Environmental Clean-up in Bankruptcy and Insolvency: What Priority for the Environment?

by

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ABSTRACT

The lack of clarity of Canadian insolvency legislation with respect to the treatment of environmental claims has left Canadian courts wondering whether they should advance the public order policies embodied in the environmental legislation or promote creditors' interests and the private relief afforded by bankruptcy. This thesis examines the state of the law on the question and provides a critical assessment of the legislation and its judicial interpretation, while uncovering the underlying reasons for the existence of such a confused body of jurisprudence. Building on these findings, the author proposes a reform of the insolvency legislation that would uphold the protection of the environment as a fundamental value in Canadian society.
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*The interface of environmental cleanup laws and federal bankruptcy statutes is never tidy; jurisprudentially it is somewhat grubby.*

-Justice Aldisert

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INTRODUCTION

"It is a simplistic statement but one that is necessary to emphasize: insolvency statutes such as the Companies’ Creditors Arrangement Act and the Bankruptcy and Insolvency Act do not mesh very well with environmental legislation", recently wrote Justice Morawetz for the Ontario Superior Court of Justice. Clearly, the objectives of environmental legislation strongly conflict with Canadian insolvency legislation. Environmental laws aim to protect the public health and safety by providing for the protection and conservation of the natural environment and holding polluters liable for the consequences of their actions. Environmental procedures, investigations and cleanups can be lengthy and extremely costly. On the other hand, bankruptcy legislation aims to protect debtors from claims in order to provide an orderly and expeditious resolution of all claims and thus give debtors the opportunity to start afresh and clear of debts. Historically, the lack of clarity of Canadian insolvency legislation with respect to the treatment of environmental claims has left Canadian courts wondering whether they should advance the public order policies embodied in the environmental legislation or promote creditors' interests and the private relief afforded by bankruptcy. While the federal legislator has attempted to provide guidance for the treatment of environmental claims through legislative amendments, recent case law is a testimony to the fact that confusion remains. The uncertainties are such that the Supreme Court of Canada has accepted to hear the appeal in Newfoundland v. AbitibiBowater Inc.,3 where the status of environmental remediation orders in the insolvency context will be debated. In this paper, I will address the many issues environmental authorities are faced with when attempting to enforce environmental legislation and obtain compliance from insolvent corporations.

As contaminated sites pose or are likely to pose numerous risks to human health and the environment, the Canadian federal government lists 21,937 contaminated properties under its custodianship and it is

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3 Newfoundland v. AbitibiBowater Inc., 2010 QCCS 1261 aff’d 2010 QCCA 965 leave to appeal to the Supreme Court granted 2010 CanLii 69211 (SCC)
estimated the number of non-federal potentially contaminated sites is upwards of 64,046. While number of these sites are appropriately managed or monitored by governmental authorities, it remains that there are too many for governments to be aware of the full extent of potential risks to human health and the environment. Contaminated property also impose a significant burden on the public purse: for the budget year 2012-2013, $336 million will be spent on assessment and remediation activities by the federal government alone. It is thus important to ensure that, when possible, remediation activities are covered by the people who directly or indirectly benefited from the contamination. The purpose of this thesis will be to examine the bankruptcy legislation, evaluate the possibility for corporations who face financial hardship to avoid or circumvent their environmental liabilities at the taxpayers' expense and assess the potential for improvement of the legislation by ensuring a better application of the "polluter pays" principle in the insolvency context.

In the first section, I will present the state of the law on the question. In order to get a complete overview of the issues surrounding the treatment of environmental claims in bankruptcy, I will proceed to a chronological analysis of the relevant legislation and case law. This will lead us to first overview a series of decisions rendered the early 1990s, break down the sections of the insolvency laws related to the environment, which were added following substantial amendments in 1997, and discuss the most recent cases related to the issue, including the pending Supreme Court hearing in AbitibiBowater. In the second section, I will proceed to a critique of the policy decisions made when amending the insolvency laws in 1997, focusing on the trustee's abandonment right and the Crown's super-priority for the expenses related to remedying an environmental condition. I will also critically assess the reasoning of the courts in the most recent decisions presented in section one and the departure from the "polluter pays" principle in the bankruptcy context. In the third section, I will present proposals for reform of the insolvency laws in an attempt resolve the conflict of laws by affirming the importance of the protection of the public health and the environment in the bankruptcy context.

INTRODUCTORY NOTIONS, PRINCIPLES AND RULES

1. Environmental Orders

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5 ECO Canada, Who Will Do The Cleanup?: Canadian Labour Requirements for Remediation and Reclamation of Contaminated Sites 2006-2009 (Calgary: 2007) at 28
6 Government of Canada, Office of the Auditor General of Canada, supra note 4 at 78
Environmental legislation generally impose a broad range of liabilities on persons who permit or control the source of the pollution, regardless of the time the pollution may have begun. The legislation generally does not require that the person be the owner, as long as it is in "control" of the property. As stated in _R. v. Sault Ste Marie_, "[l]iability rests upon control and the opportunity to prevent, i.e. that the accused could have and should have prevented the pollution. [...]This control may be exercised by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control". Thus, liability will generally be borne by the corporation who had charge, management or control of a contaminant or contaminated site.

When environmental authorities requires assessment or remediation work to be done, it may issue administrative orders requiring the person that has charge, management or control of a contaminant or contaminated site to do so. There are generally speaking four types of administrative orders: stop orders, control orders, preventative orders and clean-up orders. In the bankruptcy context, the litigious orders are generally clean-up orders, where the property has already been damaged by the discharge of contaminants, whether from a recent spill or from damage that has occurred long ago or during an extended period of time. For example, among others, sections 7, 8, 17, 18 and 157 of the Ontario _Environmental Protection Act_ authorize the environmental authority to issue a variety of orders to persons in charge or control in order to insure assessment, monitoring, securing or remediation of an impacted site. While it is unnecessary for the purposes of this paper to review each statute under which similar orders can be emitted, it is important to note that all other provincial environmental statutes delegate similar compliance and enforcement powers to their local environmental authorities.

Generally, environmental remediation orders are issued to enforce a broader principle known in environmental law as the "polluter pays" principle. The "polluter pays" principle implies that legislators will implement legislation and regulation to "ensure that goods and services causing pollution in their production or use are priced to reflect the costs of preventing or cleaning up that pollution". Most

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10 _Environmental Protection Act_, R.S.O. 1990, c. E-19
11 See footnote 13, infra
12 Cindy Chiasson, "The State of 'Polluter Pays' in Canada", (2005) Vol. 20 No. 1 Environmental Law Centre News Brief 10, available at URL: [http://www.elc.ab.ca/Content_Files/Files/NewsBriefs/PolluterPays-Vol.20-1.pdf](http://www.elc.ab.ca/Content_Files/Files/NewsBriefs/PolluterPays-Vol.20-1.pdf); See also: Jamie Benidickson, _Environmental Law_, 2d ed (Toronto: Irwin Law, 2002) at 21: "The polluter pays principle emphasizes the responsibility of those who engage in environmentally harmful conduct (either as producers or consumers) for the costs associates with their activity. They should not be subsidized financially by direct public
The statutes destined to protect the environment embody explicitly or implicitly the "polluter pays" principle by creating liabilities for polluters and giving authorities the power to issue orders to ensure environmental damages are remedied.\textsuperscript{13} The Supreme Court also noted that the principle is "firmly entrenched in environmental law in Canada".\textsuperscript{14}

When corporations face financial hardship, it may become difficult for them to comply with their environmental obligations and remedy environmental conditions which arose due to the operation of their business. Likewise, unknown environmental conditions may be discovered only when in the vicinity of insolvency. What happens, then, to the "polluter pays" principle when the polluter is belly-up and out-of-pocket and relief has been granted under the B.I.A. or the C.C.A.A.? How are environmental claims treated during such procedure?

2. The Stay of Proceedings

2.1 Under the Bankruptcy and Insolvency Act

At the time of bankruptcy, unsecured creditors detaining a provable claim\textsuperscript{15} cannot take or continue proceedings against the debtor to collect their claim. This follows from the automatic stay of proceedings provided at section 69.3 B.I.A., which states:

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

\textsuperscript{15} Section 121(1) B.I.A.: "All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act."
(2) Subject to subsection (3), sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders.  

Nonetheless, a trustee may obtain a suspension order under 69.3(2) B.I.A. in order to stay the rights of secured creditors. Obtaining such an order however does not alter the status of a secured creditor if the security is valid and enforceable against the trustee, but will impose a delay on the exercise of a secured creditors' rights.

The stay of proceeding features three main objectives:

First, the stay acts as a time-out so that the debtor's obligations may be assessed without the additional pressure of collection efforts and judicial proceedings. This has often been referred to as giving the debtor a "breathing spell". [...] Second, the automatic stay provides benefits for creditors. By prohibiting rampant collection procedures by individual collectors, all creditors benefit because the [...] Court is in a better position to provide for an orderly and pro-rata share of the bankruptcy estate. Third, the application of the automatic stay results in the conservation of resources that would otherwise be used in litigation in other forums.

The stay of proceedings is a corner stone of the B.I.A. because it seeks to ensure fair and orderly distribution of the assets of an insolvent person between its creditors pari passu and thus prevents a creditor from obtaining priority over others by bringing untimely actions or enforcing a judgement against the debtor. The stay of proceedings encompasses not only the property of the debtor, but also all goods that are in possession of the debtor at the time of bankruptcy. Similarly, the words "remedy" and "action, execution or other proceedings" receive a very liberal interpretation and include

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16 There is also a restructuring (as opposed to liquidation) process under Part III B.I.A., where an insolvent debtor can file a Division I proposal. Section 69.1 B.I.A. provides that in such circumstances, both secured and unsecured claims are stayed.

17 A restructuring process under a Division I proposal is essentially an administrative process which is initiated by filing a notice of intention to file a proposal (s. 50.4 B.I.A.), which initiate the stay of proceedings for an initial period of 30 days, renewable by periods of 45 days by application to the court (s. 50.4(9) B.I.A.). The whole process must be completed within 6 months (s. 50.4(9) B.I.A.). Alternatively, a debtor may directly file a proposition (s. 62(1) B.I.A.), which initiates the stay of proceedings. A meeting of creditors must then be organised in the 21 days following the filing of the proposition (s. 51(1) B.I.A.). The relief provided by the stay of proceedings and other restructuring tools under the B.I.A. enable the debtor to continue the operation of its business while attempting financial restructuring and drafting a proposal for its creditors. The proposal, when approved by creditors, is essentially a contract that modifies the terms and conditions of reimbursement of creditors' claims.


20 s. 67 B.I.A.
all attempts, judiciary or extra-judiciary, to recover claims.\textsuperscript{21} Thus, the stay of proceeding generally includes all judiciary and administrative recourses, as well as injunctions:

The nature of the injunctive relief sought here is such that because of its potential impact on the restructuring process it is caught by the wording of the section 69(1)(a) and is therefore, stayed.\textsuperscript{22}

\section*{2.2 Under the \textit{Companies' Creditors Arrangement Act}}

Under the C.C.A.A., proceedings are stayed in accordance with a court order obtained under section 11.02 C.C.A.A.:

\begin{enumerate}
\item[11.02] (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
\begin{enumerate}
\item staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
\item restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
\item prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
\end{enumerate}
\end{enumerate}

A corporation may only apply for relief under the C.C.A.A. if the total of claims against it is more than $5,000,000. Large corporation usually prefer filing for restructuring under the C.C.A.A. as it is considered a generally more flexible statute where the process,\textsuperscript{23} unlike under the B.I.A., has no time limitation.\textsuperscript{24}

Under restructuring proceedings, courts have stated that all proceedings put forward by a creditor that may jeopardize the chances of success of the restructuring process and prevent the debtor from presenting a compromise or arrangement should be stayed.\textsuperscript{25} Unlike under the \textit{Bankruptcy and Insolvency Act} however, the stay of proceedings is not automatic: it is only granted if the debtor is able to prove in court that such an order is warranted and that it is acting diligently and in good faith. Ordering the stay of proceedings is thus a discretionary power of the court.\textsuperscript{26} Nevertheless, court orders


\textsuperscript{22} \textit{Golden Griddle Corp. v. Fort Erie Truck and Travel Plaza Inc.} [2005] O.J. No. 6305 at para 30 (Ont Sup Ct)

\textsuperscript{23} Under the C.C.A.A., the court generally have a broader discretionary power. See: Kevin P. McElcheran, \textit{Commercial Insolvency in Canada}, 2nd Ed., (Markham: LexisNexis Canada, 2011) at 240

\textsuperscript{24} See footnote 17

\textsuperscript{25} \textit{Century Services Inc. v. Canada (Attorney General)}, 2010 SCC 60 at para 22

\textsuperscript{26} Generally: \textit{Re Inducon Development Corporation}, (1991) 8 C.B.R. (3d) 306 (Ont Ct J (Gen Div)); \textit{Re Lehndorff General Partner Ltd.}, (1993) 9 B.L.R. (2d) 275 (Ont Ct J (Gen Div))
requiring the stay of proceedings are generally defined very broadly and will restrain rights and remedies of the debtor's creditors, whether their claim is secured or not.

