may at his option perform the contract into which the bankrupt has entered or he may abandon it, by virtue of his common law right ...[143] [Emphasis added]

In opposition, MCM argued that the trustee gained no greater interest in the estate than that held by the bankrupt as of the date of bankruptcy.[144] Justice Donald agreed with MCM that EFL had alienated its property prior to bankruptcy and so the agreement fell outside of the type of contracts capable of being disclaimed by a trustee.[145] Of particular note is that Justice Donald assumed, without deciding, that a trustee had a right to disclaim an interest in an executory contract, indicating that even less than 30 years ago it remained an open question as to whether trustees held the right to disclaim executory agreements.[146]

It is consistent with the underlying policy behind an act of disclaimer that trustees be permitted to disclaim an interest in an agreement, perhaps even more so than receivers. Upon bankruptcy, the debtor's interest in the agreement vests in the trustee. Unlike a receiver, a trustee does not generally continue to operate a business as a going concern and will usually terminate all agreements.[147] Despite a surprising absence of binding authority, Canadian courts have now accepted that both types of court officers have the common law right to disclaim executory

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[143] Duncan & Honsberger, *Bankruptcy in Canada* , 3d ed. (1961) at 333-334 ("*Bankruptcy in Canada*"). See also *Re Sneezum; Ex parte Davis* (1876), 3 Ch D 463 (CA) at 472, where Justice James recognized that, at common law, assignees in bankruptcy had the option of deciding whether or not to carry on with the performance of an executory contract.

[144] *Erin Features*, *supra* note 141, at 3.

[145] *Erin Features*, *supra* note 141, at 3.

[146] *Erin Features*, *supra* note 141, at 3. See also *New Skeena CA*, *supra* note 25, at 31 for a more recent affirmation that trustees have a common law right to abandon agreements.

[147] *Erin Features*, *supra* note 141, at 6.

contracts. The primary question that now arises is in relation to the types of contracts that can be disclaimed.[148]

(i) EXECUTORY CONTRACTS

The primary target of disclaimers by court officers are executory contracts and leases. Upon appointment, court officers must elect to affirm or disclaim the agreements of the debtor within a reasonable period of time.[149] Given the fact that only receivers typically market and sell businesses as a going concern, they are the primary focus of much of the commentary and jurisprudence.

In their role, receivers are often required to make difficult business choices requiring a careful analysis of the net benefit of a particular course of action and the consideration of competing, if not irreconcilable, differences.[150] In respect of this point, *Bennett on Receivership* states:

> In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any monies that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of the existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages.[151] [Emphasis added]

While receivers are permitted to disclaim a contract, they are prohibited from doing so arbitrarily.[152] A receiver must have a commercially reasonable basis for a disclaimer as it "may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets".[153] It is

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[148] Upon the consideration of the net benefit to the estate, a court officer will need to make a decision as to whether to affirm, assign or disclaim an agreement. Although court officers are not obligated to immediately affirm or disclaim a contract upon appointment, they may not do nothing. If they do nothing, it may entitle the contract counterparty to assume that the contract is at an end. There may also be a risk the court officer will be deemed to have accepted the contract: *Re Thompson Knitting Co Ltd,* [1925] 2 DLR 1007 (ONCA) at 6.
[149] *Ibid*.
[150] *Ravelston, supra* note 38, at 40.
[151] Cited in *bcIMC Construction Fund Corp v Chandler Homer Street Ventures Ltd,* 2008 BCSC 897 at 53 ("*bcIMC*") as 2nd Ed (Toronto, Carswell).
[152] *Ibid.*
[153] *Ibid.*

therefore incumbent on a receiver to justify any proposed disclaimer through a financial analysis of the expected net benefit resulting from such disclaimer.[154]

Court officers are only permitted to disclaim executory agreements. Whether a particular agreement constitutes an executory contract is the subject of near constant scrutiny by counterparties and courts. The simple definition of an executory contract is one where some obligations remain unperformed. In 2002, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals Joint Task Force's *On Business Insolvency Law Reform Report* set out a number of types of contracts that were considered to be executory and open to disclaimer:

> (a) an uncompleted construction contract under which the customer agrees to pay the builder as the work progresses;
>
> (b) a distribution agreement or other contract for the supply of goods or services from time to time for which the supplier periodically bills the customer;
>
> (c) a real estate lease or a true lease of personal property under which the lessee pays periodic rentals;
>
> (d) a technology licensing agreement under which the licensor agrees to provide maintenance and updating facilities and the licensee pays royalties from time to time; and
>
> (e) an employment contract.[155]

There remains some dispute as to whether both parties need to have unperformed obligations for an agreement to be executory or whether the existence of only one set of remaining obligations is sufficient.[156]

