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Trustees' and Receivers' Environmental Liability Update

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I. — Introduction

In 1997, the *Bankruptcy and Insolvency Act* was amended to limit the environmental liabilities of trustees and receivers. This paper describes the purpose and effect of the amendments, in the context of 10 years of struggle over the following questions.

1. Are environmental protection requirements merely a type of monetary claim? Or do some or all of them have a legitimate priority over monetary claims? If so, under what conditions?

2. Environmental law imposes liability both on polluters and on non-polluters. Should the liability of non-polluters be limited? If so, how?

3. Should trustees and receivers have particular limits on their liability because of the nature of their duties and their social function?

Bankruptcy law is essentially a private system for the resolution of monetary disputes. There is a limited, identifiable list of affected parties. Each party has a limited and identifiable amount at stake. To a considerable extent, the risk has already materialized, and most of the money has been lost. Bankruptcy is therefore a defined procedure for allocating defined harms which have already occurred among a defined group. This structure does not accommodate, and was not designed to manage, risks of unlimited future harm to unlimited and unidentified parties. Some environmental conditions present exactly this sort of risk. In the late 1980s, Canadian courts ruled that these sorts of environmental risks (urgent requirements to prevent serious future risks) could "trump" the normal bankruptcy system of priorities. This was done by recognizing environmental requirement as both "costs of administration" of a debtor's estate and (at least arguably) the personal responsibility of the trustee. The most immediate practical consequence was that trustees refused appointments. The *Bankruptcy and Insolvency Act* was amended in 1992 to limit a trustee's personal liability. The 1997 amendments have limited that liability even further.

This paper describes several cases that illustrate why trustees and receivers felt they required protection from unlimited environmental liability. It begins by describing the general structure of the liability under environmental statutes. It goes on to analyze the cases which began the extension of environmental liability to trustees and receivers (*Belora, Quanta Resources, and Panamericana*), and the 1992 amendment. It describes the efforts of regulators to expand environmental liabilities, and the efforts of lenders and other "non-polluters" to limit liabilities. It then analyzes the 1997 amendments, and suggests some problems that may arise in attempting to implement them.

II. — The Context

Land which was taken as security may be worth little or nothing if it is "contaminated". Strict decommissioning guidelines typically prevent redevelopment of contaminated land until most of the "contaminants" have been removed, or otherwise rendered harmless.[FN1] This may cost far more than the land is worth.[FN2]

A. — Kinds of Liability

A lender who goes into possession of a debtor's property can acquire virtually all of the debtor's environmental liabilities.

1. — Prosecution

Environmental statutes create a considerable number of offences. The maximum penalties include very large fines and jail sentences, including personal liability (and potential jail sentences) for corporate officers and directors. Penalties for these offences may be surprisingly substantial, even for paperwork or small violations.

The most serious offences are those of actual pollution. Typically, it is prohibited to discharge or cause or permit the discharge of a contaminant into water which may impair water quality. It is also prohibited to discharge or cause or permit the discharge of a contaminant into air or onto land if the discharge will cause or is likely to cause an adverse effect.

Other important environmental offences include: failure to report unlawful discharges or spills; failure to clean up spills promptly; failure to comply with administrative orders; and failure to properly dispose of waste.

2. — Spills

The second major kind of liability is *liability to clean up spills*. Liability to clean up a spill rests both on the owner of the pollutant spilled and on anyone who had charge, management or *control* of the pollutant immediately before the spill. Under some statutes, liability to pay the actual costs of clean-up is absolute, that is, it does not matter whether the person required to pay was at fault in any way. Even when the spill is a result of sabotage or terrorism, the owner or the person having charge, management or control of the pollutant must pay the full cost of clean-up.

In addition to the cost of clean-up, spills frequently cause damage to third parties, such as business losses, adverse health effects, or damage to property. The owner of the contaminant, and the persons who had charge, management or control of it, must also pay these damages, unless they establish that they had used all due diligence to prevent the spill.

3. — Administrative Orders

When the government wants work done, even if no crime has been committed, it can issue *administrative orders*. Liability for these orders frequently turns on "charge, management or *control*" of a contaminant or contaminated site. This means that the government can order anyone who now has control of a property or business, whether or not they caused the contamination which is found there, to clean it up. Compliance with such orders can be extremely expensive, sometimes in the millions of dollars.

There are four main classes of administrative orders: stop orders, control orders, preventative orders and clean-up orders.

Stop orders are generally issued in situations of imminent danger to humans, and require immediate cessation of discharges into the natural environment. Stop orders can be issued to the owner of the property and/or to the "person responsible", i.e., the person who occupies property or who has charge, management or control of it.

Control orders require reductions in discharges of pollutants which infringe standards or which cause or are likely to cause adverse effects. Like stop orders, they can be issued to the owner of property or to "persons responsible", whether or not they originally caused the problem.

Preventative orders can be issued even when there has been no pollution, if a contaminant on property might cause environmental damage if discharged. Preventative orders can be issued to those persons who own or control property or undertakings. They can require that precautions be taken to prevent discharges and/or to minimize the effect of discharges which may occur.

Clean-up orders require the clean-up of land or water which has been damaged by the discharge of contaminants, whether from a recent spill or from damage long ago. It is possible that such orders can be made retrospectively, that is, even if the damage occurred long ago, before environmental damage became illegal.

B. — Charge, Management and Control

The liability of lenders for these problems depends on whether they have "charge, management or control" of their debtors' property or activities. This turns upon the nature of the security interest held by the creditor, and upon the degree of influence and control that the creditor exercises over the operations of the debtor. The same test applies in both prosecutions and administrative orders.

Discussions about "control" in the environmental context always begin with *R. v. Sault Ste. Marie (City)*.[FN3] In that case, the Supreme Court of Canada ruled [at p. 68 C.E.L.R.] that liability for "*permitting*" the discharge of a contaminant depends on control:

> Liability [for environmental offences] 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".