2.3 Exception for proceedings emanating from regulatory bodies

Despite the broad scope of the stay of proceedings, the B.I.A. and the C.C.A.A. were amended in 2009 to provide an exception allowing regulatory proceedings to be unaffected by the stay of proceedings in cases of proposals and restructuring processes:

69.6 (2) Subject to subsection (3), no stay provided by section 69 or 69.1 affects a regulatory body’s investigation in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

A “regulatory body” essentially means any body responsible of enforcement or administration of a federal or provincial statute. They are generally responsible to ensure regulatory compliance with such issues as labour relations, human rights, the environment, energy, transportation, communication and securities exchange. This provision was added to the insolvency legislations so that the stay of proceedings would not be interpreted as a broad permission to break the law and become exempted from regulatory compliance. Prior to this amendment, courts had been found to issue stay orders to suspend the regulatory enforcement activities of administrative bodies under the broad stay of proceedings provisions of the insolvency laws. In a broad sense, the stay of proceedings’ objective is to enable an orderly distribution of remaining assets among creditors, but should not enable the debtor to forego compliance with important public order regulation and legislation.

An administrative agency cannot, however, try to recover a debt due to him in his capacity of creditor, such as previously imposed fines. When a regulatory agency holds a monetary claim against a debtor company, the debt does not hold a special rank in the bankruptcy or restructuring process. Such debts become regular, unsecured claims unless the regulatory body holds a contractual or legislative security. But the stay of proceedings should in principle not affect the regulatory functions of regulatory bodies. Regulatory authorities are therefore entitled to pursue any investigations or proceedings against the debtor.

27 Thus, this section does not apply to liquidation processes under the B.I.A.
28 See also: 11.1(2) C.C.A.A.
29 69.6(1) B.I.A.; 11.1 C.C.A.A.; Vachon v. Ministère de l’emploi (Canada), supra note 19 at para 21
31 69.2 B.I.A.; 11.1(2) C.C.A.A.
When regulatory proceedings imperil the possibility of coming to a viable proposal with creditors, a court may nonetheless order a stay of proceedings brought by a regulatory body if doing so is not contrary to the public interest:

69.6 (3) On application by the insolvent person and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
(a) a viable proposal could not be made in respect of the insolvent person if that subsection were to apply; and
(b) it is not contrary to the public interest that the regulatory body be affected by the stay provided by section 69 or 69.1.

Section 69.6 of the B.I.A. has only come into force on September 18th 2009. Consequently, courts have had limited opportunities to consider the extent of the regulatory proceedings exception to the stay of proceedings. American jurisprudence however, provides good insight as to the extent and meaning of section 69.6 B.I.A. The similar section of the American Bankruptcy Code is said to illustrate the Congress’ willingness to allow certain proceedings to go forward, because they are incompatible with the stay of proceedings and are too important to be stayed. To determine if an action brought by a regulatory body is suspended by the stay of proceedings, the pecuniary purpose test and the public policy test is applied:

Under the pecuniary purpose test, reviewing courts focus on whether the governmental proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property, and not to matters of public safety. Those proceedings which relate primarily to matters of public safety are excepted from the stay. Under the public policy test, reviewing courts must distinguish between proceedings that adjudicate private rights and those that effectuate public policy. Those proceedings that effectuate a public policy are excepted from the stay. [In those instances where the government’s action benefits both the public at large and a small and discrete class of private interests, the government action satisfies the public policy test unless the private interests "significantly outweigh" the public benefit from enforcement].

This test is used to distinguish legitimate regulatory proceedings from monetary claims that are disguised as regulatory proceedings to circumvent the application of the stay of proceedings. While both purely monetary claims and monetary claims disguised as regulatory proceedings will be stayed, regulatory investigations and proceedings which aim to insure compliance with existing legislation should remain unaffected by the stay of proceedings. Although the "pecuniary purpose" test has not yet been formally adopted or laid out by Canadian courts, this interpretation is not very different from the

32 Chao v. Hospital Staffing Serv., Inc., 270F.3d 374 at 385-386 (6th Cir. 2001)
Canadian jurisprudence rendered under the B.I.A. before the 2009 amendments: regulatory proceedings that did not concern a claim provable in bankruptcy would usually not be stayed.\textsuperscript{33} This section was nonetheless adopted out of concern that the "stay of proceedings [...] should not apply to the activities of administrative tribunals, since many of the decisions are made in areas that clearly fall within the public interest".\textsuperscript{34} This applies to environmental authorities, and as we will see infra, one of the debates concerning environmental claims in the insolvency context is the nature of the claim: is the claim monetary in essence or is it related primarily to matters of public safety?

\textbf{PART I: STATE OF THE LAW - ENVIRONMENTAL CLAIMS IN BANKRUPTCY AND INSOLVENCY}

1. The early 1990s: \textit{Bulora, Panamericana, Lamford Forest}

Given the scope of the stay of proceedings, a question that has historically existed and that remains unresolved today in bankruptcy law is whether or not environmental clean-up orders constitute normal, provable claims that are stayed by the bankruptcy proceedings or if, by their public order and non-monetary nature, they remain unaffected by the stay of proceedings. Because environmental clean-up orders can be extremely costly, this question is far from trivial for corporations with potential environmental liabilities entering a bankruptcy or restructuring process and their creditors. In the early 1990’s came a series of cases which considered the effect of the stay of proceedings on environmental clean-up orders. These cases uncovered at the same time important uncertainties regarding the extent of an insolvency practitioners’ personal liability for environmental remediation orders.

1.1 \textit{Canada Trust Co. v. Bulora Corp.}\textsuperscript{35}

In the \textit{Bulora} case, a receiver and manager had to manage, among other things, buildings owned by the Bulora Corporation that were in very poor condition. The Ontario Fire Marshal judged that the buildings presented a danger for the surrounding population, and issued an order requiring the repair or the demolition of the buildings. The receiver and manager declined to comply with the order due to the important costs involved. The court found that it was appropriate for the order to be served on the receiver, because the receiver had a “social duty to comply” with administrative orders designed to

\textsuperscript{33} E.g. \textit{Re Industrie Davie Inc.}, R.E.I.B. 1998-09974 (Que Sup Ct); \textit{Nautical Data International Inc. v. Canada (Minister of Fisheries and Oceans)}, 2005 FC 407 at paras 4-5; \textit{Re Warehouse Drug Store Ltd.}, 2005 CanLII 14439 at para 2 (Ont Sup Ct)

\textsuperscript{34} Canada, Senate, Standing Committee on Banking, Trade and Commerce, \textit{Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act} (Ottawa: Senate of Canada, 2003) at 161

\textsuperscript{35} \textit{Canada Trust Co. v. Bulora Corp.}, [1980] O.J. No. 752 (Ont H Ct J)
protect the safety of the public.\textsuperscript{36} Indeed, the court held that the urgent need to protect public safety trumped the right of the creditors:

The Order of the Fire Marshal is of vital concern for the safety of residents of the units adjacent to and close-by the abandoned units. The safety of those persons occupying such units should be of paramount importance. If the receiver is given wide and sweeping powers in the management of the company surely in the course of such management it has a duty to comply with a demolition order where the safety of individuals is so vitally concerned. It is indeed unfortunate a creditor must suffer the loss resulting from the demolition. Nonetheless, the asset to be managed by the receiver must, in my opinion, be managed with a view to the safety of those residing in and beside that asset. Receivership cannot and should not be guided solely by recovery of assets.

The receiver found itself obliged to comply with the order of the Fire Marshal and to destroy the buildings, despite the “prohibitive costs involved”.\textsuperscript{37} As we will see infra, \textit{Bulora} is the first of a series of cases that created a problematic situation both for insolvency practitioners and for the environment. Monitors eventually became very reluctant to take on restructuring or bankruptcy processes that implicated environmentally challenged properties, for fear of being stuck with personal environmental liabilities to be paid out of their own professional fees. This had damaging consequences for the environment, as “the insolvency of a debtor operating on environmentally challenged property [often] resulted in derelict properties for which no one would take responsibility”.\textsuperscript{38}

1.2 \textit{Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd. et al.}\textsuperscript{39}

In \textit{Panamericana}, a Receiver-Manager contested an order from Energy Resources Conservation Board of the Province of Alberta, which required it to seal and abandon seven suspended oil wells according to the existing regulation and procedures. It was argued that the order to seal the oil wells constituted a provable claim and that, as such, the Board only ranked as unsecured creditor. It was also argued that priority had to be given to secured creditors, as provincial environmental regulation could not “subvert the scheme of distribution specified by the \textit{Bankruptcy Act}”. The Alberta Court of Appeal rather held that while sealing the oil wells constituted a liability of the debtor, the Board was not to be considered a creditor as defined in the \textit{Bankruptcy Act}:

The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the Province. All who become licensees of oil and gas

\begin{tabular}{l}
\textsuperscript{36} \textit{Ibid} at para 20 \\
\textsuperscript{37} Kevin P. McElcheran, \textit{Commercial Insolvency in Canada}, supra note 23 at 174 \\
\textsuperscript{38} \textit{Ibid} at 174-175 \\
\textsuperscript{39} \textit{Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd. et al.}, 1991 ABCA 181
\end{tabular}
wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or the public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgement for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.\textsuperscript{40}

The court concluded that the Energy Resources Conservation Board could not be a "creditor" if it was not actually owed an amount of money.\textsuperscript{41} In the Court's opinion, the fact that the Board could, under its statute, create in its own favour a statutory debt by proceeding to do the abandonment work itself had no impact on the status of the Board as a "creditor", because it had not done so.\textsuperscript{42} The Court made clear that an order to remedy an environmental condition does not conflict with the scheme of distribution specified by the \textit{Bankruptcy Act} because it is simply part of the general law that has to be respected as a duty to the public. As such, the Board is considered to be simply requiring compliance with the existing regulation, not collecting a monetary debt. It is interesting to note that, in the Court's opinion, the \textit{Bankruptcy Act}'s policy stance was that the duties respecting environmental safety, in case of insolvency, were charges to be borne by the creditors and not by the general public.\textsuperscript{43}

The \textit{Panamericana} case raised significant concerns for insolvency practitioners. Indeed, when the Alberta Court of Appeal rendered its decision, the receiver had already liquidated the assets of the debtor, apart from the seven oil wells that were the subject of the dispute. When the court ordered the receiver to comply with the order, there wasn't any money left in the estate to proceed to the proper abandonment of the wells. It is not clear from the case if the costs were incurred by the trustee personally or if he was compensated by the creditors.\textsuperscript{44} Predictably and legitimately, following \textit{Panamericana}, insolvency practitioners felt at risk of being subject to personal liability for environmental clean-up costs. The lack of protection from environmental liability for insolvency practitioners created a situation that was detrimental to the interests of the debtor, its creditors, the environment and insolvency practitioners. These uncertainties led potential trustees to seek declaratory

\textsuperscript{40} \textit{Ibid} at para 33
\textsuperscript{41} \textit{Ibid} at para 33
\textsuperscript{42} The Ontario Court of Justice (General Division) subsequently followed this reasoning in a later case \textit{Shirley (Re)}, [1995] O.J. No. 3060. In this case, the environmental authority had decided to perform the remedial work itself. The environmental authority's debt was thus considered a claim in bankruptcy.
\textsuperscript{43} \textit{Ibid} at para 29
\textsuperscript{44} Dianne Saxe, \textit{supra} note 9 at p. 5
orders to "limit [their] exposure to unlimited liability for site remediation costs or to liability for prosecution relating to [...] environmental problems". 

1.3 **Re: Lamford Forest Products Ltd.**

In *Lamford Forest*, a receiver sought a declaratory order to clarify the extent of a potential trustee's environmental liability. Lamford Forest operated a sawmill on its property until it made a voluntary assignment into bankruptcy in accordance with the *Bankruptcy Act*. As a result of the sawmill activities, the property was "contaminated by heavy metals, chlorophenols, hydrocarbons and other toxic substances". The Waste Manager of the Provincial Ministry of Environment had issued an order pursuant to the *Waste Management Act*, for an environmental assessment of the site to be carried out and for the contamination to be managed in accordance with the existing regulations. At the time of application, the assessment had been carried out, and it was forecasted that "[t]he cost of the work could absorb all the liquidation proceeds without payment to either preferred or secured creditors or substantially exceed such proceeds". It follows that potential trustees were reluctant to manage Lamford Forest's bankruptcy without the court's reassurance that they would get paid and wouldn't be found personally liable for the environmental damage.

The court first held that the *Bankruptcy Act* did not impose a personal liability on the trustee in bankruptcy for the remediation of environmental damage:

> In the same way that a trustee does not become personally responsible for any other debts of the bankrupt, the trustee cannot be held personally liable for the costs of cleanup beyond the funds realizable from the estate.