In *Kary Investment Corp v Tremblay*, 2005 ABCA 273, Justice Russell found that a contract is executory if one party has outstanding performance obligations.[157] In that case, Justice Russell

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[154] *Rassell*, *supra* note 45, at 32: "A trustee in bankruptcy who seeks approval for a course of action (as distinct from one who takes a neutral stance) should swear to explicit reasons for that course of action, so that the court does not have to guess at anything."
[155] ("*Business Insolvency Law Reform Report*") at 44.
[156] See *SW MacKay & Associates Ltd v Park Lane Ventures Ltd* (1997), 32 BCLR (3d) 338 (BCSC [In Chambers]) for an explanation of an "executed" versus an "executory" contract. In that case, Justice Burnyeat concluded that an executory agreement should have obligations outstanding from both parties.
[157] ("*Kary*") at 19-20.

noted that "it has also been said that all contracts are to a greater or lesser extent executory. When they cease to be so they cease to be contracts."[158]

In *677960 Alberta Ltd v Petrokazakhstan Inc*, 2009 ABQB 50, Justice MacLeod considered whether a guarantee constituted a executory contract within the meaning of a plan of arrangement filed under the *CCAA*.[159] Petrokazakhstan ("PKI") took the position that an executory contract is one in which both parties must have outstanding performance obligations.[160] Despite agreeing with the position of PKI, Justice MacLeod was asked to determine whether the particular contract was an "executory contract" within the meaning of the plan of arrangement, not in general.[161] This decision is distinguishable from the reasoning of the Alberta Court of Appeal in *Kary* given the emergence of a going concern entity and the type of agreement.

In *West Bay Son Ship Yachts Ltd*, *Re*, 2009 BCCA 31, Justice Levine found that a contract of employment was an executory contract, as obligations existed on both sides that had yet to be performed.[162] While there was a dispute as to whether the agreement was truly executory, Justice Levine noted that she was not required to determine which definition of "executory contract" was correct, as the contract in question fell within the scope of either definition.[163]

Due to the broad mandate of a court officer, it is reasonable to conclude that a contract should be considered executory for the purpose of disclaimer until all material obligations thereunder are executed. In any case, a court officer would likely only disclaim an agreement where the debtor had existing obligations under the agreement, regardless of whether the counterparty's obligations were satisfied. Any contract where the debtor has satisfied its obligations would be

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[158] *Ibid* at 19.
[159] ("*Petrokazakhstan*") at 46.
[160] *Ibid* at 36.
[161] *Ibid* at 42.
[162] ("*West Bay*") at 34. See also *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act, a Report of the Standing Senate Committee on Banking, Trade and Commerce*, (2003) at 131 ("*Sharing the Burden*"), online: < https://www.iiiglobal.org/sites/default/files/sharingtheburdenareviewoflegislation.pdf> and Janis Sarra, *Rescue!: The Companies' Creditors Arrangement Act,* 2nd ed (Toronto: Carswell, 2013) at 423-464.
[163] *West Bay*, *supra* note 162, at 33.

an asset of the estate (i.e. an account receivable) and would cost nothing to administer other than any cost of enforcement.[164]

Unlike the broad right of a receiver to disclaim an interest in real property, certain restrictions have been imposed on a court officer's ability to disclaim executory agreements. Unlike an abandonment of real or personal property, there is always a third party who will be directly affected by the court officer's failure to maintain the debtor's obligations. Courts will be particularly aware of any attempt to disclaim an interest in an agreement that would result in undue prejudice to such parties. As a starting point, court officers are likely prohibited from disclaiming:

(a) an eligible financial contract;[165]

(b) a collective agreement;[166]

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.[167]

Additionally, agreements that convey a proprietary right (e.g. financing leases), an interest in land or a security interest cannot be disclaimed as the corresponding property or interest will have already vested in the counterparty or attached to the property.[168] This was the primary

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[164] F. Oditah,"Assets and the treatment of claims in insolvency", (1992) 108 LQR 459-474: "The insolvent party's unperformed obligations are liabilities while the other party's unperformed obligations are an asset of the insolvent which may or may not be available for distribution among the insolvent's creditors."

[165] For an understanding of what constitutes an eligible financial contract please see: K. Bourassa, "Eligible Financial Contracts in Canadian Insolvency Regimes" (2006), online: < https://cairp.blob.core.windows.net/media/36372/10-file_MRPCIF_finalKJB.pdf> and R. Anderson and K. Bourassa, "What are eligible financial contracts?", (June 3, 2008) Mondaq, online: < http://www.mondaq.com/canada/x/61410/Insolvency+Bankruptcy/What+Are+Eligible+Financial+Contracts>.