Actual control is certainly sufficient to trigger liability; potential control, (i.e., the power to exercise control) may also give rise to liability. In *R. v. Sault Ste. Marie (City)*, the actual pollution was caused by an independent contractor retained by the corporation of the city of Sault Ste. Marie to haul away the garbage of its citizens. The municipality was held liable for the pollution because it *could* have done more to prevent the contractor from polluting, particularly through the terms of the garbage disposal contract, and through its powers as a municipality.

In subsequent cases, "control" has been broadly interpreted.[FN4]

III. — The First Cases on Lender Liability, 1989-1992

A. — Bulora

The leading case on environmental protection orders in a non-bankrupt insolvency is still *Canada Trust Co. v. Bulora Corp.*[FN5] In that case, the Ontario Court of Appeal held that a receiver-manager was obliged to comply with an provincial administrative order necessary in the public interest, prior to paying the claim of the secured creditor who had appointed him. The assets of the debtor (who was not bankrupt) included a residential subdivision. The fire marshal ordered the debtor to tear down certain of the homes, because they were fire hazards to nearby residents. As the secured creditor's claim exceeded the value of the estate, there were no funds available to pay for the demolition except those owed to the secured creditor. The creditor had a prior, perfected, legitimate claim to the funds. On the other hand, failure to demolish the houses could endanger the lives and property of all other residents of the subdivision. The Court held that the *urgent need to protect public safety* took priority over the rights of the creditor. The receiver-manager was required to comply with the order prior to paying the secured creditor.

B. — Quanta Resources

Until 1990, it was not clear what effect provincial environmental requirements would have in a bankruptcy. There is no doubt that provincial environmental statutes are constitutionally valid within the province, but when they conflict with federal laws such as the *Bankruptcy and Insolvency Act*, the federal laws prevail. What priority does a provincial environmental protection order have in a bankruptcy?

In the United States, the leading case is *Midlantic National Bank v. New Jersey Department of Environmental Protection; Quanta Resources Corp. v. New York (City)* [hereinafter referred to as "*Quanta Resources*"].[FN6] In Quanta Resources, the trustee in bankruptcy obtained court approval to abandon premises heavily contaminated with PCBs. This ended both security and fire protection services at the sites, notwithstanding state orders to the contrary. Both sites were in heavily populated areas, where fires or spills of PCBs could have devastating consequences. On appeal, the U.S. Supreme Court held that the trustee should not have been allowed to abandon the sites. Because of the danger to the public which could flow from non-compliance with the state orders, the trustee should have put compliance with the orders ahead of the interests of the creditors. Creditors are better able to protect themselves than are the innocent victims of pollution. The court specifically held that an administrative order under valid state law which requires positive action necessary in the public interest is not a "claim" in the bankruptcy sense, and is not analogous to a mere demand for money.

C. — Panamericana

This question was addressed by a Canadian court for the first time in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*[FN7] Northern Badger Oil and Gas Limited was an oil and gas producer. It operated a number of valuable wells. However, it was also the named operator of seven old, disused wells, which could cause significant contamination unless properly decommissioned, as required by provincial law. Northern Badger Oil and Gas Limited became insolvent without decommissioning the old wells. Creditors began making their claims. A receiver-manager was appointed by the principal secured creditor, followed shortly by a trustee in bankruptcy.

The receiver-manager operated the business while arranging to realize the assets. However, it did not decommission the wells, despite a formal order to do so issued by the provincial Energy Resources Conservation Board (the "ERCB"). Instead, the receiver deliberately arranged a complicated sale of the assets of the estate, designed to ensure that all of the valuable assets were realized for the benefit of the secured creditor, leaving for the trustee in bankruptcy only the burdensome "assets" such as the disused wells. The arrangement worked by "selling" all of the assets, but on the condition that the purchaser could refuse to accept any asset. This arrangement was made without notice to the ERCB, despite its express request and clear interest, and without drawing the fact to the attention of the court which approved the sale. On the day of closing, the purchaser declined to accept the seven old wells, thus leaving them in the estate.

Most of the funds realized (more than $1 million) were promptly paid to the secured creditors, leaving enough to complete the administration of the estate, but not enough to decommission the wells. When all other matters had been completed, the receiver applied to the court for permission to pay the remaining funds to the secured creditor, to turn over the unrealized property, including the seven old wells, to the trustee, and to be discharged. The ERCB moved for an order requiring the receiver to first decommission the wells.

At trial, Mr. Justice MacPherson upheld the validity of the ERCB's order, recognizing that the wells were dangerous in their present condition. However, he held that the receiver was not obliged to comply with the order. He characterized the order to properly decommission the wells as a "claim" within the meaning of the *Bankruptcy and Insolvency Act*, and characterized the ERCB as a creditor seeking to use provincial law to evade the scheme of priorities set out in the Act.

The Court of Appeal unanimously followed *Quanta Resources*, and required the receiver to comply with the order in priority to the claims of the secured creditors. The court held that an obligation to comply with the law, whether a statute or an administrative order, is a "liability", but it is not a "claim" as defined by the *Bankruptcy and Insolvency Act*. Nor was the Energy Resources Conversation Board a "creditor" of the bankrupt estate when it ordered the receiver to properly seal the abandoned wells.

The court held that it did not matter that the debtor, Northern Badger, had only a 10-per-cent ownership interest in the wells. The receiver, as manager of the wells, had operating control of them, and was therefore bound to obey the provincial law which governed those wells and which required the abandonment. The obligation to properly abandon wells is not a liability owed to the particular government agency which enforces the law; it is a duty owed by all citizens to all of their fellow citizens. A public authority which enforces the law does not thereby become a creditor of those persons bound to obey the law. Accordingly, the ERCB's order took priority over the rights of the secured creditor; the receiver was obliged to do whatever was necessary to obey the law before disbursing funds to the bank which had appointed it.