Also asked where would rank the cost of remedying the environmental damage for payout in bankruptcy, the court found, as in *Panamericana*, that the Waste Manager could not be considered a creditor in the bankruptcy process, finding that there was no authority "for the proposition that a public officer ordering a citizen to obey the general law thereby becomes a creditor for any amount the citizen may ultimately be required to pay in complying". Doing so, the Supreme Court of British Columbia

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46 *Re: Lamford Forest Products Ltd.*, *supra* note 45
47 *Ibid*
48 *Ibid*
49 *Ibid* at p. 8
50 *Ibid*
51 *Ibid* at p. 8
reaffirmed the principles laid out in *Panamericana*: an order to remedy an environmental condition does not constitute a claim provable in bankruptcy, it is simply an order to comply with the general law of a Province. While this conclusion may have an incidental effect on the bankruptcy process, in that there may be "less money available for the distribution", the court found that general compliance with laws that are of public concern was more important than creditors’ rights. Indeed, the court concluded:

The balancing of values in this case falls in favour of protecting the health and safety of society over the rights of creditors, as it did in the Bulora and the Panamericana case, but there is also a need in modern society for trustees to take on the duty of winding up insolvent estates. The evidence before me indicates that no trustee can be found who will take on the bankruptcy of Lamford without a guarantee that he or she will be entitled to trustee’s fees to be deducted from the amount paid out under the Order, and will have no personal liability for the costs of clean-up of the contaminated site. [...] I direct that in the event that there are insufficient funds to meet the requirements of the Order, the payment of funds pursuant to the Order must be subject to a reduction equal to the amount of the trustee’s fees.\(^{52}\)

1.4 Conclusion

*Bulora*, *Panamericana* and *Lamford Forest* raised some significant issues for corporations, creditors and insolvency practitioners. As noted *supra*, the uncertainty created by the potential environmental liability of insolvency practitioners in managing a debtor’s estate was clearly unsustainable. Despite the fact that the court had mentioned in *Lamford Forest* that insolvency practitioners should not be held personally liable for the costs of cleanup beyond the funds realizable from the estate,\(^{53}\) some important uncertainties remained as the court noted that they “could fall within the scope of other [environmental] legislation”, but refrained from commenting further on the issue.\(^{54}\) As courts started noting that insolvency practitioners were unwilling to manage estates potentially affected by environmental liabilities,\(^{55}\) these issues came to the attention of the legislator, who successively amended the insolvency legislation in 1992 and 1997 to address those concerns.

Importantly however, the consensus in this trilogy of cases was that, despite a debtor being in a liquidation or restructuring process, the public health and safety nature of environmental legislation rendered compliance a mandatory priority. The courts clearly voiced the opinion that the stay of proceedings does not and should not amount to a permission to violate the law with impunity. Rather,

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\(^{52}\) *Ibid* at p. 12  
\(^{53}\) *Lamford Forest Products Ltd. (In Bankruptcy), supra* note 45, p. 5. The same was also stated in *Bank of Montreal v. Lundrigans, supra* note 45  
\(^{54}\) *Ibid*  
\(^{55}\) *Re : Lamford Forest Products Ltd., 1993 CanLII 2091* at p. 3 (BC SC); See also: *Strathcona County v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559 at para 34
the courts, using strong language, found that compliance with such orders took priority over mere debts because they constitute a “public duty [owed] by all the citizens of the community to their fellow citizens” and because “the balancing of values [...] fall in favour of protecting the health and safety of society”. Compliance with clean-up orders could not be assimilated to ordinary debts owed to the public authority charged with administering the statute. It is important to note that, in all three cases, the court does not hesitate to address directly the “balancing of values” implied by conflicting environmental and bankruptcy laws and to discuss the importance and the social value of environmental legislation.

2. The 1997 Legislative Amendments: Provisions Related to Environmental Liability

After an imperfect attempt in 1992, the legislator finally provided insolvency practitioners with statutory protection from environmental liability, except when the damage occurs as a result of “gross negligence or wilful misconduct”. A procedure for the abandonment of contaminated property by trustees or receivers was also adopted and the Crown was provided with a "super-priority" for the costs of remedying an environmentally damaged property.

2.1 The Abandonment Right

When faced with an order emanating from a public authority requiring the remediation of an environmental condition or damage of a property for which the debtor is responsible, section 14.06 B.I.A. and 11.8 C.C.A.A. provide insolvency practitioners with a fairly specific procedure to follow. Upon reception of an environmental remediation order, an insolvency professional can judicially contest the order, comply with the order, or abandon the property affected by the environmental damage. In the event that it is not economically viable to comply with the remediation order, the insolvency

56 Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd. et al., supra note 39 at para 33
57 See Annex 1 for full text of s 14.06(4) ff. B.I.A. and 11.8(5) ff. C.C.A.A.
58 In 1992, two paragraphs were added to section 14.06 of the B.I.A. to protect insolvency practitioners from environmental liability. However, the legislation was amended so that trustees were protected from environmental liability, but not receivers. Moreover, trustees were subject to personal environmental liability if there was “failure to exercise due diligence”. As courts found that the exemption provided for trustees could not be extended to receivers (see: Mortgage Insurance Company of Canada c. Innisfil Landfill Corporation, (1995) 20 C.E.L.R. (N.S.) 19 at 29 (Ont Ct J (Gen Div)); Standard Trust Co. c. Lindsay holdings Ltd., (1995) 29 C.B.R. (3d) 297 at 307 (BC SC)), insolvency practitioners demanded further statutory protection.
59 s. 14.06(2) B.I.A.; s 11.8(3) C.C.A.A.
60 The order may be contested on application by the court or body having jurisdiction under the law pursuant to which to order was made. See: s. 14.06(4)(b)(i) B.I.A.; s. 11.08(5)(b)(i) C.C.A.A.
61 s. 14.06(4)(a)(i) B.I.A.; 11.8(5)(a)(i) C.C.A.A.
practitioner will generally proceed to the abandonment of the contaminated property. Abandoned property is remitted to the debtor, which, in the context of this paper, will usually be a corporation that will later be dissolved. When a corporation is dissolved, properties which have not been disposed of at the date of dissolution escheat to the Crown. Finally, in the event that the trustee decides to abandon the environmentally damaged property, claims for the costs of remedying the damage do not rank as costs of administration.

2.2 The Crown Super-priority

If the public authority decides to proceed to the environmental remediation of the property itself, it disposes by virtue of section 14.06(7) B.I.A. and 11.8(8) C.C.A.A. of a “super-priority” for the costs of remediation “on the real property or the immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage”. This “super-priority” ranks above any other claim, charge or security against the property. As such, claims that arise from remediation of an environmental condition will not qualify as costs of administration of the entire estate, and will not compromise distributions to the secured creditor of the remainder of the insolvent estate. Pursuant to section 14.06(8) B.I.A. and 11.8(9) C.C.A.A., in the event that the “super-priority” over the contaminated property is not enough to reimburse the Crown for the remediation, the unsatisfied claim would be recognized as an ordinary unsecured claim on the remainder of the estate of the bankrupt enterprise.

63 Canada, Senate, Standing Senate Committee on Banking, Trade and Commerce, Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, 35th Leg, 2nd Sess, Issue 13 (4 November 1996) at p. 9 (Jacques Hains, Director of Corporate Law Review Branch, Industry Canada); Robert M. Fishlock, “Environmental Liability of an Insolvent Business in Canada” (Toronto: Blake, Cassels & Graydon LLP, 2002) at 20; See also: Dianne Saxe, supra note 9 at p. 17
64 Canada Business Corporations Act, R.S.C., 1985, c. C-44, s. 228(1); Business Corporations Act, R.S.O., c. B.16, s. 244(1); Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp., supra note 58 at paras 12 and 25
65 s. 14.06(6) B.I.A.; 11.8(7) C.C.A.
66 Robert M. Fishlock, supra note 63 at p. 17; Dianne Saxe, supra note 9 at p. 16
67 Canada, Senate, Standing Senate Committee on Banking, Trade and Commerce, supra note 63 at p. 10 (Jacques Hains, Director of Corporate Law Review Branch, Industry Canada); see also: Canada, House of Commons, Standing Committee on Industry, Bill C-5, An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act and the Income Tax Act, 35th Leg, 2nd Sess, Meeting 17 (17 September 1996) at 1615: “So the charge, the first priority, for the environmental clean-up will apply to the contaminated and the adjacent sites. After that, if that’s not sufficient, the environmental authorities can claim as unsecured creditors, ranking behind secured creditors.” (Daniel Dowdall, member of the national bankruptcy and insolvency section of the Canadian Bar Association)
14.06(8) Notwithstanding subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remediying any environmental condition or environmental damage affecting real property of the debtor shall be a provable claim, whether condition arose or damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

It seems that the wording employed in both these sections regarding the fact that the cost of remediying environmental damage is a claim "whether the condition arose or the damage occurred before or after the date of the filing"\(^{68}\) is meant to deal with timing issues specific to environmental claims that arose, for example, in *Shirley*.\(^{69}\) In *Shirley*, the court confirmed that expenses incurred by the environmental authority for site remediation qualified as a "claim" in bankruptcy, even if the remediation process wasn't completed and the expenses were still being accumulated.\(^{70}\)

3. Recent Case Law and Interpretation of the 1997 Amendments

The amendments made to both the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* in 1997 meant to resolve uncertainties created by jurisprudence of the early 1990s, but their result may have been to create additional confusion, apart from the protection from environmental liability granted to insolvency professionals. From the wording of the provisions, it was not clear whether or not the legislator wanted to intervene on the issue of the status of environmental remedial orders as claims in bankruptcy and overrule the line of authority emanating from *Bulora*. To date, most decisions have taken the position that environmental claims are ordinary provable claims which are stayed by the bankruptcy proceedings. Indeed, the Crown's "super-priority" has generally been interpreted as representing the legislator's will of approving the stay of environmental orders, provided that the Crown enjoys a "super-priority" right on the contaminated property.

3.1 *Strathcona County v. PriceWaterhouseCoopers Inc.*\(^{71}\)

One of the exceptions to the more recent line of authority is also one of the first decisions interpreting the 1997 B.I.A. amendments related to environmental claims. In *Strathcona County*, the County had issued development permits subject "to express conditions requiring the installation of appropriate stormwater management".\(^{72}\) It was later discovered that the developers had engaged in unapproved

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\(^{68}\) s. 14.06(8) B.I.A.; s. 11.8(9) C.C.A.A.

\(^{69}\) *Shirley (Re),* supra note 42

\(^{70}\) Ibid at para 33

\(^{71}\) supra note 55; Also see: *Re Big Sky Living, 2002 ABQB 659* at paras 9-15; *KPMG v. Kovacs* 2003 ABQB 861 at para 13

\(^{72}\) Ibid at para 3
drainage work. The County sought an injunction preventing the developers from performing the unapproved work and was given the right to "engage an engineer to complete a satisfactory drainage plan and to complete the required work at the expense of the developers". The developers ultimately assigned themselves into bankruptcy. While it was planned that the County would perform the drainage work itself, that did not occur by the time of bankruptcy. At that time, the County took the position that the obligation to do the drainage work according to a County approved plan survived bankruptcy and sought a declaration requiring the trustee to use the assets of the bankrupt estates to pay the cost of the drainage work. The Court of Queen's Bench of Alberta examined the principle established in Panamericana and the 1997 B.I.A. amendments, and found:

The trustee referred to an extensive collection of materials generated by the parliamentary committee which reviewed both B.I.A. amendments. Those materials do not support the conclusion that Parliament's intention in enacting the amendments was to overrule Panamericana.