[166] Currently, court officers have no ability to disclaim a collective agreement. However, in a 2003 Parliamentary Review of Canadian insolvency law, the Standing Senate Committee on Banking, Trade and Commerce recommended that courts supervising commercial restructurings be given the ability to authorize the disclaimer of collective agreements: *Sharing the Burden, supra* note 162, at xxi. This report also suggested that the statutory right set out in the *BIA* to disclaim an interest in real property leases should apply to all bankruptcy and insolvency proceedings.

[167] These categories of agreements are expressly prohibited by section 65.11(10) of the *BIA* and section 32(9) of the *BIA*. While these sections are not directly applicable to the conduct of receivers and trustees, given the policy underlying the prohibition on disclaiming these types of agreements, it is reasonable to conclude that a court would consider these types of contracts exempt in most, if not all, types of insolvency proceedings: *Networc Health*, *supra* note 140, at 51.

[168] See *1565397 Ontario Inc, Re*, 2009 CarswellOnt 3614 (OSCJ) at 60 ("*156*"), where the court-appointed receiver sought approval to disclaim an undertaking. Justice Wilton-Siegel dismissed the application, stating "I know of no

finding of Justice Donald in *Erin Features* and the principle has been consistently upheld.[169] It is also important for court officers to consider whether an agreement related to the purchase or lease of intellectual property governed by foreign law grants a property right in such property, as it may affect the ability of such court officer to disclaim the agreement in Canada.[170]

Notwithstanding the general proposition that otherwise executed agreements conveying an interest in property cannot be disclaimed, in certain circumstances, a court may seek a compromise. *In the matter of the Receivership of Phenomenome Discoveries Inc. and Phenomenome Laboratory Services Inc*, 1639 of 2015 (SKQB), Justice Meschishnik of the Saskatchewan Court of Queen's Bench took a unique approach to an agreement granting a veto right over the sale of the property subject to the agreement.[171] The receiver purported to convey the assets subject to an agreement (both tangible and intellectual property) between the debtor and the primary secured creditor to a prospective purchaser. Much like a typical right of first refusal, the veto right required the debtor (and receiver) to notify the secured creditor of any proposed transaction and such transaction would then either be approved or rejected by the secured creditor.[172] In chambers, there was a question as to whether the agreement was executory or executed as, other than the confidentiality provisions, there were few other ongoing obligations besides the debtor's obligation to comply with the veto right.

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law that permits a court to authorize a receiver to terminate a proprietary interest in land in such manner. The effect of any such extinguishment of an interest in the Property would be the transfer of such interest to 156. Such action amounts to expropriation of the respondents' assets in favour of subordinate or unsecured creditors of 156."

[169] See *bcIMC*, *supra* note 151, and *156*, *supra* note 168. Contracts providing interests in land or that have resulted in a transfer of ownership cannot be disclaimed. It is also an open question as to whether trust agreements may be disclaimed where the debtor is the trustee. Further, courts may look to see if the equitable interest in a purchase and sale agreement has transferred: *Armdale*, *supra* note 140, at 12. See *Pope & Talbot Ltd*, *Re*, 2008 BCSC 1000 at 27-29, for the proposition that, before a purchaser can achieve "equitable owner" status, the parties must have reached "certainty." In that case, there was no consensus *ad idem* by the date of the receivership.

[170] See the civil enforcement proceedings of *A Priori Equity Partners Inc v C4i Consultants Inc et al*, Action No.: 1701-05048 (ABQB) where a counterparty to an agreement with the debtor objected to the terms of an approval and vesting order seeking the vesting of certain intellectual property free and clear of its licence to use such intellectual property. The agreement in that case was governed by American law and it was argued that it may have created a property right not present in Canadian law. See also *T Eaton Co, Re*, 1999 CarswellOnt 3542 (SCJ) at 11-12, *Phenomenome*, *supra* note 37, at 19-21 and *Royal Bank of Canada v Body Blue Inc*, 2008 CarswellOnt 2445 (SCJ) at 15, 17, 24, for support of the position that an intellectual property licence is not a property right in Canada. Contrast to A. Duggan, "The Status of Intellectual Property Licences in Insolvency Proceedings", (Oct 2016), online: <http://www.sufficientdescription.com/2016/10/the-status-of-intellectual-property.html>

[171] (unreported) at 4.

[172] *Ibid* at 3.