The Court of Appeal also stressed that a court-appointed receiver is a fiduciary on behalf of all parties with an interest in the debtor's property. As such, he is held to the highest standards of propriety and of respect of for the law. The receiver's conduct in deliberately diverting all valuable assets for the benefit of the secured creditor, thus ensuring that no funds would be left to decommission the wells, while concealing these facts from the ERCB, did not meet these standards. For this reason, the receiver was ordered to perform the abandonment (at an estimated cost of more than $250,000), notwithstanding the fact that there were no longer sufficient assets in the debtor's estate. There was no indication in the decision as to whether the deficiency would have to be made up by the receiver personally, or whether he could look to the secured creditor for indemnity.

IV. — The 1992 Amendments to the Bankruptcy and Insolvency Act

The *Panamericana* case put everyone in the lending community on notice that they must be concerned about the environmental status of their debtors. Unfortunately, the risk of uncertain and unlimited liability rapidly caused significant difficulty in persuading trustees and receivers to take appointments. This came to a head in *Re Lamford Forest Products Ltd.*[FN8] No one could be found to act as trustee of this large company, without the assurance that they would be paid. The British Columbia Supreme Court in Bankruptcy therefore ruled that the cost of compliance with an environmental protection order has priority over the claims of all secured and unsecured creditors, *except for the fee of the trustee.*

The court made an exception for the trustee because it would not be possible, otherwise, to appoint trustees in cases involving serious contamination. The court also held that a trustee in bankruptcy is not *personally* liable for cost of complying with an environmental protection order which was issued to the bankrupt before the trustee was appointed. However, the court refused to decide whether, and in what circumstances, the trustee would have personal liability for breaches of environmental laws committed during the administration of the estate.

Soon afterwards, on November 1, 1992, the *Bankruptcy and Insolvency Act* was amended to provide trustees in bankruptcy with this measure of personal protection. Subsections 14.06(2) and 14.06(3) [as enacted by S.C. 1992, c. 27, s. 9(1)] stated:

> (2) Notwithstanding any provision of federal or provincial legislation respecting the protection or rehabilita-

tion of the environment, a trustee is not personally liable under any such provision, in relation to the trustee's position as trustee of a bankrupt estate, in respect of any environmental condition that arose, or any environmental damage that occurred,

(a) before the trustee's appointment as trustee of the estate; or

(b) after that appointment, except where the condition arose or the damage occurred as a result of the trustee's failure to exercise due diligence.

(3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a provision referred to in that subsection.

These *Bankruptcy and Insolvency Act* amendments gave trustees (but not receivers) some protection for their personal assets, but still allowed the Crown to put environmental requirements before the claim of the secured creditors.

Incautious trustees could still incur personal liability. For example, in *R. v. Raymond, Chabot, Fafard, Gagnon Inc.*[FN9], a trustee in bankruptcy pleaded guilty to using uncertified waste facilities for waste storage. While acting as a trustee in bankruptcy, the defendant had seven truckloads of wastes brought to one of the bankrupt's properties. There they were stored in a deteriorating trailer for 10 months until the Ministry of the Environment intervened. The storage site was not a certified waste disposal site. The trustee was fined $25,000.

V. — Cases 1992-1997

A. — Mortgagees out of possession

Two cases have confirmed that mortgagees out of possession are not "persons responsible" who can be required to clean up the mortgagors' contamination. In *Canadian National Railway v. Ontario (Director appointed under the Environmental Protection Act)*,[FN10] the Divisional Court, affirmed on other grounds by the Court of Appeal, stated that a mortgagee out of possession was not itself in "control" of the mortgagor's property and therefore was not a "person responsible". In *Ontario (Attorney General) v. Tyre King Tyre Recycling Ltd.*,[FN11] the Crown sued the mortgagees of the famous Hagersville tire fire site, seeking recovery for part of the clean-up costs. On summary motion, the Ontario Court of Justice (General Division) dismissed the Crown's claim against the mortgagees on the grounds that they were not "in control" of the property.

B. — Receivers

Receivers can acquire "charge, management or control" when they come into possession of a debtor's property. If they are not technically capable of managing the environmental aspects of the debtor's business, do not have the resources to do it properly, or choose how to spend the debtor's limited resources in ways unacceptable to environmental regulators, they can expose themselves to prosecution or clean-up orders.

Price Waterhouse has borne the brunt of this lesson. It was, for example, convicted of several sewage offences while acting as the receiver-manager of a hotel.[FN12] The hotel's sewage treatment plant had deteriorated for two years, and broke down twice. The receiver-manager had not put as much importance on repairing the sewage system as the Ontario Ministry of the Environment & Energy (the "MOEE") thought he should have. The receiver-manager was fined $25,000. In exchange for the corporate receiver's guilty plea, charges against the individual receiver were withdrawn. This individual had visited the hotel twice a week, but had no expertise in hotel management or sewage treatment. He had relied on the hotel manager and maintenance staff to undertake day-to-day operations.

The second case was much more serious, and raised difficult questions not yet resolved about a receiver's responsibilities. It is reported in a series of four decisions of Farley J., all called *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.*[FN13] These decisions reflect a lengthy dispute between the MOEE and Price Waterhouse Ltd. ("PWL") concerning the firm's receivership of the insolvent Innisfill landfill. When the receiver went into possession of the debtor's property, the landfill was still in operation, but years of mismanagement and lax MOEE supervision had created numerous environmental problems, including a substantial leachate plume. The landfill was close to its permitted capacity, but there was room to continue landfill operations if the authorizing licence could be amended. In the receivers' judgment, the best return it could obtain for the creditors would come from investing the realizable assets of the estate in an application to expand the landfill.

The amendment application exhausted the assets of the estate, and was ultimately unsuccessful. PWL had applied to a Joint Board[FN14] for approval to expand the landfill. This approval had been refused; instead, the Board ordered PWL to install an expensive leachate collection system, forcemain and pumping system to control existing and potential pollution from the landfill. During the course of the hearing, relations between the Ministry and the receiver had become increasingly bitter, despite PWL's substantial efforts to operate the landfill responsibly and its success in reducing the environmental problems it was causing.