Furthermore, the court specifically examined the Panamericana principle in relation to section 14.06(8) B.I.A. In Panamericana, the court concluded that the cost of complying with an environmental remediation order was not a provable claim, but a liability of the bankrupt owed to the public at large. On the contrary, section 14.06(8) provides that the "costs of remedying any environmental condition or environmental damage affecting real property of the debtor shall be a provable claim, whether the condition or the damage arose before or after the date of the filing of the proposal or the date of bankruptcy". Commenting on the fact that s. 14.06(8) B.I.A. may be seen as overruling the Panamericana principle, the court stated:

That, in my view, would be a misinterpretation of s. 14.06(8). I interpret the section as intending only to overcome what would otherwise be the effect of s. 121(1). That section provides that liabilities to which the bankrupt is subject on the day on which he becomes bankrupt, or to which he may become subject before discharge by reason of an obligation existing at the time of bankruptcy, are provable claims. If that section applied, an environmental claim arising after the date of bankruptcy but before discharge might not be a provable claim. Section 14.06(8) deals only with that timing issue. It does not convert a

73 Ibid at para 13; The order also required the developers to pay $240,000 and any funds received on existing sales into court as security for the completion of the work and prevented the developers from selling any of the lands.
74 Ibid at para 18-19
75 Ibid at para 37: "The principle established in Panamericana is that an obligation of a bankrupt to comply with public safety or environmental standards, imposed pursuant to statutory authority, must be honoured by the Trustee using the estate assets notwithstanding resulting prejudice to creditors of the bankrupt".
76 Ibid at para 38
statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it.\textsuperscript{77}

Consequently, the Court of Queen's Bench of Alberta decided that the Panamericana principle continued to be part of the law despite the 1997 B.I.A. amendments and required the trustee to comply with the terms of the development permits and pay the cost of the drainage work out of the assets of the bankrupt estates.\textsuperscript{78}

3.2 \textit{Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.}\textsuperscript{79}

General Chemical produced calcium chloride, a chemical used primarily for melting ice in the winter, which generated significant chemical by-products and created environmental issues in and around the plant facilities.\textsuperscript{80} After a failed attempt at restructuring under the C.C.A.A. due to these important environmental liabilities, the court granted General Chemical's secured creditor's application to appoint an interim receiver under the B.I.A. and liquidate the remaining assets of the company.\textsuperscript{81} The order appointing the receiver did not exempt the receiver or General Chemical from environmental regulations and did not prevent the environmental authority from issuing orders with respect to the contaminated property, but the order "expressly excluded the [contaminated property] from the property of [General Chemical] over which the interim receiver was appointed".\textsuperscript{82} When moving from a C.C.A.A. restructuring process to a B.I.A. liquidation process, the contaminated property was abandoned.\textsuperscript{83} Eventually, the interim receiver requested the court's authorization to make an interim distribution to the secured creditor of General Chemical. The Ministry of Environment ("M.O.E.") opposed the distribution, stating the interim receiver had failed to comply with environmental safety requirements and that the distributions were premature, considering that General Chemical had the obligation to meet the cleanup costs. The M.O.E. had a security on the contaminated property by virtue of section- 14.06(7) B.I.A., but, as the court put it, the site was "obviously more liability than asset".\textsuperscript{84}

\textsuperscript{77} \textit{Ibid} at para 42
\textsuperscript{78} \textit{Ibid} at para 60
\textsuperscript{79} 2006 CanLii 25540 (Ont Sup Ct) aff'd 2007 ONCA 600, leave to appeal to the Supreme Court dismissed 2008 CanLii 6391 (SCC)
\textsuperscript{80} \textit{Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd, supra} note 79 at para 6 (Ont Sup Ct)
\textsuperscript{81} \textit{General Chemical Canada Ltd. (Re),} (2005) 51 C.C.P.B. 297 at paras 1-3
\textsuperscript{82} \textit{Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd, supra} note 79 at para 41 (Ont CA); See also: \textit{General Chemical Canada Ltd. (Re), supra,} note 81 (Ont Sup Ct)
\textsuperscript{83} See: Government of Ontario, Environmental Registry, EBR Registry Number IA06E0078, available at URL: \url{http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MjcxMTA=&statusId=MjcxMTA=}
\textsuperscript{84} \textit{Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd, supra} note 79 at para 16 (Ont Sup Ct); The costs of remedying the site were estimated at $64 million.
The M.O.E. thus took position that the order to appoint the interim receiver would require it to comply with orders issued by the M.O.E. and argued for the applicability of the *Panamericana* principle.\(^{85}\)

The court found that, while the order did not exempt the interim receiver from compliance with environmental regulation and did not prevent the M.O.E. from issuing such orders, it did "not create a secured claim for the M.O.E.'s orders, nor [did it] suggest the M.O.E. ha[d] priority over the interests of secured creditors".\(^{86}\) Considering only *Panamericana* and *Strathcona County*, this should not matter since the orders, according to the *Panamericana* principle, should be considered duties owed to the public at large, not claims provable in bankruptcy. However, the court found differently in *General Chemical*:

> At first glance, the reasoning in *Panamericana* seems somewhat compelling. However, it must be kept in mind that it was decided before section 14.06(7) of the B.I.A. was enacted. It seems to me that section 14.06(7) now specifically legislates concerning the issue of priority of any environmental cleanup costs. That being the case, the provisions of the B.I.A. must take precedence over any provincial legislation. The field has now been occupied, and any provincial effort to extend further rights to the Crown in respect of environmental contamination must be viewed as being in conflict with the provisions of the federal statute.\(^{87}\)

Accordingly, the court concluded that "none of General Chemical, the interim receiver or the trustee have any obligation to pay cost of environmental cleanup" and that the M.O.E. could "be nothing more than an unsecured creditor in the General Chemical bankruptcy".\(^{88}\) To find otherwise, the court stated, would amount to give the M.O.E. a "quasi-priority to other unsecured creditors, and would defeat or delay the legitimate interests of secured creditors".\(^{89}\)

The dispute was taken up to the Ontario Court of Appeal, which agreed with the motion judge:

> I agree with the motion judge that the reasoning in [*Panamericana*] has been overtaken because of subsequent amendments to the B.I.A. Section 14.06(7) now expressly provides for priority to be accorded to environmental cleanup costs and s. 14.06(8) now ensures that a claim against a debtor for environmental cleanup costs is a provable claim. Neither were in

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\(^{85}\) *Ibid.* at para 54; Also see para 21: In 1997, the M.O.E. issued a Certificate of Approval to General Chemical, which required the company to provide for the closure of the contaminated site and obtained financial assurance of $3.4 million that would insure that the costs of closure would be paid for by the company. This financial insurance turned out to be insufficient when the costs of remediation were found to be around $64 million. The M.O.E. had previously tried to review the amount of the financial insurance, but the court had stayed this attempt under the C.C.A.A.; To the same effect, see: *Harbert Distressed Investment Fund, L.P.* v. *General Chemical Canada Ltd*, supra note 79 at para 40 (Ont CA)

\(^{86}\) *Ibid*

\(^{87}\) *Ibid* at para 57

\(^{88}\) *Ibid* at para 55

\(^{89}\) *Ibid* at para 46
effect at the time of Panamericana. To give effect to provincial environmental legislation in the 
face of these amendments to the B.I.A. would impermissibly affect the scheme of priorities in 
the federal legislation.\textsuperscript{90}

With these words from the Ontario Court of Appeal, we can safely say that the state of the law is 
presently to the effect that section 14.06(8) B.I.A. has overruled the Panamericana line of cases.\textsuperscript{91}
Following General Chemical, an environmental authority's only hope in recovering costs of 
environmental clean ups is the section 14.06(7) B.I.A. super-priority.\textsuperscript{92} If the contaminated property has 
no value though, the environmental authority is considered an unsecured creditor who may share the 
leftover assets of the bankruptcy estate on a pro rata basis after all secured and preferred claims have 
been paid off — which is generally not much, if anything.\textsuperscript{93}

3.3 Newfoundland v. AbitibiBowater Inc.\textsuperscript{94}

A rather particular set of facts gave rise to the dispute in AbitibiBowater. AbitibiBowater is one of the 
world's largest pulp and paper manufacturers. During more than a century, it carried industrial activities 
at several locations in Newfoundland, which resulted in the release of contaminants into the 
environment "in amounts, concentrations and at rates which have cause and could cause an adverse 
effect both on and adjacent to the [operating sites]" ("Abitibi Sites").\textsuperscript{95} While AbitibiBowater had spent 
over $100 million in environmental compliance and remediation efforts in the fifteen years prior to the 
closure of its mill operation in 2008, the Province of Newfoundland found that, at that time, it had not 
fulfilled all of its obligations under the Environmental Protection Act.\textsuperscript{96} When AbitibiBowater undertook 
to close its mill operations in Newfoundland, the Province of Newfoundland adopted the Abitibi Act,\textsuperscript{97} 
which essentially purported to expropriate most of AbitibiBowater's assets in Newfoundland.\textsuperscript{98} The

\textsuperscript{90} Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd, supra note 79 at para 46 (Ont CA)
\textsuperscript{91} Subject of course to the Supreme Court of Canada's pending decision in AbitibiBowater
\textsuperscript{92} s. 11.8(8) C.C.A.A.
\textsuperscript{93} Kevin P. McElcheran, supra note 23 at 33-34: "Once a formal insolvency process commences, all unsecured 
creditors remedies are stayed and the creditor must stand in line behind secured and preferred creditors and share 
any remaining recoveries in the estate pro rata with all other unsecured creditors. This [is an] often bleak outcome 
[...]".
\textsuperscript{94} supra, note 3
\textsuperscript{95} AbitibiBowater Inc. (Arrangement relatif â), 2010 QCCS 1261 at paras 44-46
\textsuperscript{96} Ibid at paras 47-53
\textsuperscript{97} On December 16, 2008; Abitibi Act, S.N.L. 2008, c. A-1.01
\textsuperscript{98} AbitibiBowater Inc. (Arrangement relatif â), supra note 95 at paras 54 and 59
dispute over the expropriation resulted in a NAFTA claim, which was later settled for $130 million, upon implementation of AbitibiBowater's restructuring plans.99

In April 2009, AbitibiBowater commenced restructuring proceedings under the C.C.A.A., as the changing global market for paper products and the large debt it had accumulated became unsustainable. Shortly after, environmental site assessments were conducted by a firm retained by the Province of Newfoundland at various Abitibi sites and reports concluded that they suffered from extensive contamination.100 The Province of Newfoundland thus emitted, in November 2009, environmental remedial orders requiring AbitibiBowater to complete site remediation actions by 2011.101 However, by virtue of the Abitibi Act, AbitibiBowater was not in possession of the Abitibi sites anymore. AbitibiBowater sought a declaration from the Superior Court of Québec, arguing that the orders were in substance financial and monetary and were likely to seriously impact its ability to effect a viable plan of arrangement. Indeed, it is estimated that the cost of complying with the orders would be "at minimum tens of millions of dollars, quite probably, well over 100, perhaps, much higher than that". 102

The Superior Court of Québec first affirmed that a court's jurisdiction under statutes such as the C.C.A.A. and the B.I.A. may be exercised in a "broad and flexible manner" as to facilitate their objectives.103 Accordingly, the court stated that it was well within its jurisdiction to characterize environmental remediation orders as proper regulatory orders or as provable claims and thus to "seek to uncover the true nature of [environmental remediation orders]."104 The characterization of the order will be

99 Factum of the Respondents AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc., Supreme Court of Canada, File Number: 33797 at para 33; According to AbitibiBowater, the damages resulting from the Abitibi Act totaled about $300 million. See: AbitibiBowater Inc. (Arrangement relatif à), supra note 95 at para 9
100 The initial order stated that it did not prevent the federal and provincial governments from exercising their powers, rights or duties in relation, among others, to the environment, except for "financial or monetary fines or orders". See: AbitibiBowater Inc. (Arrangement relatif à), supra note 95 at para 11; s. 11.1(2) C.C.A.A.
101 Under section 99 of the Environmental Protection Act, S.N.L. 2002, c. E-14.2: "Where the minister believes on reasonable grounds that a person responsible has contravened or will contravene this Act or the terms and conditions of an agreement, approval, amended or varied approval, license or an undertaking exempted or released under this Act, the minister may, whether or not that person has been charged or convicted in respect of the contravention, issue an order, in writing requiring a person at that person's own expense, to [...] (b) do all things and take all steps that are necessary to control, manage, eliminate, remedy or prevent an adverse effect or an environmental effect and to comply with this act [...]"
102 AbitibiBowater Inc. (Arrangement relatif à), supra note 95 at para 6
103 Ibid at para 143
104 Ibid at para 128
"influenced by who issues the order, who stands to benefit from it, what remains its genuine objective and what means of enforcement truly exist in reality". 105

Proceeding to this characterization, the court found that "the facts demonstrate[d] that the practical, intended and inescapable result of the [orders] [was] the creation of monetary claims" and that "money [was], clearly, the only remedy in this case". 106 Indeed, as current owner of the properties concerned by the remedial orders, the Province would stand to benefit financially from compliance with the orders. 107 Moreover, the court stated that environmental remedial orders directed to past owners could only be qualified as monetary:

While the dividing line between regulatory claims and their financial consequences may be blurred at times, there can be no confusing the two when the regulatory authority is seeking to make orders concerning solely past actions and activities in relation to properties that the debtor has disposed or been dispossessed of.

