CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No. 500-11-036133-094

SUPERIOR COURT

Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.

and

ABITIBI-CONSOLIDATED INC.

and

BOWATER CANADIAN HOLDINGS INC.
and the other Petitioners listed on the motion

Petitioners

and

ERNST & YOUNG INC.

Monitor

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF THE ENVIRONMENT.

Respondent on the motion

BOOK OF AUTHORITIES OF THE ATTORNEY GENERAL OF ONTARIO

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TAB 1

Case Name:
Big Sky Living Inc. (Re)

IN THE MATTER OF the insolvency of Big Sky Living Inc.

[2002] A.J. No. 886

2002 ABQB 659

318 A.R. 165

37 C.B.R. (4th) 42

115 A.C.W.S. (3d) 13

2002 CarswellAlta 875

Action No. 96892

Alberta Court of Queen's Bench
Judicial District of Edmonton

Slatter J.

Heard: June 21, 2002.
Judgment: July 5, 2002. Filed: July 8, 2002.

(57 paras.)

Counsel:

J.H. Hockin, for HSBC Bank of Canada.

REASONS FOR JUDGMENT

1 **SLATTER J.**:-- The issue on this application is the proper scope of an ex parte order appointing an interim receiver under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Facts

2 The debtor Big Sky Living Inc. owns and is developing a piece of land in Parkland County, just west of Edmonton. HSBC Bank of Canada provided financing for the project, and took as security a general security agreement and a mortgage on the lands. HSBC has advanced approximately $1.5 million to Big Sky.

3 There are other creditors and interested parties. Country Squire 2000 Inc., the previous owner of the lands, has a second mortgage on the title. 416099 Alberta Ltd. claims an interest in the lands and has filed a caveat to protect it. Atco Gas and Pipelines Inc. has a right-of-way across the lands, and proposes to install a high pressure gas pipeline which may require an increased setback between the right-of-way and the development, and which may therefore affect the value of the property. Eng-Con Holdings Ltd. has been installing utility infrastructure on the lands. On May 23, 2002 Eng-Con filed a builder's lien on the property for $587,887.

4 The filing of the builder's lien caused concerns for HSBC. On May 30, 2002 HSBC gave Big Sky ten days' notice of its intention to enforce its security, as required by s. 244 of the Bankruptcy and Insolvency Act. On May 31, 2002 HSBC commenced these proceedings, and on June 3, 2002 it applied to Smith, J. for an interim receiver under s. 47 of the Bankruptcy and Insolvency Act. Smith, J. was apparently concerned by the short notice that had been received by some of the other interested parties, a problem that was compounded by the breadth and complexity of the proposed order, which is 15 pages long. For ease of reference a copy of the order that Smith, J. granted is attached to these reasons, with those portions that she added in handwriting shown in italics. As can be seen, Smith, J. granted the order effective until Friday, June 7, 2002 only, and directed that the order be renewed in Chambers on that date. On June 7th the matter came before me in Chambers for review. Upon reviewing the Order I became concerned about the breadth of some of the clauses, and I indicated to counsel that I was not prepared to grant the Order in the form tendered. I invited counsel to provide me with argument and authorities as to the proper scope of the Order, and to permit counsel to do so I extended the Order twice. Counsel appeared before me on June 21, 2002 and presented argument, at which point I extended the Order again, pending delivery of these Reasons for Decision.

5 Counsel advises that Big Sky, 416099, and Eng-Con are now consenting to the Order. Country Squire and Atco are not opposing it. This eliminates any concerns that the Court might have had about the impact of the Order on those parties. There remain, however, concerns about the scope and breadth of the Order.

The Statutory Framework

6 The jurisdiction to appoint an interim receiver is found in s. 47 of the Bankruptcy and Insolvency Act, which reads as follows:

> 47.(1) - Where the court is satisfied that a notice is about to be sent or has been sent under subsection 244(1), the court may, subject to

subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates, for such term as the court may determine.

(2) - The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) take possession of all or part of the debtor's property mentioned in the appointment;
(b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
(c) take such other action as the court considers advisable.

(3) - An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(a) the debtor's estate; or
(b) the interests of the creditor who sent the notice under subsection 244(1).

7 It is precondition to the appointment of an interim receiver under this section that notice of intention to enforce security has or is about to be sent. That condition has been complied with in this case. The test is then whether it is "necessary for the protection of the estate or the creditors" to appoint an interim receiver. Smith, J. obviously felt that this condition had been satisfied, and I respectfully agree. The question is then what powers and directions should be given to the interim receiver. The wording of s. 47(2) is very wide, but in granting powers to the interim receiver the Court should have regard to what is truly "necessary for the protection" of the estate or the creditor.

8 Section 47 appears to contemplate that an interim receiver will be appointed for a brief period only, to protect the interest of the creditors while the 10-day notice period under s. 244 is running. The section does not appear to contemplate that the interim receiver will actually carry on the business of the debtor, although that is the intention of HSBC in this case. However, given the consent or lack of opposition by the key players described above, this issue need not be explored further. HSBC had the power to appoint a receiver under its general security agreement, and it could also have applied for a receiver under the Judicature Act, or it could have petitioned Big Sky into bankruptcy. HSBC obviously found the interim receivership route to be more convenient, and the other parties concur.

Statutory Protection for an Interim Receiver

9 There are a number of provisions in the Bankruptcy and Insolvency Act that provide some protection to an interim receiver. These provisions are primarily designed to allow the interim receiver to deal with the debtor's assets in an orderly way, without being bombarded by litigation or burdened by frequent court appearances. They protect the interim receiver from some risks and claims which Parliament has obviously felt should not, for reasons of fairness or convenience, be visited upon the receiver. By limiting the exposure of receivers, these provisions undoubtedly helped reduce the overall costs of receiverships.

10 The key provisions that provide protection for an interim receiver are as follows:

> 14.06(1) No trustee is bound to assume the duties of trustee in matters relating to assignments, receiving orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.
>
> (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).
>
> (1.2) Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.
>
> . . .
>
> (2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred
>
> (a) before the trustee's appointment; or
>
> (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct.
>
> (3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.
>
> . . .
>
> 215. Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

In addition to s. 14.06(2), other sections of the Act deal with environmental risks in some detail. Section 14.06(4) limits the obligation of the interim receiver to comply with orders made to remedy any environmental condition. To obtain the protection of this section, the interim receiver must either comply with the order, abandon the property in question, contest the order, or apply for a stay of the order. The Act also provides a super priority for the costs of remedying certain environmental damage.

11 The Order applied for by HSBC is in many respects prospective, and it goes far beyond the provisions of the Act. It gives the interim receiver the power to deal with matters that have not yet arisen, and in all likelihood will never arise. The Order might be described as a "standard form order", and it attempts to anticipate problems or issues that might arise in a receivership. It obviously makes sense for the Order to be wide enough that the Interim Receiver does not have to be back in Court continuously seeking advice and direction on small points. There is nothing particularly objectionable in using precedents and standard form orders. However, an applicant tendering an order for signature by the court has a duty to edit it in each case to make sure that it is appropriate for the particular circumstances.

12 Of greater concern is the fact that the Order purports to affect the rights of parties that have not been served with the proceedings to date, and have probably not even been served with the Order. Those parties include employees, unsecured creditors, government agencies, landlords, and many others. While it is appropriate to anticipate powers that the Interim Receiver might require in the future, it is less appropriate to try and anticipate and cut off rights of third parties that might exist. When an order purports to affect the rights of persons who have not been given notice of the proceedings, then it is an ex parte order as against those persons and the usual principles apply. The Applicant has a duty to make full disclosure to the Court. The relief sought is extraordinary, and should only be granted in a clear case. Generally speaking, the order should be no wider than the circumstances require. Relief which is not urgent should not be granted ex parte, but should await proper notice. Further, it is generally contemplated that ex parte orders will be served forthwith on all affected parties; it is clear that the Applicant does not propose to serve all affected parties (for example landlords, employees and contractors) until some particular need arises.

13 A further problem with the Order in question is that it is in some respects "legislative" in nature. Not only does it purport to give the Interim Receiver certain powers, and to cut off the rights of others, it then goes on to provide sweeping definitions and descriptions of what those rights and immunities encompass. In many cases the provisions of the Order go far beyond the statutes that are in place. It is generally inappropriate for the Court to define what Parliament has chosen not to define, and to expand at large on what particular statutory provisions mean. These parts of the Order are declaratory in nature. The Court has always been careful about issuing declaratory judgments, and will not issue them when the issues are moot, where the issues are overly abstract or academic, or where there is no necessity on the facts of the particular case to issue a declaration. There are good reasons for these rules, relating to the constitutional division of powers and relating to the role of a common law court in developing the law. Some clauses in the tendered Order are objectionable on this basis.

14 Counsel for the Applicant was unable to provide any authority supporting an order of the scope asked for. He was able to provide copies of two interim receivership orders granted by the Ontario Superior Court of Justice - Commercial List, but these were simply copies of the orders as granted and there were not written reasons provided to explain the orders.

15 With those general comments in mind, some of the specific clauses in the order require examination.

Solicitor-Client Notice Requirements

16 Clause 3 of the Order directs all persons to deliver all of the property of the debtor to the Interim Receiver. This is the essence of the receivership order. Included is a direction that all documents belonging to the debtor be delivered over, and in this respect the Order is directed at all "legal counsel". In Bre-X Minerals Ltd. (Trustee of) v. Verchere (2001), 97 Alta. L.R. (3d) 1, 293 A.R. 73, 206 D.L.R. (4th) 280, [2002] 2 W.W.R. 71 (C.A.) the Court held that a trustee does not have a general power to waive solicitor-client privilege of the debtor. Accordingly, this provision in the Order is overly broad unless it specifically exempts privileged documents, as it is not clear that an interim receiver would have greater rights.

Exemption From Notice Requirements

17 Clause 5(f) of the order grants the Interim Receiver the power to sell assets, and ends with this clarification:

> . . . and in any case without compliance with the provisions of Part V of the Personal Property Security Act, R.S.A. 2000, c. P-7 or any other notice, statutory or otherwise, which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, in respect of which notices the Receiver be and is hereby relieved.

In my view, the Court should not grant relief in this form. It is legislative in nature, in the sense that it purports to exempt the Interim Receiver from the provisions of the P.P.S.A., and any other statute to the same effect. Parliament has not seen fit to grant interim receivers any such blanket statutory exemption, and it is inappropriate for the Court to purport to do so. If the Interim Receiver can establish that it is in fact exempt from the provisions mentioned, whether for constitutional or other reasons, then it may proceed as it is advised. However, until there is an express legislative provision exempting interim receivers from the P.P.S.A., or a binding decision of a court to the same effect, this provision should not appear in an ex parte receivership order.