An appeal of this order was settled on terms requiring the receiver to install a leachate collection system. The MOEE Security Fund paid for some of the necessary work, but the MOEE insisted that the receiver should pay for a pumping station and forcemain system. After the hearing, no funds were available in the estate to build these facilities. In the view of the MOEE, PWL had spent too much on its aggressive attempts to obtain approval of the expansion. The hearing had been extraordinarily expensive, due in part to large amounts of intervenor funding that the receiver had been required to pay to opponents of the landfill.

After the expansion application was refused, PWL applied to be discharged as receiver-manager, and sought clarification that it was not required to comply with the Joint Board's order if the assets of the estate were depleted. The MOEE objected.

The court eventually discharged PWL as receiver. However, this did not resolve the question of PWL's personal liability. The court was not hearing an appeal from the Joint Board's order, and therefore could not decide whether the receiver had incurred any liability of its own to pay for this work. The court suggested that the parties seek clarification from the Board.[FN15]

The Ministry then sought leave to sue the receiver on the grounds that it had improvidently wasted the assets of the estate, which (it argued) ought to have been spent on the leachate control system. After lengthy proceedings, Farley J. ruled that MOEE was entitled to sue PWL for its alleged improvidence, but only if there was a substantial likelihood of recovery great enough to justify the costs of legal proceedings. Farley J. ultimately decided that the Crown's case was so weak, and its potential damages so small, that a lawsuit was not justified; leave to sue PWL was ultimately refused. Price Waterhouse could not have had a more narrow escape.

C. — Individual Investors

Individual creditors can have even broader liabilities than receivers. In *Bell and Harris v. Director (Appletex)*,[FN16] the MOEE had ordered investors who were not officers, directors, shareholders or employees of a company to clean up the company's contaminated site, even though most of the environmental problems had been created long before their involvement with the company began. The Ontario Environmental Appeal Board relieved the investors of some, but not all, of the clean-up order; their decision was upheld by the Divisional Court.

The investors had exercised substantial control over the company's expenditures in its last year, including co-signing all cheques, while relying on the long-time owners to deal with technical issues, including environmental matters.

The Environmental Appeal Board was not particularly critical of the investors' behaviour during the operation of the company, particularly since they had lost heavily through no fault of their own, but ruled that they had not done enough to secure the site when operations ceased. They were therefore ordered to use their personal assets (in addition to the large sums they had already lost) to dispose of all flammable materials and hazardous wastes, to fence, lock and post the hazardous parts of the property, and to monitor the liquid waste lagoons.[FN17]

Essentially the same result can occur even where neither the MOEE nor a receiver is involved. In *King (Township) v. Rolex Equipment Co.*,[FN18] environmental clean-up costs were given precedence over the claims of a completely innocent mortgagee who was out of possession. In that case, a purchaser bought land (giving a large mortgage back to the unsuspecting vendor), and dumped almost a million dollars' worth of solid, non-hazardous waste on it. The land was not a certified waste disposal site. The township obtained a mandatory order against the purchaser, requiring removal of the waste. Instead, the purchaser abandoned the land. Shortly thereafter, the mortgagee obtained default judgment on the mortgage covenant for $1.4 million. The mortgagee refused to take possession and refused to remove waste, arguing that this was the responsibility of the regulatory authorities which had allowed the illegal dumping to take place.

The Ministry of the Environment and the township also refused to pay to remove the waste. The township then applied to the court for the appointment of a receiver to remove the waste and to sell the land, so that the cost of waste removal would take priority over the interests of the secured creditor (mortgagee). The court weighed the competing interests of the township and of the innocent mortgagee, and preferred the claim of the township. Given the public interest in removal of the waste, and given the fact that the property was unsaleable until the waste was removed, the court announced that it was prepared to appoint a receiver, and thereby to give the costs of waste removal priority over the mortgagee's interests. However, the mortgagee was given 30 days to agree to remove the waste itself, since it might be able to do so less expensively than a government agency.

In *Re Karge*,[FN19] the Ontario Environmental Appeal Board ruled that an innocent vendor/mortgagee who took some steps to protect the value of the mortgaged property,[FN20] by installing and evicting tenants and by making minor improvements, thereby acquired charge, management or control of the property, and became liable to a clean-up order. The Environmental Appeal Board did eventually decide that it was unfair to impose unlimited liability on Mr. Karge, who was the tire dumper's principal victim. In the end, the Board capped Mr. Karge's liability for clean-up costs at 50 per cent of his net proceeds from the property (which were likely to be zero). In that case, a serious aggravating factor was the fact that the Ministry had authorized the dumper to bury the tires in a trench on the Karge property. This both increased the likelihood of groundwater contamination and multiplied the cost of removing the tires to an amount far exceeding the total value of the property.

VI. — Limiting Liability

The aggressive efforts of environmental regulators to expand environmental liabilities have been met by a series of efforts to limit those liabilities. The main non-statutory approaches have comprised agreements in administrative board decisions, and in the terms of court appointments.

A. — The Environmental Appeal Board

The MOEE and the Environmental Appeal Board disagree about how far clean-up liability should be imposed on the "innocent" possessors of previously polluted land. However, both take a broad view of "control". The Board has repeatedly held that "control" includes the formal legal control available to officers and directors, and also de facto control by those in a position to influence significantly the management of the undertaking. It can include control of the purse strings through means other than direct or daily participation in the corporation or its business. Similarly, "management" is not restricted to management of the operations creating a risk of pollution; it also refers to financial management.

However, the Board also insists (despite the strong objections of the MOEE) on its right to grant full or partial relief from liability in the interests of fairness and equity. The key factors in deciding whether to relieve a person from a clean-up order are:

• benefit from participation in the polluting activity or enterprise;

• the standard of care which can reasonably be expected of the person;

• the foreseeability of environmental harm;

• the person's degree of influence over the creation of the risk;

• the steps taken to reduce the risk;

• the responsibility of others who are not ordered to share in the clean-up;

• the possibility of unjust enrichment of others.

These factors should assist innocent lenders and receivers in avoiding or minimizing personal liability.