Sections 11.1(2) C.C.A.A. and 69.6(3) B.I.A. contain no comfort for a regulatory authority seeking to limit the Claims Procedure Order from impacting their plainly financially material actions with artificial distinctions about "regulatory" orders and "financial" ones. To an insolvent company in C.C.A.A. restructuring, an order to pay tens of millions of dollars directly is no different from an order to spend an equivalent amount on specific actions that will benefit others. 108 [Emphasis added]

Since AbitibiBowater did not own the properties which were subject to the orders, the court found the regulatory orders to be effectively unenforceable. It follows that the Province of Newfoundland did not really expect enforcement in nature. The court thus found it evident that the orders were in fact an attempt to "gam[e] the C.C.A.A. and the priority of creditor claims". 109

In addition, the court clearly disagreed with the Province of Newfoundland's position to the effect that the difference between a regulatory order and a monetary claim, is such a context, was whether or not it had taken the steps to do the remediation itself. This would amount to the Province of Newfoundland having discretionary power over whether or not its claim would be compromised under the C.C.A.A., which the court found to be "hardly a defensible position". 110

Considering the applicability of the Panamericana principle, the court affirmed:

105 ibid at para 160
106 ibid at para 161
107 ibid at paras 170 and 175
108 ibid at para 170-171
109 ibid at para 244
110 ibid at paras 245 and 273; See generally paras 237-248
Pivotal in [Bulora, Panamericana and Strathcona County] was the fact that the regulators involved were not acting as creditors, nor seeking recovery of a debt. They were rather public agencies seeking to enforce the general law of the province involved. None was deriving a direct pecuniary benefit through the compliance with orders issued. That no steps had been taken (i) to enforce the law at issue, (ii) to make the regulator involved a creditor or (iii) to seek recovery of money were also key findings adopted by the courts.

On top of that, in each of Panamericana, Strathcona County and Bulora (and in Lamford too), the debtors were still owner of the assets covered by the orders to be complied with. The court further stated the “present situation [was] unique” and that the Province of Newfoundland had "taken steps to make itself a creditor" because it could be inferred that it was "in truth seeking to recover a benefit for itself, if not simply money". The case distinguished itself from Panamericana because "the core of the Panamericana argument is that the receiver, having elected to operate the business, could not shirk its duty to follow a regulatory requirement arising from that very operation under general law". Going even further, the court stated that "the proof of contingent and unliquidated claims, combined with the "debt creating" provisions of a statute like the EPA, definitely allows for the Province to be qualified as a contingent creditor with an eminently provable claim". In other words, any environmental order that may be translated into a dollar amount is akin to a provable claim.

Finally, the court noted the Ontario Court of Appeal decision in General Chemical and reiterated that the 1997 B.I.A. and C.C.A.A. amendments effectively overruled the Panamericana principle. The Québec Court of Appeal subsequently affirmed this decision, dismissing the Province of Newfoundland’s motion for leave to appeal.

3.4 Nortel Networks Corporation (Re)

Nortel Networks is the most recent reported case that had to consider the "untidy intersection" of bankruptcy and insolvency law. As a result of Nortel’s manufacturing operations, which were "largely

111 Ibid at para 255-256  
112 Ibid at para 264  
113 Ibid at para 267  
114 Ibid at para 268  
115 2010 QCCA 965 at para 35  
116 supra note 2; See also: Northstar Aerospace, Inc. (Re), 2012 ONSC 4423; In the very recent Northstar Aerospace, Justice Morawetz, who also wrote the opinion in Nortel, restates the reasoning followed in Nortel and concludes that the Ministry of Environment is attempting to use an administrative order “to create a priority that it otherwise does not have access to under the legislation”. (at para 66).  
117 Ibid at para 7
terminated" in the late 1990s, environmental damage arising from past operations was identified at five locations.\textsuperscript{118} At the time of the C.C.A.A. filing, Nortel had sold most of the impacted sites, except for an interest in a damaged property in London, Ontario.\textsuperscript{119} After the filing, the M.O.E. issued a new order regarding the impacted London property, and prepared orders concerning three other contaminated properties.\textsuperscript{120} In response, Nortel sought an authorization from the court to cease performing remediation at or in relation to any impacted property and a declaration that environmental claims related to any of the five impacted sites be subject to the stay of proceedings and be treated as an unsecured claim to be compromised in the restructuring process. Nortel argued that the orders were "in substance and effect requirements [...] to pay money".\textsuperscript{121}

As it did in \textit{General Chemical}, the M.O.E. took the position that Nortel, "as a former and current owner of environmentally contaminated property, [was] subject to regulatory obligations under the [\textit{Environmental Protection Act}] which [were] in the nature of performance obligations".\textsuperscript{122} Such obligations, the M.O.E. argued, were not susceptible to be stayed pursuant to section 11 of the C.C.A.A. by application of the \textit{Panamericana} principle. The M.O.E. further argued that such obligations only become claims when "the regulator seeks to recover the costs of work the M.O.E. has done from the responsible party or where the regulator has committed to spending public funds to undertake such environmental remediation, even though the costs have not yet been incurred".\textsuperscript{123}

The Ontario Superior Court found issue with the M.O.E.'s position according to which performance obligations required by cleanup orders were not to be stayed. It rather found that the appropriate analysis was to measure whether or not the order had the effect of requiring the debtor to incur a financial obligation:

\begin{quote}
If the result of the issuance of the M.O.E. orders is that Nortel is required to react in a certain way, it follows, in the present circumstances, that Nortel will be required to incur a financial obligation to comply. [...] \\

It seems to me that the critical point to be determined is not the distinction between performance obligations and monetary obligations, \textbf{but rather it is whether the actions of the}
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item[118] \textit{Ibid} at para 9
\item[119] \textit{Ibid} at para 10
\item[120] \textit{Ibid} at para 11
\item[121] \textit{Ibid} at paras 2, 13 and 15
\item[122] \textit{Ibid} at para 17
\item[123] \textit{Ibid} at para 89
\end{enumerate}
\end{footnotesize}
M.O.E. are such that Nortel is required to react or respond to a step taken by the MOE and in doing so, incur a financial obligation. [...] 

For the purpose of Nortel's C.C.A.A. proceedings, what matters is that Nortel is obligated to undertake remedial work which will result in Nortel expending money. Any money expended by Nortel in respect to M.O.E. obligations is money that is directed away from creditors participating in the insolvency proceedings. The same insolvency considerations ought to apply regardless of who receives the money.  

The court, following General Chemical, also interpreted section 14.06(8) of the B.I.A. as meaning that environmental remediation costs are always provable claims in bankruptcy proceedings and stated that this was the case as soon as "the condition arose or the damage occurred". Moreover, it found this section to be evidence that "Parliament clearly directed its mind to the issue of creating an exception to s. 121(1) of the B.I.A. and [...] addressed the issue as to how environmental conditions and damage were to be addressed by an insolvent debtor" and dismissed Strathcona Country as ill-founded in law. Accordingly, the court stated that environmental authorities only remain unaffected by the stay of priority proceedings when the ongoing operations of a debtor justify ongoing compliance with environmental legislation. Otherwise, the environmental authority has to rely on its super-security, "failing which it has unsecured status".

3.5 Alsa Services Canada Inc. (Syndic de)  

In the recent case of Alsa Services, the insolvent debtor sought, in a C.C.A.A. context, an order preventing the environmental authority from engaging in environmental remediation proceedings, arguing that such proceedings were stayed by the initial stay order. The debtor essentially argued both the AbitibiBowater and Nortel cases, stating the environmental remediation proceedings implied a financial obligation would be incurred and thus should be stayed. The Superior Court of Québec first noted that one should be careful in the application of the AbitibiBowater case, as it dealt with a unique set of facts. Moreover, the court expressed reservations regarding the Nortel decision, stating that even if it were to accept its reasoning, it wouldn’t apply in the present case because Alsa Services still owned and operated on the contaminated property. Indeed, the court instead found that such regulatory

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124 Ibid at paras 106-109  
125 Ibid at para 120  
126 Ibid at paras 114-15  
127 Ibid at paras 116 and 125-126; See also para 121 in fine: "Section 14.06 of the B.I.A. makes it clear that any claim of the M.O.E. is a provable claim in a C.C.A.A. proceeding."  
128 See s. 69.6(2) B.I.A. and s. 11.1(2) C.C.A.A.  
129 Nortel Networks Corporation (Re), supra note 116 at para 116  
130 Alsa Services Canada Inc. (Syndic de), 2012 QCCS 3785
proceedings were exempted from the stay of proceedings by virtue of section 11.1(2) C.C.A.A., unless it could be established that the exemption would imperil the chances of coming to a viable arrangement and that it would not be against the public interest to do so. In stark contrast with *General Chemical* and *Nortel*, the court concluded that it would be against the public interest to stay the environmental remediation proceedings, considering the evidence showed that the contamination was leaking, dangerous and constituted a public health hazard.

### 3.6 Conclusion

As the law stands today, environmental authorities seeking to insure that the contaminated properties of an insolvent debtor are properly remediated will see their claims treated as monetary claims, to be compromised as any other ordinary debt in the course of restructuring proceedings. Even if the business operations are still undergoing on the contaminated property, it is not exactly clear that environmental remediation orders will be considered proper regulatory orders. Indeed, the Québec Court of Appeal in *AbitibiBowater* suggested that since environmental authorities could elect to do the remedial work themselves and thus create a monetary claim against the debtor, their claims may simply *always be* contingent monetary claims. Similarly, the Ontario Superior Court in *Nortel* suggested that an environmental order which implied that a debtor incur a financial obligation should always be considered a provable claim. 131 Unfortunately, regulatory orders of environmental nature almost always imply monetary disbursements. Considering the latest series of cases on the questions, it seems that an environmental authority’s only way to recover costs of remediation is through the exercise of its super-priority under sections 14.06(8) B.I.A. and 11.8(9) C.C.A.A. Unfortunately, this security may often be of dubious value.

### PART 2: CRITIQUE AND DISCUSSION

The present situation is obviously problematic both for environmental authorities and citizens. The latest line of authority creates an incentive for insolvent corporations to proceed to abandon worthless contaminated properties, a procedure by which environmental claims are more likely to be considered "past claims" and thus characterized as simple monetary claims to be compromised in the restructuring proceedings. Yet, as a commentator rightfully noted, abandoning environmentally contaminated property "is more like leaving a baby in a basket on someone’s doorstep than kicking your dog out of the

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131 *Nortel Networks Corporation (Re)*, *supra* note 116 at para 122
In our case, abandonment is akin to "leaving a baby in a basket" at the doorstep of both the environmental authority and the taxpayer.

In this section, I will first proceed to a detailed policy analysis of the enactment of the abandonment right for environmentally contaminated properties. Throughout this analysis, I will present the effects of the adoption of these provisions on all affected parties and suggest that they constitute bad policy. Secondly, I will critique the most recent line of authority and question the reasoning behind the departure from the "polluter pays" principle. Finally, I will draw from both these analyses useful takeaways for suggesting proposals that can help clean up the "grubby" intersection of insolvency and environmental law.

1. The Abandonment Right and the "Super-Priority": Bad Policy for the Environment

It is clear that the position of the latest line of cases regarding the status of environmental authorities has at least in part been triggered by the interpretation of the legislative amendments that occurred in 1997. It seems however highly doubtful that the outcome of cases such as General Chemical and Nortel was the intended purpose of the amendments. Indeed, an overview of the available parliamentary materials tends to show that the objective of the legislation was to prevent contaminated land abandonment and protect insolvency professionals from environmental liability. An analysis of both the abandonment right and the "super-priority" shows that these mechanisms far from represent the stated intent of "protect[ing] the position of the environmental authorities".

- The abandonment right does not protect the insolvency practitioner from environmental liability and is unrelated to the underlying rationale of the amendments

When considered in the light of the problems which had surfaced in Bulora, Panamericana, and Lamford Forest, it is not exactly clear why the legislator has decided in 1997 to provide trustees and receivers

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133 Canada, House of Commons, Standing Committee on Industry, Bill C-5, An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act and the Income Tax Act, 35th Leg, 2nd Sess, Meeting 18 (18 September 1996) at 1640: "The major problem is orphaned sites. The problem we face is that most provincial legislation says that if you take possession you have the responsibility to clean up the property. If a trustee in bankruptcy takes possession, it incurs the personal liability to clean up the property unless it can prove it was diligent. No one knows what constitutes due diligence. [...] It has not been clearly spelled out, and the result is that trustees won't take possession". (David E. Baird, Co-Chair of the Bill C-5 Review Task Force)
134 Canada, House of Commons, Standing Committee on Industry, Bill C-5, An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act and the Income Tax Act, 35th Leg, 2nd Sess, Meeting 25 (25 September 1996) at 1715 (Gordon Marantz, Legal Advisor for the Department of Industry)
with an abandonment right. Indeed, as we have seen supra, the main issue raised by Bulora and Panamericana was the lack of protection from environmental liability for insolvency practitioners. This potential personal liability resulted in insolvency practitioners becoming unwilling to manage insolvencies of debtors with potential environmental liability without proper assurance that they would not be held personally liable\(^ {135}\) and this resulted in orphaned contaminated sites. A review of the evidence produced by the Parliamentary Committee charged with the reform of the insolvency legislation shows that the main concern for the reform was that “the insolvency community ha[d] been seeking to find a mechanism to make sure that responsible individuals [were] not going to be afraid to take on problem sites”.\(^ {136}\) While there was an obvious advantage to provide insolvency practitioners with immunity from environmental liability because it allows a trustee or receiver “to take possession, to arrange for an assessment of the cost of the environmental clean-up”\(^ {137}\) and “puts a responsible person in charge of an environmentally troubled property”,\(^ {138}\) allowing insolvency practitioners to abandon contaminated sites when the costs of the environmental clean-up exceed the realizable value of the property greatly decreases the probability of decontamination work getting done.