18 While s. 64(c) of the P.P.S.A. gives the Court the jurisdiction to dispense with notice, I do not believe that it was ever contemplated that the Court would grant a blanket exemption in the form contemplated by this Order. There may be particular instances involving particular sales where the Interim Receiver does not wish to give notice to particular persons or groups of persons. In those cases the Interim Receiver should apply, setting out the full particulars of the circumstances that have arisen, and ask for an order dispensing with the service of notice as required.

Bankruptcy

19 Paragraph 5(u) of the Order authorizes the Interim Receiver to assign the debtor into bankruptcy, and "to act as Trustee in Bankruptcy of the estate". Section 13.3(2) of the Act recognizes that it is not always appropriate for a receiver to act as a trustee in bankruptcy. There is no urgency involved, and nothing on the record to justify this relief. The provision anticipates a future state of affairs that is unknown, and this provision is not justified.

Landlords

20 Clause 5(x) of the order allows the Interim Receiver to surrender any part of any leased premises, "in which case only the prorated portion of the occupation costs shall apply". It is not clear on the record whether Big Sky has any leased premises, but it is clear that any landlord has not been served with notice of this application. There is nothing on the record that would establish any urgency justifying the granting of this type of relief in an interim order on an ex parte basis. If the Interim Receiver believes that it has this type of power at law, and the order is merely intended to be declaratory of that power, then the Interim Receiver should simply proceed to exercise the rights it believes it has. However, if the Interim Receiver wishes to have that right declared and crystallized by the Court, and set out in an order that is enforceable by the usual methods, then the Interim Receiver is under an obligation to serve notice on the landlord whose rights are being affected. This is a good example of a provision in the Order which is designed to prospectively cut off the rights of a party who has not been served with any of the proceedings.

Variation of the Order

21 There are a number of provisions in the Order that provide that an affected party can apply for a variation. Variation of ex parte orders is provided for by Rule 387(2), but such a provision is almost invariably also included in the ex parte order. Variation clauses are also advisable in orders granting general relief, such as receivership orders, because one can never anticipate all of the ramifications of the order.

22 It is sometimes argued that the variation clause mitigates any concerns the Court might have about third parties whose rights are affected by the order. The argument is that any such party can simply come forward and have the order varied. While the variation clauses can provide some comfort to the Court, they are not a complete answer. First of all, an order with a variation clause in effect reverses the burden of proof, and there is no reason why the affected party should face that burden when the order was granted ex parte. Secondly, the affected party may be prejudiced because it cannot do the prohibited thing without first obtaining leave of the Court, and the passage of time might well prejudice that party. Thirdly, there is an expense in making the initial application. Here, of course, there is a balancing of interests involved, because the Interim Receiver must have some ability to carry on with the business of a debtor without undue interference by unilateral acts of third parties. However, as a general rule, variation clauses are not a complete answer to the type of sweeping provisions included in this Order.

23 In paragraph 6 of the Order, the Interim Receiver is given the right to apply to vary the Order on two days' notice. All the other provisions of the Order providing for variation by third parties (such as paragraphs 8 and 30, and paragraph 33 as it originally read) provide for seven days' notice. It is customary for orders of this type to provide for variation on two days' notice, the time set out in Rule 386, and no reason was given why a general enlargement of time under Rule 548 is called for. If two days is insufficient notice in a particular case, the Interim Receiver can apply for an adjournment or other relief.

Contracting Parties

24 Paragraph 7 of the Order is directed at those who have contracts with the debtor, including "all persons, firms, corporations, governments, governmental agencies, municipalities, counties and other entities of any kind or nature", including all of the officers, directors and agents of Big Sky. Each of these persons are restrained from "varying, amending, terminating, cancelling or breaching any contracts or agreements with the debtor". In case someone should discover any way of circumventing the staggering breadth of this provision in the Order, the topic is picked up again in paragraphs 9(c), (d), (e) and (f). By paragraph 9(c) all persons are restrained from "accelerating, terminating, suspending, modifying or cancelling any agreements". Paragraph 9(c) ends up with a form of mandatory ex parte injunction requiring all persons to "continue to perform and observe" all agreements. It would appear to be wide enough to prevent any employee from resigning. Paragraph 9(f) of the Order restrains the exercise of certain options, remedies or rights, most of which would arise by contract. Paragraph 9(e) restrains even the "asserting or perfecting" of any right.

25 There are innumerable contracting parties who might be affected by these provisions, most of whom have no notice of the proceedings. Assuming that the contracting parties would have the right to act as contemplated under their contracts but for the provisions of this Order, then their rights are being interfered with without notice to them. If it is being suggested that this interference with contractual rights is the legal consequence of an interim receivership, then the provisions of the Order are merely declaratory and probably redundant. As such they would fall afoul of the rule against abstract and potentially moot declarations. These provisions of the order are also legislative in nature. There is nothing in the Bankruptcy and Insolvency Act which restrains contracting parties in the manner set out in this Order. Parliament not having seen fit to enact such a provision, it is inappropriate for the Court to attempt to do so under the guise of granting a receivership order.

26 In any event the rights of contracting parties should not be swept away or crystallized in a court order on an ex parte basis unless urgency can be shown. There is nothing on the record that would establish why such relief is necessary for the protection of the debtor's estate. There is also no evidence of any urgency justifying this relief being granted ex parte.

27 The only portion of these clauses which is justified is the provision in the middle of paragraph 9(c) which restrains the interference with any utilities or telecommunications being provided to the debtor. Because of the duty of public utilities to provide service on payment, and the severe effect that disruption to these services would have, those provisions may remain in the Order. The Applicant has leave to make further submissions justifying any other provision of clauses 7 and 9.

Restraint on Proceedings

28 Paragraph 9 of the Order opens with a general restraint on any proceedings against the Interim Receiver or the property of the debtor. The Order then goes on to provide two pages of single-spaced detail about the general restraint on proceedings, which is said to be "for greater clarity and without limitation". Paragraph 30 is on the same topic and to the same effect. Some general observations are appropriate. First of all, it is well known that s. 69 through to s. 69.4 of the Act impose a general stay of proceedings during a bankruptcy. The provision of a stay is one of the central tenets of the bankruptcy system, as it allows the trustee to realize the assets of the debtor in an orderly way. However, it is significant that none of the sections providing a stay extend to an interim receivership. It has been suggested that absent a statutory authority the Court can control actions against a receiver, but not against the debtor: Toronto-Dominion Bank v. W-32 Corporation Limited (1983), 27 Alta. L.R. (2d) 37, 47 A.R. 174, 50 C.B.R. (N.S.) 78.

29 The only restraint on proceedings relating to interim receiverships is to be found in s. 215, and it merely states that no action shall be brought against the interim receiver for any action taken pursuant to the Act, without the leave of the Court. It should be noted that this is a prohibition against actions against the interim receiver, as opposed to actions against the property of the debtor. It is accordingly of some concern that the Applicant is seeking an order from the Court which provides a stay of proceedings in circumstances where Parliament has not seen fit to impose one. Nevertheless, I am satisfied that in most circumstances the orderly management of the affairs of the debtor will require some protection for the interim receiver from inappropriate litigation: see F. Bennett, Bennett on Receiverships (2d ed., 1999) at pp. 221-24. Any general stay should however make it clear that leave of the Court to sue may be obtained nunc pro tunc, to avoid the issues that arose in RoyNat Inc. v. Allan (1988), 61 Alta. L.R. (2d) 165, 69 C.B.R. (N.S.) 245.

30 The second observation I would make about the Order is that while the preamble of paragraph 9 talks about "proceedings", the detail of the paragraph then goes beyond matters that would normally be considered "proceedings". While it may be a legitimate drafting technique in a contract to provide expansive and artificial definitions, it is generally inappropriate to do so in a court order, and it is certainly inappropriate to do so unless the Applicant specifically draws the provisions in question to the attention of the Court.

31 I have already mentioned (supra, para. 24) paragraph 9(c), which deals with the rights of contracting parties, and not really with proceedings at all. In addition, paragraph 9(b) states that proceedings "shall specifically include any access to or development of any utility right-of-way affecting the property or any part thereof". Counsel quite properly drew this provision to my attention, and indicated that it was an attempt to deal with the possibility that Atco might enter upon its right-of-way and install its high pressure gas line, before the Interim Receiver would have an opportunity to properly assess that issue. Since Atco is not opposing this order, I am no longer concerned about the substance of the paragraph. However, any provision like this one designed to have specific effect against one person should have been drafted naming the particular party (Atco), and it should not have been worded so generally as to cover any and all utility rights-of-way. Further, this specific provision should have appeared in a separate paragraph, to emphasize that it was an application for specific relief against a specific party, and was not simply a request for general powers for the Interim Receiver. I understand that the Interim Receiver and Atco are discussing this issue, and they may address the proper wording of the clause in the Order as required.

32 Paragraph 9(b) includes a prohibition against the termination of any permits or licenses affecting the debtor. This provision is of some concern, because there is no indication of what these licenses or permits may consist, and accordingly there can be no assurance that the Court has any jurisdiction to interfere with them. However, licenses or permits may well be in the same category as utilities and telecommunications, in that their termination might well affect the viability of the enterprise. I am therefore prepared to grant an order that no license or permit affecting the debtor should be terminated or suspended except on seven days' notice to the Interim Receiver. That would give the Interim Receiver sufficient time to seek whatever remedies might be available to it in the circumstances.

33 Paragraph 9(g) of the order provides that no person may make demand upon, send notice to, or declare default with respect to the debtor or its property. The record does not establish that such a provision is necessary for the preservation of the estate. The sending of such notices can at most fix the legal rights of the parties. It will not involve physical interference with the property of the debtor or its business. If persons have such rights, there is no obvious reason why the Court should intervene ex parte and take those rights away from them, especially in such a broad and general way. If it is a legal effect of an interim receivership that such rights may not be exercised, then this provision of the Order is redundant in any event, and any purported exercise of the rights will presumably be ineffective. The Applicant is at liberty to address this issue if it can establish that any of the rights mentioned should be restrained.

34 Paragraph 9(h) of the Order again has nothing to do with proceedings, but deals with deposits made by the Interim Receiver. There would appear to be no urgency in this regard, and no reason to deprive people on an ex parte basis of whatever rights they may have. If the Interim Receiver wants to make deposits on conditions, it is free to do so. If any other specific problems arise, the Interim Receiver can apply for advice and directions.

35 In summary, I am prepared to grant some general protection to the Interim Receiver against litigation. However, the provisions of the Order should provide that:

a) proceedings outstanding on the date of the Order are stayed for 30 days, without affecting any steps taken before service of the Order;
b) proceedings commenced after the date of, but before service of the Order are stayed for 30 days from service;
c) after service of the Order a party may commence and serve new proceedings, but they may not be further prosecuted without leave of the Court.