The receiver brought an application seeking advice and direction from the court in respect of the ability to disclaim the veto right in the otherwise executed purchase and sale agreement. Justice Meschishnik found that the veto right formed a separate agreement from the purchase agreement that was capable of being independently disclaimed.[173] Consistent with the prior jurisprudence, Justice Meschishnik confirmed that court officers cannot disclaim an agreement that has granted a property right.[174]

In addition to the well-established classes of contracts listed above, courts have repeatedly found that court officers must have regard to equitable considerations in their determination of whether to disclaim an agreement.[175] The concept of "equitable considerations" remains undefined and provides a common defense for parties opposing the potential disclaimer of their agreement. It is important to note that equitable considerations must be considered within a court officer's duty to act honestly, in good faith and to deal with the debtor's property in a commercially reasonable manner. In the event of adequate consideration, equitable considerations will not often override a commercially reasonable decision made by a court officer.

The decision of *Bank of Montreal v Probe Exploration Inc*, (2000), 33 CBR (4th) 173 (ABQB) is one such example where equitable considerations overrode commercial interest.[176] In that case, Justice Fraser refused to approve the disclaimer of three contracts by a receiver where, prior to receivership, Probe Exploration Inc. ("Probe") sold a processing facility and guaranteed minimum deliveries of product to such facility. Probe also granted a right of first refusal to Midcoast Canada Operating Corporation ("Midcoast"), the operator of the processing facility, to take over providing any other gas services required by Probe.[177]

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[173] *Ibid* at 18.

[174] *Ibid* at 8. See also *CareVest Capital Inc v CB Development 2000 Ltd*, 2007 BCSC 1146 at 10, 28.

[175] *New Skeena Forest Products Inc v Kitwanga Lumber Co,* 2004 BCSC 1818 at 22; *New Skeena CA*, *supra* note 25, at 20 and *Royal Bank v Melvax Properties Inc,* 2011 ABQB 167 at 3. See also *144 Park Ltd, Re,* 2015 ONSC 6735 at 21-24, where Justice Newbould prevented the disclaimer of purchase of presale agreement for certain condos. Justice Newbould found that the refund proposed by the trustee would not compensate the counterparties for the sunk costs in the property they had already incurred.

[176] ("*Probe QB*") at 39. See also *Bank of Montreal v Probe Exploration Inc, (*2000), 33 CBR (4th) 182 (ABCA) ("*Probe CA*").

[177] *Ibid* at 15. See also *In re Sabine Oil & Gas Corp,* 547 BR 66 (2016), where Judge Shelley Chapman of the Southern District of New York took the opposite approach and permitted the rejection of certain gas gathering agreements by an insolvent debtor in its Chapter 11 proceedings. This decision was upheld on appeal by Judge Rakoff of the US District Court for the Southern District of New York.

The receiver took the position that the disclaimer of the three agreements would enhance the value of Probe's interest in certain gas producing lands for the benefit of all creditors.[178] Additionally, the receiver argued that it had no duty to honour the contracts because Probe had no goodwill that it was obligated to preserve.[179]

Although Justice Fraser agreed that the maintenance of the contracts depressed the value of the estate's assets, he did not approve the disclaimer of the agreements. This holding was predicated on the inequitable nature of the proposed disclaimer.[180] Specifically, Justice Fraser found it inequitable that the proposed disclaimer would, among other things, deprive Midcoast of rights it had bargained for.[181] Effectively, the proposed disclaimer would turn Midcoast's otherwise secured claim into an unsecured claim for damages resulting from the termination.[182] Justice Fraser found that the unequal treatment of the two parties imposed for the benefit of one of the parties was neither equitable nor fair in the circumstances.[183] His decision was unanimously upheld on appeal by the Alberta Court of Appeal.[184]

In *Probe*, the purpose of the proposed disclaimer was economic in nature and was based on an extensive financial analysis regarding the cost of maintaining the agreements. The disclaimer would have also reduced the status of Midcoast from a secured to unsecured creditor. Despite there being little chance of recovery for Midcoast, the circumstances were such that the proposed disclaimer was untenable. It is important to understand that the facts in *Probe* contained a unique set of circumstances not commonly replicated, where the equities justified a denial of the receiver's proposed disclaimer by the court.