- **The abandonment right provides protection from environmental liability to the lending community at the environment’s expense**

Effectively, the abandonment right does not provide protection to insolvency practitioners – it provided a form of protection from environmental liability to the lending community. Because Bulora, Panamericana and Lamford Forest found compliance with environmental orders to be duties owed to the public at large – and thus found them to be top-ranking administrative expenses – they rendered the whole bankrupt estate liable for the costs of remediation. From a policy perspective, this position makes sense: those who indirectly benefited from the contamination of the land (creditors) are to be liable for environmental remediation.\(^ {139}\) Evidence from the Parliamentary Committee charged with the reform of the law suggests that the environmental liability found in Bulora, Panamericana and Lamford Forest did

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\(^{135}\) Kevin P. McElcheran, *supra* note 23 at 173-174; *Re : Lamford Forest Products Ltd.*, *supra* note 55

\(^{136}\) Canada, House of Commons, *supra* note 67 at 1620 (Daniel Dowdall, member of the national bankruptcy and insolvency section of the Canadian Bar Association)

\(^{137}\) Canada, House of Commons, *supra* note 133 at 1645

\(^{138}\) *Ibid*

\(^{139}\) This position is also consistent with the Canadian Council of Ministers of the Environment’s Recommended Principles on Contaminated Sites Liability: Canadian Council of Ministers of the Environment, *Recommended Principles on Contaminated Sites Liability* (2006) at 4-5 and 9
not seem to generate many problems in the lending community. Indeed, David Dowall, representing the Canadian Bar Association at the Parliamentary Committee, stated:

At the point of lending, it’s quite common for them to do an environmental review on a property. They assess what activities are going to be conducted on the property. They’ve learned to deal with that risk with individual properties.140

Because sections 14.06(4) B.I.A. and 11.8(5) C.C.A.A. allow insolvency practitioners to abandon contaminated property when the costs of remediation exceed the realizable value of the property and because the Crown’s priority for remediation costs is limited to the contaminated land,141 the bankruptcy estate’s liability towards the environmental remediation is only limited to the value of the abandoned property which may well be null, if not negative. This is a perverse effect of the “super-priority” for remediation costs provided by sections 14.06(7) B.I.A and 11.8(8). As I will explain infra, this “super-priority” is of very limited use for the Crown in recovering the costs of remediating an environmental condition.

- The abandonment right compartmentalizes and externalizes the costs associated with operating and dealing with environmentally risky businesses

This effective limitation of the extent of the environmental liability has enabled creditors to protect themselves from environmental liability by lending money to environmentally risky businesses in exchange for security interests in property that is not susceptible of contamination. While evidence from the Parliamentary Committee suggests that members of the Committee and lenders were worried about the effect of the Crown’s “super-priority” on the lending climate,142 it seems that the abandonment right, coupled with the “super-priority”, have enabled lenders to circumvent all environmental liability affecting an insolvent or bankrupt corporation by simply avoiding to accept land that could get contaminated as security. In such circumstances, if the clean-up costs are greater than the value of the property, the Crown would have to proceed to the clean-up at the taxpayer’s expense in the hope of being able to sell the property and exercise its security.

140 Canada, House of Commons, supra note 67, at 1605
141 Section 14.06(8) B.I.A.; The Crown can have an ordinary claim for the remainder of the costs of remediation but the prospects of getting paid as an ordinary creditor in a bankruptcy are bleak.
142 Canada, House of Commons, Standing Committee on Industry, Bill C-5, An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act and the Income Tax Act, 35th Leg, 2nd Sess, Meeting 26 (26 September 1996) at 1145
The recent case of *General Chemical*[^143] is an illustrative example of this compartmentalization. Because the Crown’s ability to recover expenses related to environmental clean-ups is limited to the value of the contaminated land, General Chemical’s secured creditor had lent money against the assets that were not likely to be affected by environmental liabilities.[^144] As a result, when the contaminated property was abandoned,[^145] the creditor bore no loss related to the environmental liability. The compartmentalization of environmental liabilities that results from the abandonment right and the super-priority enables secured creditors to lend money to businesses that engage in environmentally risky behavior while bearing almost no exposure to the environmental liabilities that may arise from the operation of these businesses. Moreover, in cases where the contaminated properties are worthless, it leaves the environmental authority and the taxpayer to bear the responsibility of proceeding to clean-ups and appropriate closure of the sites.

- **The abandonment right gives insolvency professionals significant negotiating leverage against the environmental authority**

In the event that there is equity in the contaminated property beyond the costs of remediation, it may become commercially interesting for creditors to avoid the abandonment of the land in order to find a buyer for the property. Such an outcome is generally in the better interest of all parties because it enables creditors to obtain some recovery from the property and ensures that a buyer will come into possession of the property and look after its long-term safety and remediation. In order to increase the likelihood of finding a willing buyer, it is common practice for insolvency professionals to come into agreements with the environmental authorities, whereby the insolvency professional agrees to perform some environmental work (assessments, waste disposal, protective actions) and sets aside a fund, generally a fixed proportions of the sale proceeds, “to pay for liabilities that the Ministry cannot recover from others”[^146]. With the advent of the abandonment right and the super-priority, clean-up costs only rank as an administrative expense to be paid for out of all the assets of the estate in priority to all other claims if the property is not abandoned.[^147] If the property is abandoned, the Crown is granted the

[^143]: supra note 79
[^144]: *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada*, supra, note 79 at para 42 (Ont CA)
[^145]: See: Government of Ontario, Environmental Registry, supra note 83
[^146]: Robert M. Fishlock, *supra* note 63 at p. 20; Dianne Saxe, *supra* note 9 at p. 11-12
[^147]: At the time of Bulora, Panamericana and Lamford Forest, the trustee did not have the choice to either comply with a remediation order or abandon the property. It had the obligation to comply with the order, and thus the remedial costs ranked as administrative expense. Insolvency professionals and the environmental authority would still come to agreements to circumscribe the environmental liability and increase the chances of finding a buyer.
“super-priority” against the contaminated property, which presumably is completely worthless.\textsuperscript{148} This uneven balance puts strong pressure on the Crown to strike a deal with the insolvency practitioner at any cost to persuade insolvency practitioners not to abandon damaged property: it is better to have at least some money go towards remediation with chances to find a purchaser than to see the property abandoned with nothing of value to hedge the clean-up costs.\textsuperscript{149} Without the abandonment right, the Crown was in a better bargaining position because the insolvency practitioner had an obligation to comply with the remediation order. Coming to an agreement with the environmental authorities was therefore always in the best interest of the insolvency practitioner and the creditors because it allowed to limit “the proportion of proceeds to be devoted to environmental matters”.\textsuperscript{150}

- The abandonment right is devoid of a framework that guarantees safe abandonment

Most importantly perhaps, the legislative mechanism does not take into consideration, for the protection of an environmental authority’s interest in decontaminating a property, essential and important facts such as the emergency or threat a particular situation represents. As such, no mechanism actually guarantees that the abandonment right is exercised in a way that is environmentally safe. For comparison, the Supreme Court of the United States of America, in \textit{Midatlantic National Bank v. New Jersey Department of Environmental Protection},\textsuperscript{151} held that bankruptcy courts should not authorize the abandonment of contaminated property if it would violate a state statute or regulation that was designed to protect public health and welfare.\textsuperscript{152} Although the decision has not ended “the conflict regarding when contaminated property can be abandoned”,\textsuperscript{153} it has at least been interpreted as preventing abandonment in situations of imminent risk of serious health threats\textsuperscript{154} and at most been

\textsuperscript{148} It was, after all, abandoned.
\textsuperscript{149} Dianne Saxe, \textit{supra}, note 9, p. 16-17; Robert M. Fishlock, \textit{supra}, note 63, p. 20
\textsuperscript{150} Because the trustee had to comply with the remediation order, it was always in the best interest of the estate to limit the proportion of proceeds to be devoted to environmental matters. It was also in the best interests of the Crown to come to an agreement, because unlimited liability could lead to there being no purchaser for the contaminated property and the property being abandoned as a result of a lack of funds in the bankruptcy estate. However, the liability of the bankruptcy estate being unlimited without an agreement, the environmental authority was in a much better bargaining position.
\textsuperscript{151} 474 U.S. 494 (1986)
\textsuperscript{152} \textit{Ibid} at 507
\textsuperscript{154} e.g.: \textit{In re Smith-Douglass}, 856 F.2d 12 at 16 (4\textsuperscript{th} Cir. 1988); \textit{In re L.F. Jennings Oil Co.}, 4 F.3d 887 at 890 (10\textsuperscript{th} Cir. 1993)
interpreted as requiring full compliance with environmental standards.\textsuperscript{155} The absence of such a mechanism in Canadian bankruptcy law seems senseless as it is clear that insuring the public health and safety from environmental threats should be of paramount importance, even in the context of bankruptcy. As a commentator rightfully noted:

Note that nothing in the amendments requires either the trustee or the court to distinguish between urgent needs to prevent future irreparable harm (which exist in cases such as [...] Panamericana), and other provincial environmental requirements, which have no special reason to "trump" other monetary claims". This is most unfortunate, and will lead to unnecessary hardship, injustice and waste.\textsuperscript{156} [Emphasis added]

Perhaps the legislator had not envisioned its legislation being interpreted as it was in \textit{General Chemical} and \textit{Nortel}. As the law stands today however, adopting safeguard mechanisms against abusive abandonment seems absolutely necessary.

- \textit{The "super-priority" essentially provides no additional protection to environmental authorities}

The adoption of the super-priority for the Crown's expenses related to environmental remedial work has been described as a will to "protect the position of the environmental authorities" during bankruptcy and restructuring proceedings.\textsuperscript{157} However, this "super-priority" is only useful for environmental authorities if there is residual value in the property after the costs of remediation. Indeed, if the property is more liability than assets, it will simply be abandoned.\textsuperscript{158} The environmental authority will then acquire title to the property, but considering the property is presumably more liability than asset, it is hard to see how the position of environmental authorities is protected. Moreover, while the "super-priority" may be useful when there is residual value in the property after the costs of remediation, it would effectively be no different without this protection. As was noted at the Parliamentary Committee charged with reforming insolvency legislation:

Functionally, the fact of contamination already operates as a priority for the clean-up costs, because if you have a mortgage on contaminated land and you try to sell it under a power-of-sale proceedings you're going to end up getting the discounted value of the property; in other

\textsuperscript{155} e.g.: \textit{In re T.P. Long Chem}, 45 B.R. 285 at 286 (Bankr. N.D. Ohio 1985); \textit{In re Wall Tube & Metal Products Co.}, 831 F.2d 118 at 122-123 (6th Cir. 1987); \textit{In Re Stevens}, 68 B.R. 774 at 780 (D. Me. 1987); \textit{In re Peerless Plating Co.}, 70 B.R. 943 at 948 (Bankr. W.D. Mich. 1987)

\textsuperscript{156} Dianne Saxe, \textit{supra} note 9 at p. 17

\textsuperscript{157} Canada, House of Commons, \textit{supra} note 134 at 1715

\textsuperscript{158} Robert M. Fishlock, \textit{supra} note 63 at p. 20
words, discounted by the value of the clean-up. So at a functional level there already exists a priority in the land for the clean-up expense.\(^{159}\)

A similar statement was given at the Standing Senate Committee on Banking, Trade and Commerce:

If there is net economic value to the property after the contaminated situation is dealt with, this super-priority will be irrelevant, because the owner of the property, or the bank, if it forecloses, will have to attempt to clean it up anyway. This creates a situation such that when there is no net economic value to the property, the Crown or the authorities have a legal instrument through which to take possession of the property and deal with it.\(^{160}\)

Essentially, the "super-priority" only provides clarification to the effect that when a contaminated site is abandoned, the environmental authority can at least get title of the property if it decides to undertake the remediation work.