Expansive definitions that are not found in the Act should not be provided in the Order, except that I am prepared to grant relief as set out in the first three lines of paragraph 9(b) as it may not be apparent to the untrained reader that realization remedies are "proceedings". I am prepared to grant an order restraining interference with utilities and telecommunications as previously indicated. I am also prepared to grant an order restraining interference with licenses as previously stated. The balance of paragraph 9 is unwarranted in the circumstances.

Employees

36 Paragraph 11 of the Order, which is more than one page in length, deals with the rights of employees. No employees have been served with these proceedings, and they accordingly have no notice of this application.

37 The status of employment contracts on the appointment of a receiver is somewhat unclear. Where the appointment is made privately under a security agreement, then contracts of employment are not necessarily terminated: Griffiths v. Secretary of State for Social Services, [1974] 1 Q.B. 468 at 485; Powdrill v. Watson, [1995] 2 A.C. 394 at 440. There is authority that a court directed receivership results in the automatic termination of employment contracts: Toronto-Dominion Bank v. Leonard Industries Ltd. (1983), 49 C.B.R. (N.S.) 241 (Sask. Q.B); Central Trust Co. v. Major Properties Inc. (1987), 70 C.B.R. (N.S.) 288 (BCSC). But the leading case of Parsons v. Sovereign Bank of Canada, [1913] A.C. 160 (P.C., Ont.) at 171 suggests that termination is neither automatic nor universal:

> ... The inference is that as between the company and the appellants the contracts continued to subsist. The receivers and managers were exercising the powers of continuing the business given to them under the orders of the Court by taking no actual steps to determine the relations between the company and the appellants. The state of matters was one totally different from that in Reid v. Explosives Co., Ltd. (1887), 19 Q.B.D. 264, where the appointment by the Court of receivers and managers was held, having regard to the character of the contract in that case, which was one of personal service, to have put an end to it. As Fry L.J., however, points out in his judgment at p. 269, even in the case of contracts of service it by no means follows as matter of principle that all such contracts are determined when a mortgagee takes possession. It is, for example, far from clear that in the absence of a bankruptcy the mere appointment, although compulsory, of a manager to continue in the name of the mortgagor the existing management of an agricultural estate would effect such a disturbance of the owner's possession as to determine the agreements with the farm labourers employed on the property. In the case of contracts to deliver paper, such as existed in the present case, there appears to be no reason for saying that the possession of the undertaking and assets, given by the order of the Court for the express purpose of carrying on the business, put an end to these contracts. The company remained in legal existence, and so did its contracts, until put an end to otherwise.

The suggestion that employment contracts are terminated on a receivership is based on the common law rule that the personal nature of such agreements prevents their assignment, a concept that appears somewhat artificial in the modern economy, and the context of the continuation of a business by a receiver.

38 There is authority that a bankruptcy has the effect of terminating employment: Rizzo & Rizzo Shoes Ltd. (Receiver of) v. Rizzo & Rizzo Shoes Ltd. (Trustee of), [1991] 6 W.W.R. 62, 81 Alta. L.R. (2d) 242, 119 A.R. 330, 8 C.B.R. (3d) 291. There does not appear to be authority to the same effect respecting an interim receivership under s. 47. In any event, if a party wishes to have legal rights declared and crystallized by court order, the rules of procedure require that the affected parties be given notice. This requirement of service cannot be avoided by an argument that the rights in question are "obvious".

39 Paragraph 11 starts out by providing that all employment is "hereby" terminated. I am prepared to assume that the Interim Receiver may unilaterally terminate the employment of the employees. If the Interim Receiver did so, or if that is the legal effect of a receivership, it might well be appropriate on notice to seek a declaration of the Court to confirm that fact. However, that is a far different thing from asking the Court, by court order, to terminate employees, or to declare that result, if only because there is no evidence on the record whatsoever to justify such action. A further problem arises in that an employee might be terminated by this Order, but not find out about the termination until sometime later when he or she is actually served with the Order. Accordingly, the provision for termination should not be included. The Interim Receiver may terminate employees if it wishes, and may apply for further relief on notice to affected employees.

40 Paragraph 11 goes on to provide that if the Interim Receiver employs any person formerly employed by the debtor, the employment shall be deemed <u>not</u> to be continuous. The paragraph then goes on for many lines detailing the rights that such employees will not have. It goes on to provide that the Interim Receiver is not liable to the employees for any unpaid wages "whether pursuant to statute or common law". The Interim Receiver is essentially asking the Court to grant it a blanket exemption from the laws relating to employment, including any statutes. If the Interim Receiver is entitled to such immunity by operation of the Bankruptcy and Insolvency Act, so be it. In that event the provision is merely declaratory and redundant. It is objectionably wide, abstract and theoretical, and I decline to exercise my discretion to grant declaratory relief on this basis, ex parte, even if the Applicant is right about the law. If the Applicant is not right about the law, then there is no basis on which the Court could sweep away the rights of all these unknown employees. I say no more about the substantive law except to note s. 5 of the Employment Standards Code, R.S.A. 2000 c. E-9:

> 5. For the purpose of this Act, the employment of an employee is deemed to be continuous and uninterrupted when a business, undertaking or other activity or part of it is sold, leased, transferred or merged *or if it continues to operate under a receiver or receiver manager*. (emphasis added)

Also relevant is s. 14.06(1.2) of the Bankruptcy and Insolvency Act, which deals with the continuation of employment by the Interim Receiver. The exact interplay of these two sections is complex, and while the Receiver might argue that the provincial provision is inapplicable for constitutional reasons, the very presence of these sections makes it inappropriate to include in the Order the sweeping words of paragraph 11. Section 14.06(1.2) does not exempt the debtor's estate or the Interim Receiver from all of the common and statutory law of employment. Nor does that section state that employment is "not continuous"; it merely states that the Interim Receiver is not liable for certain claims ex officio.

41 Paragraph 11 goes on to provide that if the Interim Receiver chooses to pay an employee, the employee is deemed to have assigned his or her rights to the Interim Receiver. Again, if the Interim Receiver wishes to obtain an assignment of rights from an employee, that assignment should be obtained in writing from the employee, and not indirectly by a court order.

42 In summary, the whole of paragraph 11 is overly broad, theoretical and abstract, and does not belong in an ex parte receivership order of this type.

Environmental Risks

43 The increased societal sensitivity to environmental damage and contamination created new issues for receivers and trustees in bankruptcy. Particularly problematic were provisions in environmental legislation that imposed liability not only on those who contaminated property, but on those who thereafter came to own or control that property. In 1992 Parliament addressed those problems by the new provisions found in s. 14.06 of the Bankruptcy and Insolvency Act, which provisions were modified and extended to interim receivers in 1997: see Marin and Ilchenko, "Environmental Liabilities of Trustees and Receivers" (1997), 14 Nat. Ins. Rev. 19. In addition to limiting the liability of trustees and interim receivers for environmental damage, the Act now provides a super priority for the costs of environmental clean-ups.

44 The case law on the environmental liability of receivers is sparse and inconsistent. In Bank of Montreal v. Lundrigans Ltd. (1992), 92 D.L.R. (4th) 554, 12 C.B.R. (3d) 170 (Nfld. S.C.) the Bank applied for an order appointing a receiver, but with a limit on the environmental liability of the receiver to the net value of any contaminated property. It was submitted that no receiver would take the appointment without this protection, or an indemnity for these risks that the Bank was not prepared to give. The issue was argued on notice to the federal and provincial governments, who opposed the order. The key finding of the Court was that the various pieces of environmental legislation in question did not purport to impose liability for past environmental damage on receivers, as the definitions of those responsible for such damage did not expressly include receivers. On this interpretation of the legislation the order sought was merely declaratory of the law, namely that the environmental liability of the receiver was limited to the net value of the assets.

45 The Lundrigans case was not followed in Standard Trust Co. v. Lindsay Holdings Ltd., [1995] 3 W.W.R. 181, 29 C.B.R. (3d) 297 (BCSC). Lindsay was decided after the 1992 amendments to the Bankruptcy and Insolvency Act provided some protection to trustees, but before the 1997 amendments extended that protection to receivers. The applicant in Lindsay wanted an order exempting the receiver from all past, present and future environmental liability, except for failure to comply with written directions from environmental regulators. Both levels of government were given notice, and opposed this blanket exemption from the law, and the effective delegation to the regulators of the environmental management of the assets in the estate. The Court in Lindsay held that environmental legislation did apply to receivers, even if they were not specifically named in the legislation. The Court held at paras 14 - 15:

> Rather than suggest that the legislation must specifically include entities not intended to be made liable, the more logical approach would be to expect legislation to exclude those not liable. This is precisely the approach taken by Parliament with respect to trustees in bankruptcy. Under a recent amendment to the Bankruptcy and Insolvency Act, R.S.C. 1992,

> c. 27, s. 9, the potential environmental liability of a trustee has been expressly limited. No similar limitation is given to receivers in any legislation and accordingly I conclude that the legislators intended them to fall within the ambit of environmental legislation.
>
> To make the order requested the court would have to find jurisdiction within its own Rules, the Law and Equity Act or its inherent jurisdiction. Rule 47 provides that the court may appoint a receiver "either unconditionally or on terms ..." The Law and Equity Act empowers the court to appoint a receiver and the order may be made "on terms and conditions that the court thinks just." Neither of these, in my opinion, empowers the court to impose conditions that conflict with statutory duties, rights or liabilities.

The order was refused.

46 In Alberta, it is clear that receivers are bound by environmental legislation. They are expressly included among the "persons responsible" mentioned in sections 1(tt)(iii) and 134 (b)(vi) of the Environmental Protection and Enhancement Act, R.S.A. 2000, ch. E-12 ("E.P.E. Act"). The scope of the liability of a receiver was discussed by the Court of Appeal in Panamericana de Bienes y Servicos, S.A. v. Northern Badger Oil & Gas Limited (1989), 81 D.L.R. (4th) 280, 80 C.B.R. (N.S.) 84 (Alta. C.A.). There is no basis for holding that a receiver in Alberta has any immunity for environmental damage beyond what is found in s. 14.06, or the E.P.E. Act itself. As was held in Lindsay, the Court has no general jurisdiction to grant exemptions from statutes.

47 The provisions of s. 14.06(2) are fairly short and have been reproduced supra, paragraph 10. Essentially they provide that a receiver is only liable for environmental damage arising after the receiver's appointment and because of its gross negligence or wilful misconduct. The Court is given no power to extend or limit the protection given. The Applicant has turned those brief provisions into over one page of text in the Order, encompassing clauses 22 through 28.