This position was echoed by Justice Wilton-Siegel in *Romspen Investment Corp v Horseshoe Valley Lands Ltd,* 2017 ONSC 426, where he found that the central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position by means of a disclaimer of a contract.[185] This inquiry informs the standard by which the equities between the

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[178] *Probe QB*, *supra* note 176, at 26.
[179] *Probe QB*, *supra* note 176, at 20, 27, 32.
[180] *Probe QB*, *supra* note 176, at 37.
[181] *Probe QB*, *supra* note 176, at 37.
[182] *Probe QB*, *supra* note 176, at 35.
[183] *Probe QB*, *supra* note 176, at 37.
[184] *Probe CA*, *supra* note 176, at 3.
[185] ("*Romspen*") at 31.

parties must be assessed.[186] Justice Wilton-Siegel noted, in this case, that the right of a receiver to disclaim an interest in an agreement will depend upon, among other things, the nature of the interest (i.e. whether it is contractual or proprietary), the relative priorities of creditors and the operation of the doctrine of marshalling, where applicable.[187]

The maneuvering of positions is inherent in any act of disclaimer aimed at mitigating liabilities and so it must necessarily fall to a determination of degree. It is important to recognize that the obligation to act in an equitable manner must be exercised within the framework established by the respective priorities of the creditors and in the furtherance of the maximization of the estate.[188]

As a result, the focus of a disclaimer analysis should be on the negotiation of the particular agreement and the effect of the proposed disclaimer on the counterparty and the estate.[189] Where there is any uncertainty as to the propriety of a proposed disclaimer, court officers should apply to the court for either advice and direction or approval.[190]

(ii) LEASES

Leases are a subset of executory contracts. Court officers have long held a statutory right to disclaim a debtor lessee's interest in a lease where it makes fiscal sense to do so.[191] Much like

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[186] *Ibid* at 31.
[187] *Ibid* at 28.
[188] *Ibid* at, at 28, 32.
[189] *Ibid* at 32: "The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant" for the determination of whether a proposed disclaimer should be permitted.
[190] See *bcIMC*, *supra* note 151, at 60: The ability to "market any or all of the Property", the ability to "sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof" and the ability to "apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof" must be taken to allow the Receiver and Manager to disclaim a Contract providing the Receiver and Manager seeks court approval to do so and providing the holders of the Contracts are notified of such an application." This statement of Justice Burnyeat would seem to indicate that a receiver should always obtain court approval prior to disclaiming an agreement.
[191] Although a type of executory agreement, they are treated differently under the *BIA*. See *New Skeena CA*, *supra* note 25, at 22.

other executory contracts, an interest in a lease may be disclaimed by notice as well as inaction.[192] Leases that are disclaimed usually fall into one of two categories:

> …the "wasting" type, where the imminent or short-term end of the lease or the inclusion of onerous covenants in the agreement minimizes its value to the estate, or commercial leases, where an uplift clause or one prohibiting assignment renders the lease of little benefit to the estate…[193]

The abandonment of leases by receivers is caught by the discussion of executory contracts, but there are special considerations in respect of trustees given the statutory grant of authority under section 30(1)(k) of the *BIA* and the underlying debate as to whether their common law right to disclaim contracts also extends to leases.[194] Section 30(1)(k) is not limited to real property and encompasses any leases of, or temporary interests in, property generally.[195]

Upon bankruptcy, a bankrupt's leasehold interest and the agreement by which that interest is granted vests in the trustee.[196] While section 30(1)(k) permits a trustee to disclaim an interest in a lease, it may only do so in respect of a real property lease where the bankrupt is the lessee not the lessor.[197] Section 146 of the *BIA* provides that the rights of a trustee as a lessor are determined by provincial law in the province in which the leased premises are situated.

If provincial law grants a trustee the right to choose whether to retain, assign or disclaim leases, section 30(1)(k) provides the trustee with the statutory vehicle by which to exercise such right.[198]

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[192] See *Perimeter Transportation Ltd*, *Re*, 2010 BCCA 509 at 35-36 for an example of a disclaimer by inaction and *Francis v Landrigan*, 1990 CarswellNfld 11 (NFLDSC) at 18 ("*Landrigan*") for an example of an express disclaimer.

[193] *Disclaiming Onerous Property in Insolvency*, *supra* note 13, at 42.

[194] See *Sittuk Investments Ltd v Aylen Estate*, 2002 CarswellOnt 3040 (ONSCJ) at 65: "The applicant submitted that a trustee in bankruptcy for a bankrupt landlord may disclaim a lease at common law and also pursuant to section 30(1)(k) of the *Bankruptcy and Insolvency Act*. The respondents submit the contrary." and *IKON*, *supra* note 35, at 8: "The trustee's right to disclaim flows from ss. 30.(1)(k) and 146 of the [*BIA*], with s. 146 providing that a landlord's rights on bankruptcy shall be determined according to the laws of the province in which the leased premises are situated." Given the consistent interpretation of section 30(1)(k), trustees are justified in assuming that the statutory grant has overtaken any need to rely on a common law right to abandon an interest in a lease.

[195] See *Re Giffen*, [1998] 1 SCR 91 at 69 for the proposition that, if a lease of personal property is ineffective because of failure to perfect the security interest under provincial *PPSA* legislation, section 30(1)(k) will have no application.