2. Interpreting Flawed Legislation: General Chemical, Abitibi and Nortel

It must be noted however that the impact of the 1997 amendments would not have been the same had they been interpreted differently. Indeed, the state of the law today largely stems from the inherent ambiguity of the provisions of the B.I.A. and C.C.A.A. related to environmental liability. While the courts in General Chemical, Abitibi and Nortel concluded that the amendments "overruled" the Panamericana principle,\(^{161}\) the evidence produced by the parliamentary committee appointed to reform the insolvency legislation generally do not corroborate this finding. On the contrary, the parliamentary materials rather seem to support the position of the Ministry of Environment in Nortel, which argued that the "super-priority" was "only created where the regulator seeks to recover the costs of work the M.O.E. has done from the responsible party or when the regulator has committed to spending public funds to undertake such environmental remediation, even though the costs have not yet been incurred".\(^{162}\) In fact, it appears from these materials that the "super-priority" was enacted to have a close relationship with the abandonment right and officially enable environmental authorities to gain title when the contaminated property is abandoned and the authority proceeds to its remediation. For example, Mr. Jacques Hains, Director of the Corporate Law Policy Directorate at the Department of Industry Canada, stated:

\(^{159}\) Canada, House of Commons, supra note 67 at 1605 (Daniel Dowdall, member of the national bankruptcy and insolvency section of the Canadian Bar Association)

\(^{160}\) Canada, Standing Senate Committee on Banking, Trade and Commerce, supra note 63, p. 9

\(^{161}\) Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd, supra note 79 at para 57 (Ont Sup Ct) aff'd at para 46 (Ont CA); AbitibiBowater Inc. (Arrangement relatif à), supra note 95 at para 267; Nortel Networks Corporation (Re), supra note 2 at para 120

\(^{162}\) Nortel Networks Corporation (Re), supra, note 2 at para 88
What is happening now has to do with legal chaos and vacuum. No one knows who holds the title or who is responsible for cleaning [abandoned sites] up. If the regulator cleans it up and restores the land to a marketable value, technically, the owner of the land still has the title, not the regulator. Well, this proposal will clear that up. [...] The proceeds from selling this clean asset will first go to society for the cleanup.163 [...] 

If the super-lien is not enough to reimburse the Crown totally, the unsatisfied claim would now be recognized as an ordinary secured claim on the remainder of the estate of the bankrupt enterprise. [Emphasis added]

Accordingly, it seems somewhat errant for the courts to state that the Panamericana principle has effectively been overruled by the legislation in General Chemical, Abitibi and Nortel. It may be that it is not applicable to factual situations where an environmental authority is disguising a monetary claim as a regulatory order, but stating that Panamericana is unequivocally overruled implies that as soon as a debtor enters a bankruptcy or restructuring process, environmental authorities lose all administrative powers against the debtor if they imply that costs will be incurred, even if the debtor is still in possession of the property. No other conclusion can be drawn from the Ontario Superior Court's statement in Nortel that an environmental remediation order must be stayed if the debtor "is required to react or respond to a step taken by the MOE and in doing so, incur a financial obligation".164 Similarly dangerous is the Superior Court of Québec's suggestion in Abitibi to the effect that when an environmental statute contains a "debt creating" provision,165 any order that has the effect of requiring monetary disbursements constitute contingent monetary claims.166 Environmental authorities may issue very legitimate administrative orders. The fact that they may require some expenditure of money is a simple corollary of the regulatory requirements — very much like respecting securities or workplace safety regulations requirements may imply financial costs.

Recently, prominent environmental lawyer Dianne Saxe concisely presented the issue at stake: "When is a regulator deemed a regulator, and when is it just a creditor?".167 The Ontario Superior Court's answer in Nortel is overly simplistic: if the order will result in the debtor expending money, it is money directed

163 Canada, Standing Senate Committee on Banking, Trade and Commerce, supra note 63 at p. 9
164 Nortel Networks Corporation (Re), supra note 2 at para 106
165 i.e. A provision that enables the authority to do the remediation work itself and thus "create" a debt owed to itself by the debtor.
166 "AbitibiBowater Inc. (Arrangement relatif à), supra note 95 at para 267
away from creditors and the environmental authority should be considered a creditor.\textsuperscript{168} Similarly, in \textit{General Chemical}, the court interpreted of section 14.06(8) B.I.A. as ensuring that environmental remediation orders are provable claim. This conclusion is in no way supported by any of the parliamentary materials and it seems clear that the provision was adopted to protect the position of environmental authorities who decide to undertake environmental remediation work after the time of bankruptcy.\textsuperscript{169} It is evidently convenient to dismiss environmental claims as monetary debts, as it is much easier to deal with a provable or contingent claim rather than an injunctive relief that may postpone a distribution of assets or the implementation of a restructuring plan. However, obvious reasons justify characterizing environmental authorities as regulators rather than creditors. Looking past the sophisticated gloss of technicality, the reasoning in \textit{Bulora, Panamericana} and \textit{Lamford Forest} concerning the status of environmental authorities of "regulators" and not "creditors" is sound: they are attempting to enforce compliance with environmental legislation to protect public health and the environmental safety of citizens at large. The fact that the debtor is insolvent does not change the nature of the duty performed by the environmental authority. Indeed, relegating the environmental authority to the status of ordinary creditor anytime an environmental order requires expenditures of monies would be nothing short of a travesty.

This does not mean however that courts should lose their legislatively recognized authority to stay monetary claims that are disguised as environmental orders or that environmental remediation order should never be subject to compromise.\textsuperscript{170} For example, in \textit{Abitibi} the Province of Newfoundland had expropriated AbitibiBowater of all their assets in Newfoundland with the explicit purpose of offsetting AbitibiBowater's environmental liability.\textsuperscript{171} This would suggest that the environmental authority's additional efforts to see the remediation orders unaffected by the stay of proceedings may legitimately be assimilated to an attempt to enforce a payment.\textsuperscript{172} But systematically denying environmental authorities their status of regulator when their orders require expending some money is akin to denying the importance of environmental protection, which has been described by the Supreme Court of Canada

\begin{footnotes}
\item[168] Nortel Networks Corporation (Re), supra note 2 at para 107
\item[169] See supra, note 67
\item[170] s. 11.1(2) C.C.A.A.; s. 69.6(2) B.I.A.
\item[171] Newfoundland and Labrador, House of Assembly, \textit{Proceedings of the House of Assembly of Newfoundland and Labrador (Hansard)}, Vol. XLVI, Bo. 51 (Dec. 16, 2008), at pp. 10-11; The Premier of Newfoundland and Labrador stated that "what [they] ha[d] done to the \textit{Abitibi Act} is basically protect any environmental liability".
\item[172] As it was characterized in \textit{AbitibiBowater Inc. (Arrangement relatif à)}, supra, note 95; Especially considering the fact that the Province of Newfoundland would directly stand to benefit from any compliance with the environmental orders, as the costs of remediation had already been offset by the expropriation.
\end{footnotes}
both as a "fundamental value in Canadian society"\textsuperscript{173} and "a public purpose of superordinate importance".\textsuperscript{174} In both \textit{Nortel} and \textit{General Chemical} for example, the environmental authority had a legitimate regulatory purpose in seeking to enforce the environmental orders. Indeed, Nortel had remaining contractual obligations to remediate the contaminated properties, even if they had been sold. General Chemical had obligations regarding the appropriate disposal of its contaminated dump site, even if it had been abandoned during the proceedings.

However, as the court noted in \textit{Abitibi}, the "dividing line between regulatory claims and their financial consequences may be blurred at times" and that obviously is the case in \textit{Abitibi}.\textsuperscript{175} The general reluctance to the environmental authorities' argument that remedial orders only become monetary when the remediation work has been undertaken is very understandable. Environmental authorities should not hold the discretionary right to \textit{choose} to remain unaffected by the stay of proceedings by not undertaking the remediation work. Conversely, I am equally reluctant to the statement put forward in \textit{Abitibi} that environmental remediation orders issued in relation to properties that the debtor has disposed or been dispossessed of are necessarily monetary claims.\textsuperscript{176} Debtors should not have the discretionary right to \textit{choose to abandon} contaminated properties so that remediation orders issued against them become characterized as monetary claims. Starting from the premise that proceedings from "regulatory bodies" should remain unaffected by the stay of proceedings because they serve higher public purposes that should not be compromised or stayed,\textsuperscript{177} the fact that the regulator has undertaken the remediation work or the fact that the debtor has abandoned the property should not matter at all in the consideration of whether or not the action is regulatory or monetary. Basing the analysis on whether or not the order causes the debtor to incur a financial obligation is also flawed: the expenditure of money is a natural consequence of almost all environmental orders. Discussing this very issue, the Third Circuit of the United States Court of Appeals rightfully noted: "almost everything costs something".\textsuperscript{178}

Environmental remediation orders, by virtue of sections 11.1(2) C.C.A.A. and 69.6(2) B.I.A., should \textit{a priori} be considered valid and exempt from the stay of proceedings, because they serve in principle a public safety purpose that should not be compromised. Under sections 11.1(3) C.C.A.A. and 69.6(3)

\textsuperscript{173} \textit{Ontario v. Canadian Pacific Ltd.}, [1995] 2 S.C.R. 1031 at para 85
\textsuperscript{175} \textit{AbitibiBowater Inc. (Arrangement relatif à)}, supra note 95 at para 170
\textsuperscript{176} \textit{Ibid}
\textsuperscript{177} Canada, Senate, Standing Committee on Banking, supra note 34 at 161
\textsuperscript{178} \textit{Penn Tera Limited v. Department of Environmental Resources}, 733 F. 2d 267 at 278 (3d Cir. 1984)
B.I.A., the debtor or any person likely to be affected by a regulatory order may apply to the court in order to extend the application of the stay to regulatory proceedings if it is not against the public interest to do so and they compromise the ability to come to a viable proposal. It follows that, if an environmental authority issues an order that is essentially a disguised monetary claim (as it seems to be the case in Abitibi), it could be stayed by application to the court because staying such a monetary claim would presumably not be against the public interest. This should be the analysis required to determine when an environmental remediation order is a monetary claim: would it be against the public interest to stay the order? Would it be risky for the health and environment of the surrounding citizens? Proceeding in this way would recognize the fact that, even when environmental remediation claims require some expenditure of money, they actually serve the “fundamentally important” purpose of protecting the public health and environment. This is precisely the reasoning the Québec Superior Court followed in Alsa Services, which seems to be the most sensible interpretation of section 11.1(2) C.C.A.A. and of the application of the stay of proceedings to environmental remediation orders. In the United States of America, the line has been drawn by adopting a "past damage/future harm" test, where orders attempting to compensate for past injuries and reducible to a sum certain are stayed, while orders requiring the prevention of future harm are exempted, whether they require an expenditure of money or not.

3. Conclusion

The 1997 amendments had the unfortunate effect of making the recovery of remediation costs depend on the residual value of the property after the remediation and on the decision of the trustee or the receiver to abandon or not the property. This creates quite a peculiar situation: a contamination or spill is remediated only if fortune has it that it occurs on a property that is worth more than the remediation costs. In addition, in the latest line of authority, courts have made statements that have the effect of making the recovery of remediation costs depend on such facts as whether the contamination is "past" or "present" or whether the debtor currently owns the property or not, even if it has been abandoned.

179 Québec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 129 at para 71; In the recent case Alsa Services Canada inc. (Syndic de), supra note 130, the Québec Superior Court precisely came to the conclusion that the environmental remediation order was exempted from the stay of proceedings pursuant to section 11.1(2) C.C.A.A. and that the stay of proceedings could not be extended to the remediation order because, considering the danger of the contamination, it would be against the public interest. (See paras 47-55)

180 Penn Tera Limited v. Department of Environmental Resources, supra note 178 at 278; This test has been challenged but remains widely accepted: Lonnie T. Kishiyama, supra, note 153 at 8 citing: United States v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077 at 1086 (3d Cir. 1987); In re Commonwealth Oil Ref. Co., 805 F.2d 1175 at 1186-1187 (5th Cir. 1986); United States v. Hubler, 117 B.R. 160 at 165 (Bankr. W.D. Pa. 1990); United States v. ILCO, 48 B.R. 1016 at 1024 (Bankr. N.D. Ala. 1985)
during the insolvency proceedings. This is a major issue. The state of the law today determines whether or not environmental authorities will obtain recovery based on factors that are completely unrelated to the seriousness of the contamination and the danger it poses for the public health and the environment.

What *General Chemical*, *Abitibi* and *Nortel* demonstrate however is that compromise in insolvency may be absolutely necessary, even for remediation orders that serve a fundamentally important public purpose. As such, the *Panamericana* principle and a dogmatic application of the "polluter pays" principle for the enforcement of the full liability cost may be counter-productive in insolvency situations. While the ideal situation may be the full application of the polluter pays principle, practically, no party gets everything it is after in insolvency proceedings. As such, the paramount principle should not necessarily be to "make the debtor pay". Our first priority should be to ensure we can have environmentally safe insolvencies and restrukturings by securing dangerous sites and putting forward plans to find successors for contaminated properties, even if it means that some money will be directed away from creditors. For environmental authorities and the population at large, the worst case scenario is land abandonment and the state of the law today incentivizes this behavior.