48 The initial problem with the proposed environmental provisions in the Order is that they contradict other provisions of the Order. Paragraph 2 of the Order places all of the assets of the debtor under the power of the Interim Receiver. Paragraph 28 then provides that the Order does not vest in the Interim Receiver care or control of any property which "may be" environmentally polluted. This latter clause is unacceptable, because at best it creates great uncertainty as to which properties are under the control of the Interim Receiver, and at worst it gives the Interim Receiver some sort of ex post facto right to elect whether it has been in control of property or not. Sections 14.06(4)(c) and 14.06(6) contemplate the abandonment of contaminated property by the receiver, which is the process that should be followed if this later becomes necessary.

49 There would be nothing objectionable to a provision in the Order which essentially parallels s. 14.06(2) of the Bankruptcy and Insolvency Act. While such a provision might be redundant in legal terms, it is helpful to note those provisions in the Order. However, the Order as drafted goes considerably beyond this. First of all, it deems the Interim Receiver not to be an occupier for the purposes of "environmental legislation". The Bankruptcy and

Insolvency Act does no such thing. There is no indication what environmental legislation is being referred to, or whether the Court has any jurisdiction to make this type of declaration. No notice has been given to any Department of Environment or other regulator who might have an interest in the matter. These provisions are legislative in nature, in the sense that the Court is being asked to extend general and unlimited immunity to the Interim Receiver.

50 Paragraph 23 of the Order does roughly parallel section 14.06(2) of the Bankruptcy and Insolvency Act. However, it goes further in that it states that the Interim Receiver's immunity comes into effect on the later of the appointment of the Interim Receiver, or the date the Interim Receiver goes into possession. Section 14.06(2) contains no such provision. Presumably if Parliament had intended to extend that type of immunity, it would have done so.

51 Paragraphs 26 and 27 of the Order purport to define "Environmental Legislation" and "Adverse Environmental Condition". Parliament did not see fit to define either of these terms, and did not see fit to exempt trustees from all of the requirements of environmental legislation as implied by paragraph 23 of the Order. For example, I note that clause 14.06(3) of the Act requires the Interim Receiver to make any reports or disclosures called for by such legislation. Counsel for the Applicant indicated that these definitions were to "provide comfort" to the Interim Receiver, and to clarify what the Act "really means". He indicated that receivers have more faith in court orders than in the ex post facto interpretation of statutory provisions. Whether that be so, Parliament did not see fit to define these terms, and I cannot see why the Court should do so prospectively and in a factual vacuum.

52 Paragraph 25 of the Order limits the Interim Receiver's liability for environmental damage to the "Net Realizable Value of the Property" in the estate. Again, the Bankruptcy and Insolvency Act contains no such provision. If Parliament had intended a cap on the liability of receivers, it presumably would have provided for one. Furthermore, I note that the Net Realized Value of the property is defined in paragraph 29 as being net of the remuneration of the Interim Receiver and a number of other items including "distributions of proceeds". Accordingly, if the estate was only large enough to pay the secured creditors and the Interim Receiver's compensation, there would be nothing left and the Interim Receiver would be absolved of any liability whatsoever. After distribution of the assets, the Interim Receiver's liability is limited under the Order to the amount of its fees. I am unable to see on what basis the Court could grant this sort of relief ex parte and before the Interim Receiver has even gone into possession.

53 In summary, the environmental clauses provided in this order are inappropriate. The Applicant is at liberty to insert a clause which essentially parallels the provisions of s. 14.06(2) of the Act.

General Protection of the Receiver

54 Paragraph 29 purports to limit the liability of the Interim Receiver to the Net Realizable Value of the estate. I have already commented on the breadth and effect of the definition of Net Realizable Value of the assets.

55 Paragraph 29 purports to protect the Interim Receiver from all kinds of liability "whatsoever", including negligence and wilful misconduct. Paragraph 29 is so broad it even appears to protect the Interim Receiver if one of its employees negligently injured someone in a motor vehicle accident while acting in the scope of the employee's duties. It contradicts s. 247 of the Act which requires the receiver to act honestly and in a commercially reasonable manner. It purports to cap the liability of the Interim Receiver in connection with any environmental legislation, or labour or employment laws, something that s. 14.06(1.2) does not do. There is no obvious jurisdiction in the Court to exempt anybody from the general operation of statutes, or excuse liability for their own negligence, or to limit their liability. Apart from the environmental damage cases mentioned, there does not appear to be a decision where it has been attempted. Even the Lundrigans case is based on the premise that it was merely declaratory of the law. There is no provision in the Bankruptcy and Insolvency Act which provides any limit on the liability of receivers, whether tied to the net value of the estate or otherwise. There may situations, such as the one that arose in Lundrigans, where the public interest requires a receiver to wind up a high risk enterprise but no one will accept the assignment without some protection. Whether the Court can grant that protection will have to be decided when the point arises. But these protective clauses should not be included in all receivership orders as a matter of routine, and they should only be granted on notice to all governments and interested parties. In my view, the provisions of Clause 29 are unjustified on this record. The Applicant may include in the Order a provision that paraphrases s. 215. A provision paraphrasing s. 247 should also be included.

56 The indemnity in paragraph 16 is acceptable, but the reference to "gross negligence" should be a reference to "commercial reasonableness", the standard found is s. 247.

Conclusion

57 In conclusion, the Applicant has established that it is entitled to an interim receivership order in accordance with s. 47 of the Bankruptcy and Insolvency Act. However, the order tendered for signature is overly broad, and overly declaratory and legislative in nature. It purports to affect in general terms the rights of broad and undefined classes of parties who have not received notice of this application. It goes far beyond what is necessary for the protection of the estate of the debtor. It attempts to provide the Interim Receiver with immunities and protections that are not authorized by statute. The Order as presently granted will be extended for a further five days from the date of these Reasons, during which time the Applicant can draft and submit a further order for signature.

SLATTER J.

APPENDIX
Order of Smith, J. dated June 3, 2002

DISTRICT OF ALBERTA	COURT NO. 96892
DIVISION NO. 1	ESTATE NO. _______

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF
THE INSOLVENCY OF

BIG SKY LIVING INC.

BEFORE THE HONOURABLE	)	
MADAM JUSTICE L.P.L.J. SMITH	)	ON MONDAY, THE 3RD
IN CHAMBERS, LAW COURTS,	)	DAY OF JUNE, 2002.
EDMONTON, ALBERTA	)	

ORDER APPOINTING INTERIM RECEIVER

UPON the application of the HSBC BANK CANADA (the "Bank"); AND UPON having read the Affidavit of DAVID BELL, filed; AND UPON hearing counsel for the Bank;

AND UPON IT APPEARING that the Bank has a security interest in all present and after-acquired personal property of BIG SKY LIVING INC. (the "Debtor"), and has a first mortgage registered against title to certain real property located in the Province of Alberta;

AND UPON IT APPEARING that the Bank has sent to the Corporation the notice prescribed by Subsection 244(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3 (as amended) (the "BIA");

AND UPON IT APPEARING to this Honourable Court that there is sufficient urgency and reason for abridging notice of this application;

AND UPON IT APPEARING that it is necessary for the protection of the interests of the Bank and of the Debtor's estate that this Order be granted;

And upon Big Sky not appearing, though served, Atco and Country Squire not appearing, though served, Engcon Holdings appearing on a watching brief;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The time for service of the Notice of Motion and the Affidavit(s) is hereby abridged so that this Motion is properly returnable today and that further notice is hereby dispensed with.
2. Effective as of 12:01 a.m. Mountain Standard Time on the date hereof, KMPG Inc. is hereby appointed interim receiver pursuant to section 47(1) of the BIA (the "Receiver") without security of all of the property, assets and undertaking of the Debtor (collectively, the "Property"), with power to act at once to administer, manage, take control of, receive, preserve, protect, dispose of, deal with and sell the Property or any part thereof as it sees fit subject to further Order of this Court to the extent required herein, and the Receiver is hereby empowered and authorized to take possession and control of the Property, and any and all proceeds, receipts and disbursements arising out of or from the Property, and to act at once in respect thereof, until further Order of this Court.
3. The Debtor, its present and former officers, directors, solicitors, agents, custodians, managers, employees, servants, limited partners, shareholders, members, contractors, any persons acting on their instructions or behalf including, without limitation, any accountants thereof or legal counsel thereto, and all other persons having notice of this Order (collectively, the

"Affected Persons"), shall forthwith grant access to and deliver possession of the Property of every nature and kind whatsoever, wheresoever situate to the Receiver including, without limitation: (a) all monies, cash on hand, cheques, post-dated cheques and remittances of any kind relating to the Property; (b) all books, securities, documents, contracts, tenancy agreements, deeds, engineering drawings, papers, records, computer records (including computer facilities and access codes) and accounts of every kind relating thereto; and (c) any other records and information of every kind and nature relating to the Property or the business carried on by the Debtor and to provide or permit the Receiver to make, retain and take away copies thereof, and to allow the Receiver immediate, continued and unrestricted access to the Property; and all of the aforesaid persons are hereby restrained and enjoined from disturbing or interfering with the Property or the Receiver and with the exercise by the Receiver of its powers and the performance by the Receiver of its duties hereunder and, to the extent required to effect the provisions hereof, all Affected Persons are hereby relieved of the powers conferred on all Affected Persons by virtue of any office or position they may hold relating to the Debtor.

4. If the Debtor's records relating to the Property are stored in a computer (which term shall include any electronic data processing system, whether in the possession of the Debtor or a third party including, without limitation, internet service providers ("ISP") accessible to any of the persons referred to in paragraph 3 of this Order, such persons shall, at the request of the Receiver, give the Receiver access to and assistance in retrieving such information in such manner as the Receiver, in its discretion, considers reasonable and expedient.