[196] *Carpita Corp (Trustee of) v Douglas Shopping Centre Ltd,* 1990 CarswellBC 375 (BCSC) at 13 and *BIA*, *supra* note 2, at section 71.

[197] *Business Development Bank v Adventura II Properties Inc*, 2015 ONSC 5026 at 18 ("*Business Development Bank*") and *Palais des sports de Montreal, Re*, 1960 CarswellQue 25 (QCSC). The insolvent landlord's rights re determined by provincial legislation such as *Landlord's Rights on Bankruptcy Act*, RSA 2000, c L-5 and the *Commercial Tenancies Act*, RSO 1990, c L.7.

[198] *Ikon*, *supra* note 35, at 8.

In this way, it differs from sections 20 and 14.06(4) by granting a statutory right compared to the recognition of a pre-existing right. If the applicable provincial legislation does not provide for a right to disclaim a lessor's interest, the trustee is not permitted to disclaim the lease and must either seek to convey the active lease, negotiate for its surrender or avail itself of any other provincial statutory provision available to it.[199]

For example, in *Business Development Bank*, Justice Penny reversed a disclaimer of a landlord's interest by a trustee upon an application brought by the lessee under section 37 of the *BIA*. Although the trustee disclaimed the interest to increase the value of the estate and close a sale of the assets, Justice Penny found that the provincial legislation did not provide the trustee with the right to do so. As a result, the trustee's only recourse was to negotiate an appropriate buyout price with the lessee for the premature termination of the agreement. It is important to note that the common law right of receivers to disclaim leases is also likely subject to this exception.

Consider also the effect of a court officer disclaiming a leasehold interest as it differs from an interest in real property. Unlike real property, disclaiming a lessee's interest in a lease does not result in the interest returning to the hands of the debtor (in the case of a bankruptcy). Instead, the lessee's interest terminates upon the issuance of the disclaimer.[200]

In summary, to comply with their duty to act in a commercially reasonable manner, court officers should continue to disclaim agreements where such disclaimer would have a net benefit to the value of the estate (and the court officer is statutorily permitted to do so). Not seeking to formally disclaim an agreement may leave a court officer open to challenge by a secured creditor or counterparty unhappy with the course of action chosen by it. While it is admittedly a balancing act, proceeding on the basis that an act of disclaimer will benefit the estate will, from a commercial reasonableness standpoint, generally be met with approval by the court and the other stakeholders with an interest in the estate.

C. PERSONAL PROPERTY

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[199] *Business Development Bank*, *supra* note 197, at 26. It has been settled law since at least 1960 that the authority granted to a trustee under section 30(1)(k) of the *BIA* does not extend to the disclaimer of a lease on behalf of the landlord, unless such authority is specifically granted by provincial law.

[200] *Cummer-Yonge Investments Ltd v Fagot,* 1965 CarswellOnt 40 (ONSC) at 15 aff'd by *Cummer-Yonge Investments Ltd v Fagot*, [1965] 2 OR 157 (ONCA)and *Landrigan*, *supra* note 192, at 23.

There has been surprisingly little consideration of the abandonment of an interest in personal property. One reason is that personal property may be valueless rather than onerous (unlike real property and contracts) and will either be sold, destroyed, offered to the creditors or returned to the debtor.

Since 1949, a common understanding of what is now section 30(1)(a) of the *BIA* has existed in that it permits a trustee to, with the permission of the inspectors, sell or dispose of all or any part of the property of the bankrupt for such price or other consideration as the inspectors may approve.[201] The addition of "dispose of" contemplates the release of an interest by abandonment or destruction. In the case of onerous personal property, such as a leaking barrel of chemicals, a trustee may simply dispose of the personal property to a landfill or any other waste depository.

Other than the strategies for abandoning property as described above in Part III, section 3(l) of the Alberta Model Order also provides a receiver with the authority to "convey" or "transfer" any of property within certain prescribed limits. When abandoning onerous property of the debtor, the consideration for the "transfer" or "conveyance" will necessarily be below such prescribed limits. In the event a receiver is not permitted to rely on section 3(l) as a source of an abandonment power, section 3(s) permits it to take any action incidental to the powers provided for under the Alberta Model Order (including, arguably, an abandonment of property). Aside from simply seeking a discharge, these provisions are sufficiently broad to allow for the abandonment or destruction of burdensome property by a receiver.[202] There appears to be little qualification on this right to dispose of onerous or valueless personal property. One exception is

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[201] There is also common law authority allowing for a disclaimer of an interest in personal property. In *Boutique d'animaux Yogi Inc, Re*, 1993 CarswellQue 1038 (QCSC) at 3, 6, Chief Justice Gomery stated: "if the Trustee had then stated unequivocally that it disclaimed any interest in the merchandise, the parties would have been in a position to exercise the appropriate recourses before the civil courts to determine their respective rights." In such a case, all other stakeholders would then be permitted to enforce on such property if there was sufficient value remaining to justify the costs of enforcement and realization.