The Board has ruled that special considerations apply when failure of a business becomes imminent. By definition, those responsible for a failing business will not have the resources needed to meet all their responsibilities. Nevertheless, a "reasonable proportion" of the available resources of the corporation must be devoted "to safeguard the property":

> This will include such obvious steps as disposing of all flammable materials and hazardous wastes and securing from vandals and from forces of nature the parts of the property containing environmental hazards where it is not feasible to remove contaminants and sources of contamination. Under such circumstances, such parts of the property should be securely fenced, locked and posted. If the persons having management and control fail to have the corporation carry out such obvious precautions, the Board will not hesitate to hold them personally responsible for using their personal funds to do so.

The Board has given no guidance as to the proportion of available resources it considers "reasonable". However, it indicated its strong support for the principles on lender's liability suggested by the Canadian Council of Ministers of the Environment (CCME) Core Group on Contaminated Site Liability, as adopted by the CCME Ministers in May 1993. Those principles are:

a) when the substance became present at the site;

b) with respect to owners or previous owners (defined to include lessees and occupants), including but not limited to:

i) whether the substance was present at the site when he took ownership;

ii) whether the owner ought to have reasonably known of the presence of the substance when he took ownership;

iii) whether the presence of the substance ought to have been discovered by the owner when he took ownership, had he taken reasonable steps to determine the existence of the contaminants at the site;

iv) whether the presence of the substance was caused solely by the act or omission of an independent third person;

v) the price the owner paid for the site, and the relationship between that price and fair market value of the property had the substance not been present at the site at the time of purchase;

c) with respect to a previous owner, whether that owner sold the property without disclosing the presence of the substance at the site to the purchaser;

d) whether the person took reasonable steps to prevent the presence of the substance at the site;

e) whether the person dealing with the substance followed the laws of the day;

f) once the person became aware of the presence of the substance, whether he or she contributed to further accumulation or continued release of the substance;

g) what steps the person took on becoming aware of the presence of the substance, including immediate reporting to and co-operation with regulatory authorities;

h) whether the person benefited from the activity resulting in the contamination, and what the monetary value of their benefit was;

i) the degree of a person's contribution of other responsible persons; and

j) the quantity and toxicity/degree of hazard of the substance that was discharged or otherwise released into the environment.

B. — The global agreements

Provincial regulators realized some time ago that imposing unlimited liability on lenders would simply drive them to abandon contaminated properties, leaving the sites in the possession of impoverished and unco-operative debtors. The public interest is often better served by having a lender come into possession of a property, do environmental studies, and ameliorate the most urgent risks. On the other hand, the provincial ministries have been able to exact substantial concessions from trustees and secured creditors, because the creditors were not willing to risk imposition of unlimited environmental liabilities.

Accordingly, agreements between lenders and provincial regulators have become increasingly common and standardized.[FN21] This has resulted in an elaborate, if somewhat secretive, procedure that allows lenders to go into possession and to obtain some recovery from the property without exposure to unlimited liability, in exchange for an agreed series of steps to protect the environment.

In a nutshell, this process has two main stages. First, a lender enters into a preliminary agreement with the Ministry, allowing it to enter and secure the property, and to make investigations. These agreements generally provide that the lender will *not* thereby be deemed to have acquired charge, management or control of the property, and may abandon it at any time upon notice to the Ministry. In exchange, the lender promises to provide the Ministry with information concerning the property, including copies of any environmental reports obtained by the lender, and to give the Ministry prompt notice of any problems prior to its abandonment of the site.

The preliminary agreements generally have the following components:

1. The agreement limits the creditor's liability for pre-existing contamination, not for any negligence or non-compliance which may occur while the lender is in possession of the property.

2. The Ministry does not, and cannot, protect the creditor from claims by third parties.

3. The creditor must fully inform the Ministry and prospective purchasers or tenants of any environmental problem on the property known to the creditor.

4. The creditor must provide the Ministry with any information known or available to the creditor that will assist the Ministry to pursue those responsible for the environmental problem.

5. The creditor must make some contribution to resolving the environmental problems of the site. This may include (a) carrying out studies, (b) keeping the premises secure, (c) some clean-up for proper waste disposal, and/or (d) dealing with newly discovered problems. The agreements typically provide a dollar cap for this contribution.

6. The creditor can acquire the right to walk away from the property without further liability, upon giving the Ministry reasonable notice (usually 21 days) and having completed the agreed-upon work.

7. The agreement may include a dollar cap on the environmental responsibilities of the lender. These dollar caps remain variable. They may be as high as the total net recovery of the lender from the property; some proportion of that net recovery; a fixed dollar amount; or different portions of net recoveries from different categories of assets, e.g., 100 per cent of the value of the land plus 50 per cent of inventory on hand.

8. The Ministry typically demands the right to terminate the agreement upon notice if the receiver remains in possession for a prolonged period of time, e.g., two years, and this is particularly so where the receiver is going to operate an ongoing business.

9. If the agreement is to be incorporated in a court order (usually the Bankruptcy Court), the order must permit the Ministry and other public authorities to enter the property for emergency purposes.

10. Any special provisions in the court order, such as a provision deeming the receiver not be in possession of the property, should be expressly limited to protecting the receiver from the Ministry issuing orders or taking enforcement steps, and there should be an acknowledgment that the Ministry may apply for an amendment to the order upon reasonable grounds, e.g., if the receiver is negligent or acts illegally.

11. If the creditor does not hold a first charge on the property, the court order may authorize the Ministry to issue remedial orders for the purpose of better enabling the receiver to carry out his responsibilities. This will allow the environmental expenses of the receiver to take priority over prior secured creditors.

12. The Ministry will not keep arrangements with lenders confidential indefinitely, but may be prepared to negotiate confidentially while a creditor is making an application.

If there is sufficient equity in the property to justify further action, a supplementary agreement can be entered into. This agreement varies somewhat depending on the circumstances, but generally includes the following additional provisions:

> 1. A requirement that the lender notify any prospective purchaser of the presence of contaminants on the property so that the purchaser can be held fully liable for any subsequent clean-up. It may be necessary to register this against the title to the land.
>
> 2. The lender agrees to take certain environmentally protective actions (e.g., to remove the tires) and/or to set aside some fixed proportion of the net proceeds (often 50 per cent) of the property to improve environmental conditions on the site.