5. Without limiting the generality of paragraphs 2 and 3 above, the Receiver shall be at liberty and is hereby authorized and empowered, but is not obligated, to take such steps on behalf of or in the name of the Debtor as it deems appropriate in respect of the Property, including, without limitation, any or all of the following, without the necessity for any further Order of the Court except in respect of transactions referred to in paragraph (f) hereof:

   (a) take possession of all or any part or parts of the Property;
   (b) make arrangements with such agents, consultants, assistants and employees as the Receiver may consider necessary or desirable to secure their assistance in the exercise of the Receiver's powers and the performance of the Receiver's duties hereunder;
   (c) carry on the business pertaining to the Property, including, without limiting the foregoing, the power to sell, lease, mortgage, manage, develop and operate the Property or any part or parts thereof in the ordinary course of business;
   (d) obtain such appraisals of the Property or any part or parts thereof as the Receiver may, in its discretion, deem appropriate;

(e) solicit offers to purchase the Property or any part or parts thereof, whether directly or indirectly through agents, auctioneers or liquidators, whether for cash or on credit, privately or otherwise;

(f) sell, transfer or assign, whether on credit, by private tender, public auction or otherwise, or to lease or mortgage the whole of the Property or any part or parts thereof in the ordinary course of business without Court approval, and out of the ordinary course of business with the approval of this Honourable Court first having been obtained in respect of any sale in which the gross sale price exceeds $1 million and in any case without compliance with the provisions of Part V of the Personal Property Security Act, R.S.A. 2000, c.P-7 or any other notice, statutory or otherwise, which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, in respect of which notices the Receiver be and is hereby relieved;

(g) take steps for the preservation and protection of the Property, including, without restricting the generality of the foregoing, to pay any debts, claims, obligations or liabilities, of the Debtor which have priority over the claims of the Bank and to pay such other debts, claims, obligations or liabilities, of the Debtor as the Receiver deems necessary or advisable to protect or properly realize on the Property, provided that all of the aforementioned payments are to be allowed to the Receiver in passing its accounts and shall form a part of the Receiver's First Charge (as defined below) on the Property;

(h) complete or partially complete such repairs and improvements on the Property as the Receiver may, in its discretion, deem appropriate;

(i) employ and retain such agents, assistants, experts, auditors, advisors, consultants, employees, solicitors and counsel, including legal counsel, as the Receiver may consider necessary or desirable and, in particular, but without limiting the generality of the foregoing, to retain a manager to, among other things carry out the management of some or all of the Property and to the extent that the Receiver employs any of the former employees of the Debtor, paragraph 11 shall apply;

(j) receive, attorn and collect all monies and deposits now or hereafter owing to the Debtor pertaining to the Property;

(k) extend the time for payment of any monies now or hereafter due or owing to the Debtor pertaining to the Property, with or without security, and to settle or compromise any such indebtedness;

(l) apply for any permits, licenses, approvals or permissions as may be required by any governmental authority with respect to the Property;

(m) assume any contracts, licenses, or permits to which the Debtor is a party or refrain from assuming same;

(n) execute, sign, issue, endorse or negotiate in the name of and on behalf of the Debtor, or any of them, all necessary cheques, leases, bills of sale, transfers of land, conveyances, bills of lading, deeds and documents of whatever nature necessary or incidental to the exercise of the powers granted herein;

(o) purchase or lease such machinery, equipment, premises or other assets or supplies as may be necessary or desirable in the opinion of the Receiver to receive, manage, preserve, protect or realize upon the Property or any part or parts thereof;

(p) take such steps as in the opinion of the Receiver are necessary or appropriate to establish and maintain control over the Property or any part or parts thereof, including, but not limited to, the changing of locks and security codes, (including but not limited to computer access and security codes) the engaging of independent security personnel, the taking of physical inventories and the placement of adequate insurance coverage as required;

(q) pay ongoing costs or expenses incurred prior to, on or after the date of this Order which arise out of or in connection with the day to day use of the Property;

(r) take any steps, enter into any agreements or incur any obligations necessary or incidental to the exercise of the aforesaid powers and to disclaim, terminate or otherwise refuse to carry out any agreement of the Debtor in connection therewith;

(s) register notice of this Order against title to the Property in the appropriate registry offices;

(t) vote any shares and exercise any rights which the Debtor may have as a shareholder;

(u) make an assignment of all of the property of the Debtor for the general benefit of its creditors pursuant to the BIA, or to consent to a Receiving Order against the Debtor and to act as Trustee in Bankruptcy of the estate of the Debtor;

(v) file a Notice of Intention to Make a Proposal or a Proposal pursuant to the BIA or initiate reorganization or arrangement proceedings pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36. as amended, the Alberta Business Corporations Act, R.S.A. 2000, c.B-9, as amended, or any other provincial or federal statute, and to participate fully in any such proceedings, which may include but is not limited to applying for an extension of any period of time within which the Debtor is required to file a Proposal or plan in any existing reorganization or arrangement initiated by the Debtor whether pursuant to the BIA or otherwise;

(w) to complete any sale which is pending as at the date of this Order, (i) on the basis that any representations and warranties to be given under any agreement of purchase and sale remain representations and warranties of the vendors named therein and shall not be or be deemed to be representations and warranties of the Receiver and

(ii) if necessary, with such changes or amendments as are deemed appropriate by the Receiver, without prior approval or further order of the Court, and to do or perform all acts or things necessary for the completion of such transactions; and

(x) abandon or surrender all or any part of the Property, including leased premises, in which case only the pro-rated portion of the occupation costs shall apply;

6. The Receiver may apply, from time to time, upon two (2) days notice to the persons affected for directions and guidance in the exercise of the Receiver's powers and the performance of its duties hereunder.
7. All persons, firms, or corporations, governments, governmental agencies, municipalities, counties and other entities of any kind or nature including without limitation all Affected Persons (collectively, the "Persons" and each a "Person") are each hereby restrained and enjoined until further Order of this Honourable Court from varying, amending, terminating, cancelling or breaching any contracts or agreements with the Debtor in existence as of the date of this Order.
8. Without limiting the generality of the provisions hereof, no Person claiming an interest in the Property or any part or parts thereof shall be at liberty to exercise any rights in respect of such interest, including without limitation a right to possession of such Property or any part or parts thereof, except with the prior written consent of the Receiver or with leave of this Honourable Court being first obtained on at least seven (7) days notice to the Receiver.
9. Absent the consent of the Receiver, until further Order of this Honourable Court, no Proceedings (as hereinafter defined) shall be commenced, taken or proceeded with against the Receiver or the Property. For greater clarity and without limitation:

(a) any and all Proceedings (as hereinafter defined) commenced, taken or proceeded with or that may be commenced, taken or proceeded with by any Person, including, without limitation any of the Debtor's creditors, shareholders, employees, directors, officers, partners, joint ventures, beneficiaries, trustees, customers, clients, purchasers, suppliers, consultants, agents, principals, lessors and lessees (including without limitation, lessors and lessees of real property and equipment), governments of any nation, province, state or municipality or any other entity, exercising the executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, whether federal, provincial, state or municipal, in Canada or elsewhere and any corporation or other entity owned or controlled by or which is the agent of any of the foregoing or any other person, firm, corporation or entity wherever situate or domiciled, against or in respect of the Debtor or any Person who is from and after the date of this Order a director, officer or employee of the

Debtor, or in respect of any present or future Property shall be stayed and suspended;

(b) for the purposes of this Order, Proceedings shall mean and include, without limitation, any act or process of or connected to realization, seizure, repossession and/or any suits, actions, extra-judicial proceedings or remedies, enforcement processes or the termination, revocation, suspension or cancellation of any permits or licenses affecting the Debtor, its business, operations, Property or other remedies, and shall specifically include any access to or development of any utility right-of-way affecting the Property or any part thereof;

(c) all Persons having Agreements (as hereinafter defined) with the Debtor, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such Agreements or the supply of goods and services and are also hereby restrained from exercising any right of distress, recession, set-off or consolidation of accounts in relation to any indebtedness or obligation in favour of the Debtor or from retaining goods, without the prior written consent of the Receiver or leave of this Honourable Court on proper notice to the Receiver. Without limiting the generality of the foregoing, all Persons are restrained until further Order of this Honourable Court from discontinuing or interfering with any utility or required services to or utilized by the Debtor (including telephone, facsimile or other communication services at the present numbers used by the Debtor in respect of any Property), the furnishing of oil, gas water, heat or electricity, the supply of equipment, computer software, hardware support and electronic, internet access, electronic mail and other data services, so long as the Receiver pays (subject to the other provisions of this Order) the normal prices or charges (other than security or other deposits whether by way of cash, letter of credit or guarantee or otherwise, stand-by fees or similar items, which the Receiver shall have no obligation to pay or grant) for such goods and services received after the date of this Order as same become due and payable in accordance with present payment practices, or as may be hereafter agreed by the Receiver from time to time, or as otherwise may be provided for in this Order. Provided that nothing herein shall prohibit any Person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the date hereof, and all Persons shall continue to perform and observe the terms and conditions contained in any Agreements (as hereinafter defined) entered into with the Debtor whether in connection with any of the Property or otherwise;

(d) for the purposes of this Order, Agreement(s), shall mean and include any arrangement or agreement, written or oral, with the Debtor, including, without limitation, agreements or arrangements for the sale, supply, purchase or lease of goods and/or services (inclusive of labour) and/or real property from, by or to the Debtor or with respect to any of the Property, or any service agreement, warranty agreement, transportation agreement, rental agreement, collective bargaining agreement, delivery agreement, consulting agreement, management agreement, insurance contract or agreement and/or any similar contract or agreement;

(e) the right of any Person to commence or continue Proceedings in respect of any encumbrance, security interest, tax, lien, charge, mortgage, hypothec, prior claim or other security held in relation to Property, or to any trust attaching to the Property, including the right of any Person to take any step in asserting or perfecting any right or interest is hereby restrained. Notwithstanding the foregoing or any other term of this Order, the Bank is at liberty to commence and continue any action for the enforcement of its security;

(f) the right of any Person to assert, enforce or exercise any option, remedy or right, including, without limitation, any right of dilution, buy-out, divestiture, repudiation, recession, forced sale, forced purchase, acceleration, termination, suspension, modification, cancellation, or right to revoke any qualifications or registration, howsoever such remedy, option or right arises and whether such remedy, option or right arises under or in respect of any Agreement or by reason of any default under any Agreement, is hereby restrained;

(g) the right of all Persons to make demand upon, send notice to or declare default with respect to the Debtor or the Property is hereby restrained;

(h) any deposit made by the Receiver with any Person from and after the making of this Order, whether in an operating account or otherwise and whether for its own account or for the account of any other entity, shall not be applied by such Person in reduction of or repayment of any amount owing as of the date of this Order or which may become due on or before the date of this Order or in satisfaction of any interest, fees, charges or other amounts accruing in respect thereof, and such Person shall have no right of lien, set-off, counterclaim, consolidation or other right in respect of such deposits, and such deposits shall be remitted to the Receiver.

10. The Receiver is hereby fully authorized and empowered, but not obligated, to initiate, prosecute and continue the prosecution of any and all actions, applications, administrative hearings, arbitrations or proceedings as may in its judgment be necessary or desirable to properly receive, manage, operate, preserve, protect or realize upon the Property and to secure payment of rent and accounts from the Property, to defend all applications, proceedings, actions, administrative hearings or arbitrations now pending or hereafter instituted against the Debtor or the Receiver the prosecution or defence of which will in the judgment of the Receiver, be necessary to properly receive, manage, operate, protect, preserve or real-

ize on the Property or to protect the administration by the Receiver of the Property, and to settle or compromise any such actions, applications, proceedings, administrative hearings or arbitrations which in the judgment of the Receiver should be settled or compromised. The authority hereby bestowed shall extend to such appeals or applications for judicial review as the Receiver shall deem proper and advisable in respect of any order or judgment pronounced in any such application, proceeding or action, administrative hearing or arbitration.