**PART 3: PRIORITIZING ENVIRONMENTAL REMEDIATION**

The intersection of insolvency law and environmental law is consistently described as "untidy", "grubby", "conflicting", "diametrically opposed", as an "eternal conflict", with one commentator going as far as describing it as a "clash of the Titans". In truth, there is nothing inherently exceptional about environmental obligations that make them absolutely incompatible with bankruptcy legislation. Indeed, one could also say that creditors' rights are "diametrically opposed" to insolvency legislation. The only difference is that in the latter case, there is a clear and effective framework for the resolution of creditors' claims. As a commentator rightfully noted, environmental

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181 *Nortel Networks Corporation (Re)*, supra note 2 at para 7
182 *Matter of Chicago, Milwaukee St. Paul & Pacific R.R. Co.*, supra note 1
184 Mary W. Koks, "Environmental Claims in Bankruptcy", Mealey's Environmental Litigation Conference, April 18-19 2005, Houston TX at 1
protection laws and insolvency laws "need not be viewed as mutually antagonistic".\textsuperscript{187} What is needed is a framework for the treatment of environmental claims in insolvency that disposes of the uncertainties currently created by the lack of clarity and that responds to the need of protecting the population from public health and environmental hazards.

1. Comment on \textit{Abitibi} in the Supreme Court of Canada

For this reason, I think that even if the Supreme Court of Canada rendered a decision favourable to the environment in \textit{Abitibi}, it would ultimately be insufficient in resolving the issues that arise from the intersection of bankruptcy and insolvency law. For example, even if it is unlikely in the case of \textit{Abitibi} given the fact that the Province of Newfoundland has expropriated AbitibiBowater of its assets in Newfoundland, the court could find that environmental remediation claims generally should be considered to be regulatory in nature, even if they imply some expenditure of money. The issue is that the facts in \textit{Abitibi} tend to show that the nature of the Province of Newfoundland's environmental orders is at least more monetary than regulatory. On the assumption that the Supreme Court of Canada will hold that environmental remediation orders should be exempted from the stay of proceedings, which in itself is somewhat doubtful considering \textit{Abitibi} and \textit{General Chemical}, it will still have to adopt some form of test to determine whether orders are regulatory or monetary. For example, the court could establish a test similar to the \textit{Penn Terra} past damage/future harm test, where expenditures of money for future harm are not stayed but those for past injuries reducible to a sum certain are.\textsuperscript{188} Such a judgement would surely yield better protection of the environment in bankruptcy and insolvency cases.

However, this solution would be far from perfect. First of all, despite the establishment of a new "test", the result will still be lengthy and costly litigation. Debtors going through bankruptcy or restructuring processes will still presumably apply to the court to attempt to stay environmental remediation orders. In turn, environmental authorities will still have to wait for the debtor to comply with the orders, which may take years if there is ongoing litigation. Second, because environmental remediation orders do not necessarily have a "fixed" price tag, they have the potential to be extremely detrimental to the restructuring efforts of an insolvent corporation. Without any assurance as to the costs of remediation and the remediation efforts being constantly subject to the approval of the environmental authority,


\textsuperscript{188} \textit{Penn Tera Limited v. Department of Environmental Resources}, supra note 178 at 278
insolvent corporations may be prevented from implementing viable plans of arrangement or proposals. It follows that, even in the case of a decision of the Supreme Court favourable to the environment in *Abitibi*, legislative reform has the potential to bring better, more comprehensive solutions to the problem.

2. True super-priority for environmental remediation costs

Most of the complexities that arise from the intersection of bankruptcy and insolvency stem from the still unanswered question of whether or not the stay of proceedings applies to environmental remediation orders. As noted *supra*, *it should not really matter* whether the orders are regulatory or monetary: they ought to have priority because they serve a higher public purpose. While the exemption of the stay of proceedings for regulatory proceedings may or may not have been originally seen to encompass environmental remediation orders, the easier solution would be to eliminate the need for environmental authorities to proceed by regulatory order. Incorporating a legislative super-priority over all or most other creditors (secured and unsecured) for the costs of environmental remediation would eliminate that need. While the existence of the abandonment right has also been identified as an important issue, it is only an issue because the "super-priority" given to environmental authorities when contaminated land is abandoned is clearly insufficient. Amending the insolvency laws to include a legislative priority for the costs of environmental cleanup would also remediate that issue and eliminate the possibility of unloading an environmental liability on taxpayers.

The biggest concern with contaminated properties is their threat to public health and safety. Introducing a priority rank for cleanup costs eliminate the need for litigation over the question of whether or not an environmental remediation order is "regulatory" or not. A priority allows environmental authorities to undertake immediate remediation activities at the damaged sites without having to wait for compliance with administrative orders. While this may seem to be a drastic solution, it is only the result of a complete internalization of the environmental costs of having operated an environmentally risky business and reflective of the fact that environmental policies have high societal value.\(^{189}\)

Adopting such a policy stance would force creditors to internalize the costs related to the risks of environmental damage when considering whether or not to finance environmentally risky corporations. Opponents to such a reform would presumably argue that it would prohibitively increase the costs of

\(^{189}\) This policy would also be consistent with the Canadian Council of Ministers of the Environment's Recommended Principles on Contaminated Sites Liability: see *supra* note 139 at pp 4-5 and 9
credit. However, this is precisely the objective: if the operations of a corporation are so environmentally risky that there is a need to externalize the costs of environmental risks for its financing to be commercially attractive, the corporation should simply not obtain financing. Why should the population and the taxpayer bear risks that creditors themselves are not willing to bear? It could also be argued that it is unfair for creditors who did not actively participate in the operation of the business to bear the costs of remediation. It should be noted that they indirectly benefit by making a profit from lending funds to businesses that run environmentally risky operations and that sound lending practices include risk management and pricing that reflects the level of risk.

Such a proposal is not particularly far-fetched or unconventional: commentators have advocated for different forms of priority for environmental remediation costs in the United States.\(^{190}\) Likewise, in the United States, eight States have enacted environmental protection statutes that provide state environmental agencies with "liens of a special, higher priority, called 'superliens', for recovering clean-up expenditures", and they apply on all property owned by the person responsible, "regardless of when the competing liens were obtained".\(^{191}\) The exact priority to be given to environmental remediation costs may also possibly be subject to debate and certain exemptions without necessarily altering the effectiveness of the mechanism.\(^{192}\)

3. Estimation of environmental remediation costs

Prioritizing environmental remediation costs by enacting a super-priority creates however the issue of having to estimate the costs of remediation. As we have seen in Abitibi, this is not always an easy task, the court describing the costs to be "at minimum tens of millions of dollars, quite probably, well over 100, perhaps, much higher than that".\(^{193}\) Nonetheless, especially in restructuring processes, there is an absolute need to settle on a dollar amount as quickly and efficiently as possible for a plan of arrangement or proposal to be drafted and implemented. It follows that it is necessary to implement a

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\(^{193}\) \textit{AbitibiBowater Inc. (Arrangement relatif à), supra} note 95 at para 6
mechanism to prevent the estimation of remediation costs from systematically evolving into full fledged trials.

A solution could be to create a statutory obligation for the environmental authority and the debtor to jointly appoint an environmental assessment firm for the estimation of remediation costs. This would provide the environmental assessment firm with a certain level of independence to establish a fair estimation. It would also prevent the need for lengthy contradictory evidence on the dollar amount of remediation costs. The environmental assessment firm could, for example, establish a price range for the remediation costs based on different restoration standards. The appropriate standard for the site in question could then be established by settlement or in front of a motions judge.

4. Policy Analysis

Reforming the insolvency legislation to reflect these changes would certainly provoke changes and impact the practices of certain parties. First, giving environmental remediation claims true super-priority would enable environmental agencies to move forward with remediation work as soon as required to protect the public health and safety, as they would operate with a certain assurance that their expenditures would be covered in the bankruptcy process. Allowing environmental agencies to move in swiftly and proceed to the remediation work itself is key, the goal being to protect the population from any harm that may result from the contaminated property. The adoption of a true super-priority responds to this need. Moreover, it also responds to the need of the debtor corporation to focus on financial restructuring and on the proposing an appropriate compromise that may be accepted by the creditors. Indeed, by enabling the environmental authority to perform the remediation work itself, the burdensome task of managing an environmentally damaged property shifts from the debtor to the environmental authority, allowing directors and officers to focus on the restructuring process without having to worry about environmental remediation orders.

These efforts would be rendered useless however if the environmental authorities were allowed to complete the remediation work without regard to the precarious finances of the debtor. This is why there is a need, as mentioned supra, to estimate the environmental costs as quickly as possible. Establishing a fair but fast-tracked process, impervious to lengthy litigation procedures, would thus be necessary. Environmental authorities could have the assurance that a certain amount of the remediation costs would have to be covered in the restructuring or bankruptcy process, and the debtor would benefit from the remediation costs being reduced to a sum certain, allowing it to move forward
with a restructuring plan. This constitutes a "middle ground" position: we accept the importance of environmental protection by enabling environmental authorities to perform remediation work, even in insolvency contexts and enable debtors to move forward with the assurance of a "fixed price" for the costs of remediation, subject to the plan of arrangement. This constitutes, in my opinion, a viable compromise that respects both the objectives of environmental and insolvency legislation.

Obviously, expanding the scope of the super-priority for the costs of remediation would also impact lenders and corporation looking for funding. Funding environmentally risky ventures may become more expensive, but as I have mentioned supra, this is not without reason. Simply, there is a cost associated with this risk that the current state of the law does not recognize. While the cost of credit is a legitimate concern for entrepreneurs and the legislator, it should be noted that the proposal may increase the cost of credit only for environmentally risky businesses. There is no reason to believe that projects that have enough economical value to cover their environmental risks will have particular difficulty to find funding. Indeed, as mentioned supra, environmental superlien statutes have coexisted with commercial lending practices in eight states in the United States. The public policy objectives associated with the protection of the environment greatly justify the increased risk for lenders willing to fund environmentally risky ventures. In truth, the continued externalisation of environmental risks yields an unfair situation, whereby the population at large bears the risks for the lenders. Reforming the legislation would remediate this injustice and shift the costs associated with environmental risk to the people who stand to benefit from it.

Expanding the scope of the environmental super-priority also implies that lenders will have to improve environmental surveillance of their debtors. Indeed, such a proposal would create incentives for the implementation of environmental self-regulation mechanisms. The evidence produced by the Senate Committee charged with reviewing the insolvency law reform in 1997 showed that banks already have environmental practices and guidelines for implementation by their clients:

At the Royal Bank, and I am sure at the Bank of Nova Scotia too, there are management practice guidelines on environmental standards that we insist are followed by our borrowers. We want to know their policies in dealing with environmental issues. If we are not satisfied that

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194 Jonathan Remy Nash, supra, note 191, p. 146-147
they are adhering to standards, we do not want them as clients. It is incumbent on us to do our due diligence on that side as it is for the real estate lender to do theirs.\textsuperscript{195}

Implementing this reform would incentivize banks and other lenders to upgrade their environmental standards, monitor their clients and make sure that the standards are respected. Another interesting component of such a reform would be that \textit{all creditors} of an environmentally risky business would have a \textit{common interest} in overseeing that the corporation operates with extremely high environmental safety standards. Simply getting assurance that a particular security is safe would be insufficient, as the super-priority would affect all secured claims. This would presumably generate mechanisms whereby a third party would be hired to insure supervision and constant compliance with environmental regulatory norms and highest safety standards. From a policy perspective, this is justifiable. If we are to internalize the risks of environmental contamination, it should not be possible for a corporation to obtain financing by offering as security non risky assets while leaving risky assets unencumbered. In the long run, this should result in better lending practices through environmental supervision of the debtor’s activities. This result is desirable considering the difficulties environmental authorities are having in enforcing environmental regulatory standards. In the end, the people who stand to benefit from the environmental risks would bear the costs and, in case the risks materialize, environmental authorities will have to monies available to protect the health and safety of the population.

CONCLUSION

The Supreme Court of Canada has time and again reminded us that the protection of the environmental was a fundamental value for Canadian society. It has affirmed that it is "one of the major challenges of our time" and that it ought to be regarded as a "fundamentally important matter". The country's highest court has also referred to a "right to a safe environment", stating that "measures to combat the evils of pollution" are "a public purpose of superordinate importance". The state of the law today concerning the treatment of environmental claims in bankruptcy and insolvency is highly inconsistent with such statements. It is not possible to both hold environmental principles as being fundamental and throw them out the window when insolvency hits. It will be interesting to see how the Supreme Court will juggle with such precedents when addressing the Abitibi case. Nevertheless, even if the Supreme Court renders a judgement that is favourable to the environment, endless litigation will most probably continue without proper legislative amendments. Indeed, a comprehensive reform could potentially reduce litigation, fast-track the remediation process, internalize environmental costs in insolvency situations and increase incentives for lenders to monitor borrowers' environmental practices.

As I have shown, Canada's insolvency laws contain important flaws that are detrimental to the environment and unfair to the population. The shortcomings are such that environmental authorities are simply stripped from their regulatory powers and find themselves without recourse when a corporation responsible for a contaminated property enters bankruptcy or restructuring proceedings. Without the appropriate resources and statutory tools, environmental authorities become unable to support the costs of ensuring appropriate levels of environmental and public health safety when a polluter goes bankrupt. Reform is urgent: this flawed legislation can clearly yield dangerous outcomes, the cost of which the population has to bear.
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