In the *Karge* case, as indicated above, the Ontario Environmental Appeal Board applied these principles to a mortgagee in possession of contaminated property, even though he had not signed an agreement with the Ministry of the Environment & Energy.

C. — Terms of appointment: The Lundrigans approach

In *Bank of Montreal v. Lundrigans Ltd.*,[FN22] a Newfoundland court significantly limited a receiver's liability *in the terms of appointment*.

In that case, the bank (a secured creditor of a large diversified company) sought a court order appointing a receiver. The receiver refused to be appointed unless the bank agreed to indemnify it against all claims arising out of the proper performance of its duties as receiver and manager. Due to the open-ended nature of environmental obligations, the bank was not prepared to provide an unlimited indemnification agreement. The bank *was* prepared to indemnify the receiver against environmental liability with respect to any particular property over which the receiver assumed control, but only up to the net proceeds realized by the receiver from that particular property. The receiver was prepared to accept this limited indemnification agreement, provided that its own liability be similarly limited by the court order appointing it as receiver. Notice of the proposed order was given to both the provincial and federal governments. Both objected to the limitation of liability.

Hickman C.J.T.D. held that he had jurisdiction to appoint the receiver on conditions which limited its liability, due to general statutes which authorize superior courts to make orders on whatever terms they consider just. He then reviewed the environmental provisions of a number of statutes, including the federal *Fisheries Act*, the *Canadian Environmental Protection Act*, and three Newfoundland statutes. Each of these statutes imposed important environmental liabilities on the "occupant" or the person who "owns" or "has the charge, management and control" of contaminants or contaminated property. The judge agreed that the appointment of a receiver put him or her in a position to take possession and control of a debtor's property, and that the receiver frequently chooses to acquire such control.

The governments argued that once a person is in control of contaminated property, their liability is unlimited. Under most environmental statutes, anyone in control of contaminated property can be required to clean up that property, regardless of how that person came into possession, and whether or not he or she was at fault in causing the contamination. However, Mr. Justice Hickman ruled [at pp. 178-180 C.B.R.] that the rules are different for receivers, at least in respect of environmental damage caused prior to the receiver's appointment:

> In my view, the principles of vicarious liability for prior environmental damage or offences cannot be extended to a receiver and manager who is charged with the responsibility of controlling and realizing on all or some of the assets of what is, in essence, a bankrupt company.
>
> ... None of the relevant legislation clearly provides that a receiver and manager shall be personally liable for any environmental contaminant found upon the property that comes into its or his hands. There is nothing in

> environmental legislation which defines "charge and control", "authority or having control" or "charge, management or control" over land and assets, particularly as it relates to the peculiar responsibilities of a receiver and manager who, upon his appointment, becomes an officer of the court.
>
> In my view, the appointment of a receiver and manager by the court, and his subsequent assumption of control of all or some of a debtor's assets, does not, under existing legislation, render him liable to pay money or perform work ordered by environmental authorities in excess of the value of or moneys received from *the sale of the individual asset which caused the environmental damage*. Legislation intended to impose unlimited liability on a receiver and manager would have to say so in clear and unmistakable language which is not the case with existing environmental legislation. [Emphasis added.]

Accordingly, Mr. Justice Hickman appointed the receiver on terms that the receiver had no liability for environmental costs relating to any asset which exceeded the proceeds of sale of that asset. He held that such an order was consistent with the environmental legislation of the federal government and the province as he interpreted them. The policy considerations which motivated Mr. Justice Hickman are clearly set out in his judgment [at p. 181 C.B.R.]:

> If a receiver and manager is appointed under the terms proposed, then some of the operations of Lundrigans will continue, at least for a time, with the resultant employment of those on the payroll of such enterprises. If, on the other hand, a receiver and manager is not appointed, at this time, the bank, understandably, is not prepared to continue financing the operation of Lundrigans with the result that the entire operations will immediately shut down, all employees will be laid off and the assets and enterprises abandoned, subject only to the bank's continuing security. As a result, there would be no one responsible for any environmental cleanup required as a result of the operations of the various businesses by Lundrigans. This would not be in the public interest.
>
> In my view, it is very much in the public interest that as many of the operations of Lundrigans continue as going concerns in the hope that they may be sold at realistic prices and, hopefully, continue in operation in the future. It is also in the public interest that there be someone to whom governmental authorities may look to for compliance with existing environmental legislation.

Unfortunately for creditors, other judges refused to follow the *Lundrigans* approach. In *Standard Trust Co. v. Lindsay Holdings Ltd.*,[FN23] a secured creditor sought a similar court order limiting the environmental liability of a proposed receiver. Thackray J. [at pp. 305-306 C.B.R.] flatly rejected the reasoning of Hickman C.J.T.D., and held that receivers have the same environmental obligations as anyone else:

> I am of the opinion that receivers do have environmental obligations and that the court does not have the jurisdiction to either tamper with or emasculate legislation creating such obligations.
>
> In my opinion the purpose of designating individuals as officers of the court is not to shield them from liability but to impose upon them obligations for which they will be accountable.

While the jurisdiction which Mr. Justice Hickman claimed to achieve the *Lundrigans* result was doubtful, his policy objectives were sound. The new *Bankruptcy and Insolvency Act* amendments achieve much the same result.

VII. — The 1997 Amendments to the Bankruptcy and Insolvency Act

On April 25, 1997, the 1992 *Bankruptcy and Insolvency Act* provisions were replaced by new provisions [S.C. 1996-97, c. 12, s. 15(1)] to come into force in September 1997. The key changes are:

- the personal protection given to trustees in 1992 now also extends to receivers and interim receivers:

14.06 (1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes an interim receiver or a receiver within the meaning of subsection 243(2).