[202] *bcIMC*, *supra* note 151, at 60: "The ability to "market any or all of the Property", the ability to "sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof" and the ability to "apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof" must be taken to allow the Receiver and Manager to disclaim a Contract providing the Receiver and Manager seeks court approval to do so and providing the holders of the Contracts are notified of such an application."

that a trustee may not disclaim the books and records that must be retained pursuant to Rule 68 of the *Bankruptcy and Insolvency General Rules*, CRC c. 368.[203]

Much like the abandonment of real property and the disclaimer of contracts, the abandonment of personal property should be based in an analysis of the net benefit. Typically, a court officer should only dispose of onerous personal property. Any valueless property with a minimal cost of administration (including storage) should either be distributed to the creditors in accordance with their entitlements or left in the estate to be returned to the debtor. This will help to ensure that no aggrieved creditor returns to challenge the propriety of an abandonment.

D. CHOSE IN ACTION

A claim against the estate is a liability but a claim of the estate may be an asset that leads to a recovery for creditors. The determination of whether to abandon an interest in such a claim is rife with risk for court officers. It will often be unclear as to whether an action is worth pursuing (except where such claim is able to be sold) and whether the probability of success justifies the costs of litigation.

Receivers will not be required to expressly abandon such a claim in many, if any, circumstances.[204] The decision whether to proceed with litigation should be a decision made in conjunction with the fulcrum creditor who will, in effect, be the party paying for the proceedings out of its expected recovery from the estate.[205] If an economic analysis indicates that a claim is not worth pursuing, or that a creditor is unwilling to fund the lawsuit, a receiver may simply refuse to continue taking steps in the proceedings. Where the last material step in the action is taken outside of the long delay window, the claim will have been effectively abandoned. In the event it is not possible to obtain direction from the court in short order, practicality suggests that taking no action will offer a receiver more protection from a claim of improvident administration of the property than where it actively disclaims a potentially valuable claim. Where there is a

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[203] See *Thomson Kernaghan*, *supra* note 96, at 14. Justice Lederman found that this was an exception to the trustee's overriding duty under the *BIA* to maximize the realization of assets in an attempt to obtain a reasonable dividend for creditors.

[204] Although this statement is not meant to preclude the conclusion that they have a common law right to do so.

[205] It may also be possible for the fulcrum creditor to take an assignment of the litigation from the receiver.

challenge to a receiver's administration of an action of the debtor, it should, as always, seek advice and directions from the court.

This approach is similar for trustees, who should assess the potential value of the claim and make a determination as to whether the costs associated with the litigation would justify the expenditure of the estate's assets. Where a trustee determines that it is uneconomical to proceed with a claim, it should either attempt to sell such claim and, barring such a sale, it should notify the creditors of its decision and allow them to determine whether any one of them wishes to bring an action under section 38 of the *BIA* to individually pursue the claim of the estate for their own benefit.[206]

A failure to take action under section 38 differs from an express disclaimer, in that it does not return the cause of action to the debtor. Section 38 merely allows a creditor to stand in the trustee's place to advance a cause of action that the trustee has refused to pursue.[207] The creditor is then entitled to the full amount recovered up to the full amount of its claim but the action itself remains an asset of the estate.

A trustee is also permitted to disclaim an interest in an action. Such act of disclaimer results in a re-vesting of the litigation interest in the debtor. An express disclaimer will typically only occur where an insurance company has compensated the debtor for its claim and wishes to subrogate into the bankrupt's position to proceed against a third party. In such a case, there is no unrealized benefit to maintaining the action in the estate or cost to disclaiming the same.[208]

It will be uncommon for a court officer to expressly abandon an interest in an action. In any case where a court officer is contemplating the abandonment of an interest in litigation, it is prudent for it to bring an application seeking advice and direction from the court.[209]

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[206] Under section 38 of the *BIA*, there are only two conditions precedent to a creditor's commencement of an action: (i) the trustee's refusal or neglect to initiate litigation, and (ii) an order of the court authorizing a creditor to pursue the litigation: *Wilfert v McCallum*, 2017 ONSC 3853 at 32. See also *Toyota Canada Inc v Imperial Richmond Holdings Ltd*, 1994 ABCA 261 at 14-15, for the proposition that section 38 "provides the mechanism for creditors to proceed with an action when the trustee refuses or fails to act; thereby ensuring that assets of the bankrupt (which may otherwise go unrecovered) are available to creditors willing to finance the litigation."