11. The employment of all of the employees of the Debtor, including without limitation, all employees on maternity leave, disability leave, layoff, temporary leave or any other of approved absence is hereby terminated effective 11:59 p.m. on the day before the making of this Order. Notwithstanding the appointment of the Receiver or the exercise of any of its powers or the performance of any of its duties hereunder, or the use or employment by the Receiver of any person in connection with its appointment and the performance of its powers and duties hereunder, the employment by the Receiver of any person formerly employed by the Debtor shall be deemed not to be a continuation of that person's employment and the calculation of any benefits or entitlements arising from that person's employment shall not be computed as though that person's employment continued after 11:59 p.m. on the day before the making of this Order and the Receiver is not and shall not be deemed or considered to be the same employer, a successor employer, related employer, common employer, representative or successor of the employer, deemed employer, sponsor or payer with respect to any of the employees of the Debtor or any of its subsidiaries or any former employees thereof within the meaning of any provincial, federal or municipal legislation or common law governing employment or labour standards, the treatment of persons in their capacities as employees, or labour or employment standards or workplace safety, or any other statute, regulation or rule of law or equity for any purpose whatsoever, or any collective agreement or other contract between the Debtor and any of its present or former employees. The Receiver shall not be liable to any of the employees of the Debtor for any unpaid pension or benefit contributions or for any wages (as "wages" are defined in the Employment Standards Code, R.S.A. 2000, c.E-9, or any other provincial statute governing labour or employment standards), severance pay, termination pay, vacation pay, holiday pay, or any other employee benefit or accrued incentive or entitlement, or any amount whatsoever arising from any of the employees' employment on the cessation or termination thereof, whether pursuant to statute or common law except for such amounts as the Receiver may specifically agree to pay. If the Receiver deems it necessary or advisable to make payment to the employees of the Debtor of any amounts on account of unpaid wages, severance pay, termination pay, vacation pay or any other employee benefit or accrued incentive and entitlement owing by the Debtor as at the date of this Order, the claims of the employees in respect of such amounts shall

be deemed to have been assigned to the Receiver for the purpose only of the Receiver asserting a claim against the estate of the Debtor and, in the event of the bankruptcy of the Debtor, the Receiver shall be entitled to file one or more proofs of claim in respect of such amounts which shall be accepted by the Trustee as valid claims pursuant to subsection 136(1)(d) of the BIA. For greater certainty, such assignment shall not have the effect of granting to the Receiver any claims or rights against the present and former directors and officers of the Debtor. Further, by the granting of this Order, the business of the Debtor has not been and shall not be deemed to have been, nor treated as having been sold, but rather, such business or businesses will continue to be the business(es) of the Debtor until sold, in whole or in part, to a purchaser other than the Receiver and nothing in this order shall or shall be deemed to determine whether such a purchaser is or is not a successor employer of the Debtor's employees and former employees.

12. The Receiver shall pass its accounts from time to time and shall pay the balances in its hands as this Honourable Court may direct.
13. The Receiver's remuneration and any expenses which may be properly made or incurred by the Receiver in connection with the exercise of its powers and the performance of its duties hereunder (including without limitation fees and disbursements of its counsel on a solicitor and its own client basis) shall be allowed to the Receiver in the passing of its accounts and shall form a first and specific, fixed ranking charge on the Property ranking in priority to any and all other charges or claims of the Bank or any other Person and all encumbrances subsequent thereto (the "Receiver's First Charge").
14. The costs of the Bank in the preparation of this motion, and up to and inclusive of the hearing of this motion and the entry of this Order be assessed as between a solicitor and his own client and the Receiver shall pay such costs, which shall be treated as an expense of the Receiver and be satisfied as contemplated herein.
15. The Receiver shall be at liberty, from time to time, to pay, from monies in its hands, costs and other expenses relating to the Property, including its own remuneration and disbursements and that of its legal counsel, whether incurred prior to or subsequent to the date of this Order. Any amounts so applied against the Receiver's remuneration and expenses shall constitute advances against the amounts allowed on the passing of the Receiver's accounts.
16. The Receiver is hereby indemnified out of the Property from and against all liabilities arising out of the performance of its duties as Receiver pursuant to the terms of this Order, save and except for any gross negligence or willful misconduct on part of the Receiver with respect to such duties, and the Receiver shall have a charge on the Property for such indemnity in priority to all security, charges and encumbrances affecting the Property excepting only the Receiver's First Charge.

17. The Receiver shall be at liberty and is hereby empowered to borrow monies without personal liability from time to time as it may consider necessary, not to exceed $2 million in principal amount in the aggregate, with such fees and at such rate or rates of interest as it deems advisable and for such period or periods as it may be able to arrange, for the purpose of exercising its powers and performing its duties. The monies authorized to be borrowed and interest thereon shall form a first specific, fixed charge on the Property and/or its proceeds ranking in priority to the charge of the Bank or any other Person and all encumbrances subsequent thereto, on the Property and/or its proceeds, but subject to the Receiver's First Charge and the rights of the Receiver to be indemnified out of the Property with respect to its liability, expenses and its own remuneration properly incurred, as contemplated herein.
18. The monies authorized to be borrowed by this Order shall be evidenced by certificates substantially in the form of the draft certificate attached as Schedule "A" to this Order and may be in the nature of a revolving credit or term facility which the Receiver may pay off or re-borrow within the limits of the authority hereby conferred.
19. All monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Honourable Court, and all Receiver's Certificates representing the same or any part thereof, shall rank pari passu.
20. Any security granted by the Receiver in connection with its borrowings shall not be enforced without leave of this Honourable Court first being obtained upon seven (7) days notice to the Receiver.
21. Notwithstanding any other provision contained in this Order, the Receiver shall be protected by the terms and provisions of the BIA including without limitation, section 14.06 of the BIA, as amended.
22. The Receiver is not and shall not be deemed to be an owner, occupier or other person responsible in respect of any of the Property for any purpose including, without limitation, for purposes of Environmental Legislation.
23. The Receiver shall not be liable under Environmental Legislation in respect of any Adverse Environmental Condition (as defined below) with respect to the Property or any part thereof that arose or occurred before the latter of the date of appointment of the Receiver or the date the Receiver goes into possession of the Property, if applicable.
24. The Receiver shall not be liable under Environmental Legislation, in relation to its position as Receiver, in respect of any Adverse Environmental Condition at the Property or any part thereof that arose, occurred or continued after the time of appointment of the Receiver unless such Adverse Environmental Condition has been caused by gross negligence or willful misconduct of the Receiver.
25. Notwithstanding paragraph 24, the Receiver shall not be liable beyond the Net Realized Value of the Property (as defined in Paragraph 29 below) under any Environmental Legislation in respect of any Adverse Environmental Condition with respect to the Property or any part thereof ex-

cept that which has been caused by the gross negligence or willful misconduct of the Receiver.

26. For purposes of this Order, the term "Environmental Legislation" shall mean any federal, provincial or other jurisdictional legislation, statute, regulation, guideline, standard, or rule of law or equity respecting the protection, conservation, enhancement, remediation or restoration, rehabilitation or assessment of the environment or relating to the disposal of waste or other contamination, which may have application in any province or state in which the Debtor carries on business and any orders or directions made pursuant to any of the foregoing.
27. For purposes of this Order, the term "Adverse Environmental Condition" shall include, without limitation, any injury, harm, damage, impairment or adverse effect to the environmental condition of the Property and the unlawful storage, spillage, discharge, release, deposit or disposal of any substance which may cause an adverse effect including, without limitation, hazardous substances, waste or other contamination on or from the Property.
28. Nothing herein contained shall vest in the Receiver the care, ownership, control, charge, occupation, possession, responsibility or management, nor require the Receiver to take care, ownership, control, charge, occupation, possession, responsibility or management, of any of the Property which may be environmentally polluted or contaminated or where a pollutant or contaminant, is or may become present or from which any spill, discharge, release or deposit of a substance emanates, contrary to any Environmental Legislation or which is the subject of any Adverse Environmental Condition.
29. Any liability of the Receiver whatsoever, including in respect of any form of negligence and willful misconduct, and whether in its personal capacity or in its capacity as Receiver and whether arising out of or from its appointment or the exercise of its powers hereunder, including without limitation, arising in connection with Environmental Legislation, or labour or employment laws, shall be limited in the aggregate to the Net Realized Value of the Assets in the possession of the Receiver and, after distribution thereof, in respect of claims in respect of gross negligence and willful misconduct, only to the total assessed fees of the Receiver. "Net Realized Value of the Assets" shall be the cash proceeds actually received by the Receiver from the operation and disposition of the Assets, after deducting all costs and expenses properly incurred in connection therewith, including the remuneration and expenses of the Receiver and the fees and disbursements of its counsel, on a solicitor and its client basis, and any monies borrowed by or other indebtedness incurred by the Receiver pursuant to this Order and all interest thereon paid out of such proceeds, and any distributions of such proceeds.
30. No person shall commence any proceedings concerning the affairs of the Debtor or the Receiver's performance or alleged failure to perform its duties under this Order without first obtaining leave of this Honourable Court

by motion made on not less than seven (7) days notice to the Debtor and the Receiver.

31. The Registrar of Land Titles for the North Alberta Land Registration District is hereby directed, notwithstanding Section 191 of the Land Titles Act, R.S.A. 2000, c.L-4, to effect registration of this Order, or any conveyance or Transfer of Land or instrument executed by the Receiver pertaining to land owned by the Debtor.

32. The Receiver is at liberty, and is hereby authorized and empowered to apply, upon such notice as it may consider necessary or desirable, to any other courts or tribunals in any other jurisdictions, both foreign and domestic, including any Province in Canada, the Federal Court and any foreign court, tribunal or administrative body, for orders aiding, assisting or recognizing the appointment of the Receiver and confirming the powers of the Receiver in any other jurisdiction or jurisdictions, and all courts of all such jurisdictions, both foreign and domestic, are hereby respectfully requested to make such orders and provide such other aid, assistance and recognition to the Receiver, as an officer of this Honourable Court, as they may deem necessary or appropriate in furtherance of this Order or any subsequent Order in this proceeding. For the purposes of s. 304 of the U.S. Bankruptcy Code, the Receiver is the foreign representative of the Debtor.

33. This order expires on Friday, June 7, 2002 at noon unless it is renewed in chambers, and it is now put over to Friday, June 7/02, at 10:00 am chambers.