• the standard for personal liability of trustees has been raised from mere negligence (failure to exercise due diligence) to gross negligence or willful misconduct:

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

• the estate can abandon contaminated sites; if so, the trustee is not personally liable to comply with orders relating to that site, and clean-up costs for that site do not rank as costs of administration:

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

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

(i) complies with the order, or

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

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

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

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

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

(6) Where the trustee has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

• when an administrative order is issued, the trustee has 10 days' grace, during which it can abandon the property, appeal the order, or seek a stay of order while considering its options:

refer to s. 14.06(4) above.

• clean-up costs are provable claims, no matter when they arise:

(8) Notwithstanding subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

• the Crown has a superlien against the contaminated property, but not against other assets of the estate, e.g., accounts receivable:

(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property of the debtor is secured by a charge on the real property and on any other real property of the debtor that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

The most important substantive change is that trustees (including receivers) have acquired the qualified right to abandon contaminated property.[FN24] When property has been abandoned, the trustee cannot be required to comply with any remedial order relating to that property. Costs of cleaning up property which has been abandoned are still a claim provable in the bankruptcy, but they are not costs of administration. The amount actually expended by the Crown in right of Canada or a province for "remedying any environmental condition or environmental damage affecting real property of the debtor" can be recovered by a special "superlien" which attaches to that property and to any other real property of the debtor that is contiguous to the affected property and is related to the activity that caused the environmental damage. However, these clean-up costs do not have any special priority as against the other assets of the debtor, but will rank as ordinary unsecured claims.

The most important procedural change is a new "grace period" in relation to administrative orders. When an administrative order is issued against a trustee, the trustee has 10 days to:

1. abandon the property,

2. comply with the order,

3. seek a stay of the order from:

a) the bankruptcy court, in order to determine whether it is in the financial interest of the debtors' estate to abandon the property, or

b) the court or administrative body of competent jurisdiction to hear appeals from the order (for example, the Ontario Environmental Appeal Board), or

4. appeal the order on its merits to the court or administrative body of competent jurisdiction.

These rights *must* be exercised within the first 10 days after the trustee's appointment,[FN25] or within the first 10 days after an administrative order is issued, if it is issued after the appointment. There are no remedial provisions should the 10-day deadline be missed.

A. — The Impact of These Changes

Now that the trustees and receivers can abandon properties, and thereby substantially protect the debtors' remaining assets, we may expect trustees to take more aggressive positions in their negotiations with the provincial Ministries of the Environment. These negotiations will continue to be necessary. The *Bankruptcy and Insolvency Act* amendments do not directly aid a trustee who goes into possession of contaminated property and does not abandon it. In such cases, the trustee will still be obliged to negotiate with provincial regulators a cap on the proportion of proceeds to be devoted to environmental matters.[FN26]

However, the amendments may strengthen the trustee's bargaining position. Provincial regulators must be aware that clean-up costs expended by the trustee while in possession of contaminated property will rank as costs of administration, and therefore will be paid for out of all the assets of the estate in priority to all other claims. If the trustee renounces the property, the Crown is still free to do the work itself and to attempt to recover the funds, but it will have priority only as against the affected property and its neighbours, which is often an asset of dubious value. The Crown is also increasingly unwilling to fund clean-ups out of its own purse, as it would be required to do once the trustee abandons it. Accordingly, provincial regulators should be anxious to convince trustees to retain possession of problem properties, even more than they have been in the past. The staff cuts experienced by provincial regulators may also contribute to increased regulator interest in standardized lender agreements for modest but definite environmental improvements.

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 *Quanta* and *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.

B. — Questions of Interpretation

Numerous questions of interpretation are likely to arise as the new sections are applied to insolvencies across the country. For example:

- What will constitute "gross negligence or willful misconduct" on behalf of a trustee? Was Price Waterhouse guilty of gross negligence or wilful misconduct in exhausting the estate in its attempt to expand the landfill, rather than, as the Ministry preferred, in controlling the leachate plume? Nothing in the amendments gives either regulators or trustees guidance in making these tradeoffs.

- In s. 14.06(7), the Crown's superlien applies to "an environmental condition affecting real property". There are cases in which contamination has moved from the polluter's property into the property of a neighbour. Administrative orders are not infrequently issued to the polluter requiring the remediation of off-property contamination. If so, does subs. (7) apply? To what property?

- Subsection (7) extends the lien to any other real property of the debtor that is "contiguous to" the affected property. Will it apply where the second parcel is across a municipal street? What are the defining characteristics of property "related to the activity that caused the environmental condition or environmental damage"? Does it matter whether the polluting activity was carried on by a person other than the debtor, or whether the parcels were in separate ownership at the time the contamination occurred? How will it be applied where the cause of the contamination is unknown, or where the responsibility for the contamination could have arisen from similar operations on adjacent parcels?

• How will lenders manage the risk of losing their priority on a secured property because of (past or future) contamination on a "contiguous" site?

• Are the "costs of remediating any environmental condition or environmental damage", for which the Crown may claim priority, limited to those costs which the Crown has already incurred, or do they include the costs of those activities which the Crown has ordered someone to carry out, but which no one has performed?

There are also small but noticeable differences between the English and French versions, most notably in s. 14.06(2). For example, is "any environmental condition ... or environmental damage" the same as "tout fait ou dommage lié à l'environnement"? Probably not in all cases, such as certain breaches of conditions in a licence or approval.

VIII. — Conclusion

Ten years ago, environmental issues in a bankruptcy were presented to the courts as urgent requirements to take timely action to avoid threatened, substantial, irreversible harm to significant public interests. In these extreme cases, environmental requirements should, and did, "trump" the monetary allocation framework of the *Bankruptcy Act*.

This conclusion, however, required, and received, re-evaluation. Aggressive efforts by environmental regulators to extend liability to those without fault have met strong opposition, particularly from those with bargaining power, such as the lending community. It has become apparent that many environmental claims are directed at correction of past harms, or merely at the collection of money, rather than at urgent, future dangers to the public welfare. Moreover, the urgency and social value of environmental demands are sometimes modest in comparison with the other social values that must be balanced in a bankruptcy. It is therefore no surprise that environmental issues no longer automatically trump other priorities.