[207] *Re Zammit* (1998), 3 CBR (4th) 193 (OCJ Gen Div) at 7, *Shaw Estate (Trustee of) v Nicol Island Development Inc* (2009), 51 CBR (5th) 12 (ONCA) at 72 and *Wei, Re*, 2011 ONSC 4741 at 13.

[208] *Douglas v Stan Fergusson Fuels Ltd*, 2016 ONSC 442 at 32.

[209] See section 40(2) of the *BIA* and section 25 of the Alberta Model Order.

VI. CONCLUSION

A misunderstanding exists in Canada in respect of the source of a court officers' ability to disclaim property in insolvency proceedings and the purpose of such power. This misunderstanding has developed as a result of the continued reliance on the common law for the primary source of such power.

The codification of abandonment rights has resulted in a more consistent understanding and uniform application of the powers provided for thereunder by court officers and the judiciary. Of particular note are sections 30(1)(k), 65.2 and 65.11 of the *BIA* and section 32 of the *CCAA*. All of these provisions provide a party with an express right to disclaim an interest in property and, in some cases, provide a specific test for doing so. Codification of the right to abandon provided a uniform basis for a consistent test to develop. Upon codification, the argument shifted from whether a right existed to whether its exercise was appropriate in the circumstances.

The uncertainty that exists with respect to the extent of court officers' common law abandonment rights can be resolved with the same type of codification that occurred in the American and English insolvency statutes. This proposed rectification would occur by adopting a similar provision to section 315 of the *Insolvency Act*, *1986* into the *BIA*, preferably available to both receivers and trustees. The relevant portions of section 315 state:

> **Disclaimer (general power).**
>
> (1) Subject as follows, the trustee may, by the giving of the prescribed notice, disclaim any onerous property and may do so notwithstanding that he has taken possession of it, endeavoured to sell it or otherwise exercised rights of ownership in relation to it.
>
> (2)The following is onerous property for the purposes of this section, that is to say—
>
> (a)<u>any unprofitable contract</u>, and
>
> (b)<u>any other property comprised in the bankrupt's estate which is unsaleable or not readily saleable, or is such that it may give rise to a liability to pay money or perform any other onerous act</u>.
>
> (3)A disclaimer under this section—

> (a)operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the bankrupt and his estate in or in respect of the property disclaimed, and
>
> (b)discharges the trustee from all personal liability in respect of that property as from the commencement of his trusteeship, but does not, except so far as is necessary for the purpose of releasing the bankrupt, the bankrupt's estate and the trustee from any liability, affect the rights or liabilities of any other person.
>
> […..]
>
> (5)Any person sustaining loss or damage in consequence of the operation of a disclaimer under this section is deemed to be a creditor of the bankrupt to the extent of the loss or damage and accordingly may prove for the loss or damage as a bankruptcy debt.

This section (and section 178 in the case of a liquidator) were adopted to provide a uniform understanding of abandonment rights in English jurisprudence and simply codified the extensive common law rights already afforded to liquidators and trustees by English courts.[210] The adoption of a similar provision into the *BIA* would rectify the current uncertainty described in detail above, codify the current economic triage model of common law abandonment rights and provide a uniform basis on which future jurisprudence could develop in a consistent manner.

Such a provision would be a boon for court officers and the judiciary and would enshrine, but not extend, the current abandonment rights afforded to court officers. Further, it would act to supplement sections 14.06(4) and section 20 and would not conflict with the current understanding of section 30(1)(k).

In addition to the provision above, it would be beneficial to clarify that creditors are free to enforce their claims against the abandoned property, set notice requirements for the exercise of such rights and any other procedural requirements deemed to be appropriate.

Understanding that the wheels of government grind slowly, an interim solution would be to revise the form of Model Orders to adopt a provision similar to that in the receivership order granted in the *Lexin Resources* proceedings which authorized the receiver to "disclaim, abandon

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[210] As were the corresponding provisions under the *Bankruptcy Code*. It is possible that the separation of powers under section 91 and 92 of *The Constitution Act, 1867* and the application of the doctrine of paramountcy has affected the acceptance of a broad right to disclaim property in Canadian insolvency proceedings given the interplay between the provincial power over property and the federal power over bankruptcy.

or renounce the Debtors' interest in any of the Property". Although it would not extend the same relief to a trustee, it would provide the basis for the uniform understanding of the rights to abandon property through court order. Although neither is necessary given the current state of the common law, it would do much to curtail the present uncertainty regarding this aspect of the Canadian insolvency regime and would allow Canada to finally join its peers with statute-based abandonment rights.