[Smith, J. deleted the draft paragraph 33, which read: Any person affected by this Order may move on seven (7) days notice to the Receiver and the parties affected to amend any provision of this Order provided that the moving party brings such motion forthwith after the matter at issue becomes known to that moving party.]

34. The Bank is hereby given leave to file the Motion and Affidavit in connection with the application which has resulted in the granting of this Order, and proof of service thereof, after the time prescribed by Rule 13 of the General Rules of the BIA.

"L.P.L. J. Smith" JUSTICE OF THE COURT
OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY
AND INSOLVENCY

ENTERED this 3rd day of
June, 2002.

"W. Breitkreuz"
REGISTRAR IN BANKRUPTCY

SCHEDULE "A"

AMOUNT $ RECEIVER CERTIFICATE NO.

1. THIS IS TO CERTIFY that KPMG Inc., the Interim Receiver (the "Receiver") over the assets, property and undertaking of ______________ (the "Property"), appointed by an Order of the Court of Queen's Bench of Alberta dated the __________ day of ________, 20_____ made in an action having court file number __________ (the "Order"), acknowledges that as Receiver it is indebted to ___________ (the "Lender") on account of this certificate in the maximum principal sum of $__________, which the Receiver is authorized to borrow under and pursuant to the Order.
2. The principal sum which may from time to time be outstanding on account of this certificate is payable on demand with interest thereon calculated and payable monthly on the ________ day of each and every month at the rate of __________ per annum (both after as well as before demand) to the date of payment. The first payment of interest shall be calculated for the period commencing __________ and shall be payable on the __________ of _________.
3. The principal sum with interest thereon is by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, together with all other assets and property which are now or may hereafter be in the custody and control of the Receiver (the "Charge"), in priority to the security interests of HSBC BANK CANADA and all subsequent encumbrances thereto, but subject to the right of the Receiver to indemnity out of the Property in respect of its remuneration and its expenses and legal costs properly incurred.
4. Until the Lender delivers or issues a written notice to the Receiver pursuant to paragraph 2 above, the Receiver may borrow, repay and reborrow, and the Lender may advance on account of this certificate such principal sums as the Receiver may require; provided that the principal outstanding shall at no time exceed $1.
5. From time to time and at any time, the Receiver may make such payments on account of principal sum outstanding as it considers appropriate or desirable without any penalty.
6. All sums payable in respect of principal and interest under this certificate are payable at ___________.
7. Until all liability in respect of this certificate shall have been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the Lender, without the prior written consent of the Lender.
8. All liability in respect of the whole or any part of the principal sum for which this certificate is issued and interest thereon shall at any time or

from time to time be terminated on tender to the Lender of the outstanding balance of the principal sum together with interest accrued thereon to the date of tender.

9. The Charge shall operate so as to permit the Receiver to deal with the Property and all other assets and property coming under the control of the Receiver as authorized by the Order and as authorized by any further or other order of the Court.

10. Notwithstanding any other provisions hereof, the Charge created hereby shall not cease to operate or be or be deemed to be void by reason of the principal sum outstanding hereunder becoming or being zero at any time or from time to time.

11. The Receiver does not undertake and it is not under any personal liability to pay any sum in respect of which it may issue certificates under the terms of the Order.

cp/i/qlrds/qlhjk

TAB 2

Amendments to the *Bankruptcy and Insolvency Act*—Bill C-5 Environmental Liabilities of Trustees and Receivers

Joseph Marin and Alex Ilchenko
Lang Michener
Toronto

[Editor's note: The following is the first part of a two-part article on Bill C-5. The conclusion will be published in the next issue of NIR.]

Introduction

When the *Bankruptcy and Insolvency Act* (the "BIA") was amended in November 1992, Bill C-22 contained a three-year review clause to assess the impact of the 1992 amendments and to determine whether additional reform was necessary. In furtherance of this review process, the Bankruptcy and Insolvency Advisory Committee ("BIAC") was established as a public and private sector consultative committee with a mandate to identify insolvency and bankruptcy issues and make policy and legislative proposals. BIAC established eight working groups and thirteen task forces to examine specific issues and present issue papers to BIAC for review.

One of the task forces was the BIAC Environmental Task Force (the "BIAC Environmental Task Force"), which proposed compromises on matters such as personal liability and the priority of environmental remediation claims which might be asserted by environmental regulatory authorities. The amendments proposed by the BIAC Environmental Task Force were received by BIAC, and Bill C-5 (formerly Bill C-109), *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, which incorporates many of the recommendations of BIAC to amend the BIA, was passed by the House of Commons on Oct. 23, 1996 and passed by the Senate with amendments on Mar. 20, 1997. A motion to adopt the Senate amendments was passed by the House on Apr. 15, 1997.

Regulatory Framework

Under the provincial environmental regulatory framework, administrative orders may issue against a wide range of persons having, or which have had, a relationship to a property, an undertaking, a pollutant or a contaminant.[1] In addition to the significant expense that may be incurred to comply with such administrative orders, the failure to do so may constitute an offence under provincial environmental legislation.[2]

Administrative orders, generally, may be issued by environmental regulatory authorities:

1) against persons without responsibility for causing or permitting the discharge or release of a contaminant;
2) without limitation by the expiry of time following the cessation of ownership, occupation, charge, management or control by the person to which an order has been issued;
3) without regard to any causal connection between the discharge and the specific relationship of an owner or occupant or person in charge, management and control, past or present, to a property; and
4) without apportionment of liability among the "persons responsible" to which the order has been directed (or with any persons which may be "persons responsible" to whom the order has not been directed).[3]

This framework is particularly troubling for trustees in bankruptcy, receivers, receivers and managers and interim receivers because of their relationship to environmentally sensitive sites, either by ownership[4] or by charge, management or control of these sites.[5] This is particularly the case because environmental legislation does not generally prescribe the specific conduct, acts or omissions that attract corresponding environmental liabilities.[6]

Environmental Liability Prior to Bill C-5

The enactment of subss. 14.06(2) and (3) of the BIA in 1992 was heralded as providing statutory protection to trustees in bankruptcy to administer environmentally troubled properties. This provision was a response to the need to provide protection for trustees in bankruptcy from personal liability for environmental concerns arising prior to their appointment. Subsections 14.06(2) and (3) provided that a trustee was not personally liable as trustee of a bankrupt's estate for any environmental conditions which arose or any environmental damage which occurred before the trustee's appointment, or after the appointment, unless, in the latter instance, such conditions or damage were a result of the trustee's failure to exercise due diligence. The trustee was, however, required to make any report or disclosure required by federal or provincial environmental legislation.

Subsections 14.06(2) and (3) do not address the contentious issue of priority of governmental environmental claims against bankrupt estates. Prior to the enactment of s. 14.06, courts in Canada had held that an environmental administrative order directed to the bankrupt would not constitute a provable claim in the bankruptcy, but nonetheless had to be complied with by the trustee.

This "public duty" of a trustee to comply with administrative orders would require that the value of the assets under the trustee's administration be applied to pay for the costs of compliance with administrative orders issued against the bankrupt (or against the trustee, where the trustee was a "person responsible" under the applicable environmental legislation) for historical environmental conditions at any of the bankrupt's properties, in priority to all other unsecured claims, and without any assurance of recovery out of the estate assets of the trustee's remuneration or disbursements. The financial liability for the discharge of such a duty was not limited to the proceeds of sale of the specific environmentally affected property.[7]

As well, this statutory protection was not extended, in the 1992 amendments, to interim receivers appointed under the BIA,[8] to receivers or receivers and managers or to trustees acting in a proposal. This left the courts to determine the nature and extent of the obligation of such persons to apply the assets of the estate to remediate environmental conditions and damages; whether such obligation was of a personal nature in circumstances in which the assets under administration were insufficient to wholly satisfy the discharge of such an obligation; and the priority of governmental environmental claims asserted against the estate for the remediation of adverse environmental conditions or damages.

Judicial decisions both prior to and following the enactment of s. 14.06 established principles of great concern to receivers, receivers and managers, interim receivers and trustees of proposals (and to trustees in bankruptcy, at least to the extent of the priority of governmental environmental claims in the estate which had not been addressed by the 1992 amendments):

1) The discharge of a statutory duty to comply with environmental administrative orders requires that persons administering insolvent estates apply the assets under administration to the remediation of the environmental condition or damage in priority to the claims of other creditors, secured and unsecured.[9]
2) By implication, the payment of the costs of discharging this public duty is not limited in amount to the net proceeds of realization for the particularly affected property or for that matter, to the net proceeds of realization for all of the properties under administration.[10]
3) Where the liability of such persons under environmental legislation is clear and unambiguous and does not exclude such persons from its ambit, courts do not have inherent jurisdiction to "rewrite" this legislation to immunize the court-appointed officer by including language limiting their liability in the appointment order.[11]
4) In the context of a private receivership, the secured creditor appointing a receiver and manager may be liable for any breach of an imposed standard of care in the course of the disposition by a receiver and manager of the debtor's assets and, if the debtor is a bankrupt, in the carrying on of the business of the bankrupt.[12] Secured creditors may accordingly attract environmental liabilities by the private appointment of a receiver and manager to administer environmentally affected properties in circumstances in which such receiver and manager is acting as agent for the secured creditor.

Because of concerns of secured creditors under environmental legislation as to their liability as a "person responsible," either directly through their enforcement of security or by indemnification of receivers and managers upon their appointment,[13] secured creditors have, following the enactment of the 1992 amendments, petitioned a debtor into bankruptcy with a view to having a trustee in bankruptcy, with the statutory protection of subs. 14.06(2) of the BIA, realize upon the debtor's assets.[14]

However, in a bankruptcy, the trustee in bankruptcy would have limited ability to conduct the debtor's business (absent an indemnity from the appointing creditor or creditors or from the inspectors of the estate) and would be bound to exercise "due diligence" to avoid liability for post-appointment environmental conditions or damages.

The "due diligence" standard imposed under subs. 14.06(2) has been perceived as an uncertain one for trustees, given the limited technical, physical and financial resources that were or could practically be made available from the bankrupt estate.[15] This standard of "due diligence" could be particularly onerous in circumstances in which the trustee had not been responsible for the establishment of the bankrupt's system to prevent occurrences of adverse environmental effects, but was practically and economically required to rely upon this system in maintaining or operating businesses on the bankrupt's properties.[16]

Principles Applying to the BIA Amendments

The general principles which guided the recommendations of the BIAC Environmental Task Force were expressed in the BIAC Environmental Task Force Issue Paper dated Nov. 16, 1994 and included the following:

1) The uncertainty of the "due diligence" standard of care, which would be determined by the facts of a particular situation, had resulted in trustees in bankruptcy refusing to accept engagements which would involve taking possession of environmentally sensitive properties, even with the statutory protection afforded by subs. 14.06(2) of the BIA.
2) Parties with a financial interest in the bankruptcy proceedings were reluctant to provide indemnities to trustees where the extent of the liabilities was uncertain and environmental remediation costs were unquantifiable, resulting in such properties being unprotected and abandoned.
3) To encourage the operation of a debtor's or a bankrupt's business, the liability of the estate for environmental remediation should be limited to proceeds realized from the sale of the particularly affected property. This may result in no recovery for the estate from the carrying on of the business of the debtor or the bankrupt, but would not expose the remaining estate assets to remediation costs.
4) Remediation costs should constitute a first charge on proceeds realized from the sale of the environmentally affected property, but the limitation of this charge to the affected property would ensure that the ability of borrowers to obtain financing from lenders would not be unduly restricted.