How, then, should the balance be struck? In an ideal system, bankruptcy priorities would reflect a functional analysis: urgent needs to prevent future harm to significant public interests would take priority over mere monetary claims; environmental monetary claims would rank with other monetary claims. This is not, however, the approach taken in the current *Bankruptcy and Insolvency Act* provisions. It is difficult to discern any clear principle which underlies them; instead, they suggest arbitrary truce lines drawn out of exhaustion in the midst of a prolonged battle. We should expect continuing struggles as the lending and environmental regulatory communities continue to pursue their separate agendas on the murky battlefield of the *Bankruptcy and Insolvency Act*.

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FN1. E.g., *Guidelines for the Cleanup of Contaminated Land*, Ontario Ministry of Environment and Energy (Toronto, June 1996).

FN2. For the same reasons, it has become very difficult to dispose of contaminated land without cleaning it. Buyers are becoming increasingly wary; more and more of them conduct environmental audits, and require stringent terms in the agreement of purchase and sale.

The value of contaminated property is also reduced by the growing obligations of vendors to disclose environmental problems. Several real estate vendors are now facing lawsuits because they failed to make full disclosure of the environmental condition of their property at the time of sale. Regulators may specifically require disclosure of environmental problems. For example, Ontario environmental orders may prohibit "dealing with" a property unless the order is disclosed to the purchaser, lender or tenant. The government may also require the orders to be registered against the title of the land.

FN3. [1978] 2 S.C.R. 1299, 3 C.R. (3d) 20, 21 N.R. 295, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161.

FN4. See D. Saxe, *Ontario Environmental Protection Act, Annotated* (Aurora, 1997), cases and commentary to s. 1 ('person responsible') and s. 7 ('cause or permit').

FN5. (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.).

FN6. 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986).

FN7. 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (C.A.).

FN8. (1991), 10 C.B.R. (3d) 137, 63 B.C.L.R. (2d) 388, 86 D.L.R. (4th) 534, 8 C.E.L.R. (N.S.) 186 (S.C.).

FN9. (January 20, 1993), (Ont. Prov. Div.) [unreported].

FN10. (1991), 6 C.E.L.R. (N.S.) 211, 80 D.L.R. (4th) 269, 3 O.R. (3d) 609, 47 O.A.C. 47 (Div. Ct.); affirmed (1992), 87 D.L.R. (4th) 603, 8 C.E.L.R. (N.S.) 1, 7 O.R. (3d) 97, 54 O.A.C. 367 (C.A.).

FN11. (1992), 24 R.P.R. (2d) 63, 8 C.E.L.R. (N.S.) 202, 9 O.R. (3d) 318 (Gen. Div.).

FN12. *R. v. Price Waterhouse Canada Inc.* (May 16, 1994) (Ont. Prov. Div.) [unreported].

FN13. See (1995), 30 C.B.R. (3d) 100, 3 O.T.C. 23 (Gen. Div. [Commercial List]); (1995), 20 C.E.L.R. (N.S.) 19, 3 O.T.C. 30 (Gen. Div. [Commercial List]); (1996), 20 C.E.L.R. (N.S.) 37, 2 C.P.C. (4th) 143, 3 O.T.C. 44 (Gen. Div. [Commercial List]); (1997), 23 C.E.L.R. (N.S.) 288 (Ont. Gen. Div. [Commercial List]).

FN14. The Environmental Assessment Board and the Ontario Municipal Board, sitting together.

FN15. The court also expressed its dismay at the MOEE's lack of co-operation with the receiver-manager. The MOEE was ordered to pay $1,500 in costs for its failure to properly answer the receiver's requests for directions.

FN16. Reported as *Re 724597 Ontario Inc.* (1994), 13 C.E.L.R. (N.S.) 257 (Ont. Environmental App, Bd.); affirmed (1995), 18 C.E.L.R. (N.S.) 137, (sub nom. *Ontario (Ministry of the Environment & Energy) v. 724597 Ontario Inc.*)) 26 O.R. (3d) 423 (Div. Ct.); leave to appeal to Ont. C.A. refused (March 11, 1996), Doc. CA M17227 (Ont. C.A.), 61 A.C.W.S. (3d) 719.

FN17. The corporate president, who had drawn a salary from the funds supplied by the investors, but had poorly managed his part of the business, was relieved of liability on the grounds of poverty.

FN18. (1992), 23 R.P.R. (2d) 313, 90 D.L.R. (4th) 442, 8 O.R. (3d) 457, 9 C.E.L.R. (N.S.) 1 (Gen. Div.).

FN19. (1996), 21 C.E.L.R. (N.S.) 5 (Ont. Environmental App. Bd.).

FN20. His family farm, sold with a mortgage-back.

FN21. The recent decision of the Ontario Environmental Appeal Board in *Re Karge* has further standardized what regulators can expect a lender in possession to expend on environmental improvements: 50 per cent of the net proceeds of the property.

FN22. (1992), 12 C.B.R. (3d) 170, 92 D.L.R. (4th) 554, 100 Nfld. & P.E.I.R. 36, 318 A.P.R. 36 (Nfld. T.D.)

FN23. (1994), 15 C.E.L.R. (N.S.) 165, 100 B.C.L.R. (2d) 378, [1995] 3 W.W.R. 181, 29 C.B.R. (3d) 297, 17 B.L.R. (2d) 127 (S.C.).

FN24. Where the debtor is a corporation which is later dissolved, many of these properties may escheat to the Crown. However, the Crown denied that this was the effect of the discharge of the receiver in *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.*

FN25. Where the order was outstanding when the trustee was appointed, the trustee has, in effect, a 10-day extension of the time for launching an appeal. In many cases, this extension will be in direct conflict with the provisions of provincial environmental statutes, which typically provide only 15 days for the launching of such appeals. However, because of the doctrine of paramountcy, the federal provision will prevail, provided that it is intra vires.

FN26. As it will often be impossible to conclude these negotiations within the 10 days, extensions of the 10-day limit will probably be routine.

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