Effect of Amendments

The amendments to subss. 14.06(2) and (3) of the BIA in Bill C-5 have extended the statutory protections for potential environmental liabilities in the following manner:

1) The protection from personal liability for environmental matters provided to trustees in bankruptcy is extended to "receivers" (which includes receivers and managers) within the meaning of subs. 243(2) of the BIA, to interim receivers appointed under the BIA and to trustees acting under proposals made to creditors under the provisions of the BIA. For purposes of this paper, trustees in bankruptcy, "receivers" within the meaning of subs. 243(2) of the BIA, interim receivers appointed under the BIA and trustees acting under proposals made to creditors under the provisions of the BIA are referred to as "trustees."
2) Trustees will not be personally liable for environmental conditions that arose or damages that occurred after their appointment, unless such conditions arose or the damages occurred, as a result of such persons' "gross negligence or wilful misconduct." This replaces the "double negative" standard which currently applies under subs. 14.06(2) of the BIA to trustees in bankruptcy and exempts them from personal liability for environmental conditions arising or environmental damage occurring after their appointment unless such conditions or damage result from their failure to exercise "due diligence." Trustees (in the extended meaning of that term in Bill C-5) will continue to be protected from personal liability for environmental conditions which arose and damages which occurred prior to their appointment.
3) Trustees will not be personally liable for failing to comply with an environmental administrative order or for any costs that would be incurred in carrying out the terms of such order if, within prescribed time periods, trustees comply with the order, abandon the property or are divested of the property or properties that are subject to such order. In furtherance of this principle, trustees may apply to the bankruptcy court or to court or the regulatory authority having jurisdiction under environmental legislation to obtain a stay of enforcement or a stay of proceedings with respect to such order.
4) Any federal or provincial governmental claim for environmental remediation costs will be secured by a first ranking "superpriority" charge on the affected real property and against any real property of the debtor that is contiguous to the affected real property and that is related to the activity that caused the environmental condition or damage. If these

environmental remediation costs exceed the value of the property that is adversely affected (and the value of any qualifying contiguous property), such costs in a bankruptcy (whether the condition arose or the damage occurred before or after the date of the filing of the proposal or of the bankruptcy) may be proved as ordinary unsecured claims in the estate, but cannot claim priority as costs of administration in circumstances in which the trustee has abandoned or renounced an interest in the property.

As was the case for a trustee in bankruptcy under subs. 14.06(3), trustees will continue to be bound to comply with any statutory duty to report or make disclosure where such duty is imposed by federal or provincial environmental legislation.[17]

Analysis of Environmental Provisions of Bill C-5

Persons to Which the Term "Trustee" Extends:

> 4.06 (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 term trustee, which includes a "receiver" within the meaning of the BIA, would incorporate the traditional appointment of an insolvency professional to take possession or control of secured property by the terms of a security agreement or a court order and the taking of possession or control of such property under the terms of a security agreement directly by the secured creditor.

However, by reason of the definition of "receiver" under the BIA, the protections extended under Bill C-5 will only apply to receiverships or to secured creditor realizations that involve all or substantially all of the property (or of one of enumerated classes of property) of an insolvent person or a bankrupt that was acquired for or is used in relation to a business carried on by the insolvent person or the bankrupt.[18] Accordingly, the environmental protections afforded by Bill C-5 would not extend to receiverships (including secured creditor realizations) in circumstances in which the assets under administration or being realized upon or the status of the debtor would not qualify the secured creditor or its (or the court's) appointee as a "receiver."[19]

A mortgagee or secured creditor which enforces its security against a particular property, or against all the properties of a person who is neither an insolvent person nor a bankrupt, will not be afforded the statutory protection of s. 14.06(2). In such circumstances, such persons will have to consider, where environmental regulatory authorities are prepared to do so, negotiating an agreement with such regulatory authorities to limit their environmental liabilities upon enforcement of their security.[20]

Trustees acting in a proposal (unless they become trustees in bankruptcy because of the deemed bankruptcy of the debtor when the proposal does not proceed, is not accepted by the creditors or is not approved by the court) do not, during the period that they act in that capacity, carry on the business of a debtor or exercise charge, management or control over the debtor's property. Accordingly, certain of the provisions of s 14.06 (such as the right to abandon environmentally affected properties) would not apply to a trustee acting in a proposal (and would not operate to limit the liabilities of, or confer rights upon, the debtor which are not otherwise available to it).

Standard of Care:

> 14.06(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred
> (a) before the trustee's appointment; or
> (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct.

A. Exemption from Legislation of General Application

There has been a variance in the "notwithstanding" provisions in subs. 14.06(2) (which have also been incorporated in subs. 14.06(6)) from one which references "any provision of federal or provincial legislation respecting the protection or rehabilitation of the environment" in the current subs. 14.06(2) to one of "anything in any federal or provincial law."

The language utilized in the 1992 amendments did not clearly incorporate within the ambit of protection a vast array of statutes and regulations which incidentally deal with environmental concerns such as pesticides, transportation or dangerous goods, underground storage tanks, occupational health and safety, fisheries regulation and water resource management. The generalization of the ambit of the "notwithstanding" provisions in Bill C-5 should remove any doubt that the protection is intended to apply to all legislation having environmental impact or concern whether of a primary or incidental nature.

However, the reference to federal and provincial legislation would continue the exclusion from the ambit of the protection, embodied in the 1992 amendments, of claims asserted against a trustee in environmentally founded actions based upon principles of contract or in tort. Accordingly, the standard of care, if the conduct of the trustee were impugned in such a claim, would not be one of "gross negligence or wilful misconduct," but those standards which courts have applied in common-law actions such as strict liability, nuisance, riparian rights, trespass and negligence.[21]

B. "Gross Negligence or Wilful Misconduct"

The varying of the standard of care from one of "due diligence" to that of "gross negligence or wilful misconduct" provides a standard with which receivers (and trustees in bankruptcy) may be more familiar (both in terms of a standard which is often imported into appointment orders in court-appointed receiverships or in indemnities extended to trustees and receivers by petitioning or appointing creditors).[22]

A trustee in bankruptcy's duties and powers are prescribed in the BIA[23] and both privately and court-appointed receivers and receivers and managers have common-law and statutory duties to act in a commercially reasonable manner.[24] These duties and powers are, as expected in the context of a receivership and a bankruptcy, primarily directed to ensure that the assets under administration are dealt with at their highest possible value, for the benefit of the creditors (and the debtor) with an interest in the estate, consistent with prudent conduct on the part of the receiver or receiver and manager.

These common-law and statutory duties have variably been described as including "equitable" or "fiduciary" duties owed to all creditors (and to the debtor),[25] a standard of care that an ordinary or reasonably prudent person would give to the business if it were its own[26] and an obligation to discharge the powers granted to the estate administrator honestly and *bona fide*.[27] In certain circumstances, a standard of negligence, and not gross negligence or wilful misconduct, has been applied to assess whether a duty of care has been breached.[28]

It is, however, not these duties which are of concern to a trustee in the context of adverse environmental conditions or damages at a property under administration. In these circumstances, courts have fashioned a "public" duty imposed upon both a trustee in bankruptcy and a receiver and manager to comply with the terms of administrative orders issued under provincial environmental laws of general application, whether the object of these orders is sourced from historical or continuing occurrences.[29] Specifically, judicial authorities have emphasized that a trustee in bankruptcy and a receiver and manager must comply with common-law standards and provincial environmental laws of general application in the performance of its duties and powers.[30]

The standard of care of "gross negligence or wilful misconduct" which is imposed upon a trustee in Bill C-5 would be premised upon the singular standard of care in negligence, being the failure to do what a reasonable person would do in like circumstances.[31] "Gross negligence" has been described as "very great negligence,"[32] as a "marked departure from the standards by which responsible and competent [persons] habitually govern themselves,"[33] but "gross negligence" does not necessarily require conduct which amounts to "reckless disregard of consequence."[34]

As to the term "wilful misconduct", such conduct may be similar but not equivalent to "gross negligence,"[35] although, apparently, the use of this term will import a standard which is "more reprehensible"[36] than "gross negligence."

The concern with the standard of "due diligence" was one of uncertainty because the standard would be determined by the facts of each particular situation and whether reasonable steps had been taken to ensure that an adverse environment condition or damage would not arise or occur.

Similar concerns may well apply with respect to the standard of "gross negligence and wilful misconduct." Courts have stated that such term is not capable of precise definition and that regard must be had to all of the surrounding circumstances to determine whether the standard has been met in any particular case.[37] In the absence of a uniform standard, this assessment would be made in light of the foreseeable risks in the particular circumstances.[38] As a consequence, conduct which in one set of surrounding conditions may be described as inadvertence, may in another constitute "gross negligence."[39]

While the amendments in Bill C-5 may operate to impose a lower threshold for the standard of care than one of "due diligence," trustees will continue to have to evaluate the conduct which will satisfy this standard of care imposed by subs. 14.06(2) in light of the factual and regulatory requirements which apply to particular circumstances.

C. Distinction Between Pre-Appointment and Post-Appointment Conditions and Damages

The provisions of subs. 14.06(2) (reflecting the language of the 1992 amendments) import a concept of environmental conditions arising or damages occurring before and after the appointment of a trustee. This distinction may be less than precise in circumstances in which the environmental condition or damage is dynamic and not static.

A discharge of contaminants may continue for as long as a deposit (such as buried drums or tanks leaking contaminants) remains in the ground and the likelihood of adverse effects to the environment continues. In fact, such discharge (and the liability therefor) can be "permitted" on a daily basis continuing for many years, merely by the failure to prevent the continuing release of contaminants into the environment.[40]

In circumstances of such a "dynamic" adverse environmental condition, the distinction between the availability of a statutory protection and the imposition of a standard of care of "gross negligence or wilful misconduct" may not be readily apparent. This is particularly a concern because the provisions of subs. 14.06(2) continue to utilize the terms "environmental condition" and "environmental damage" without definition.

As well, trustees that maintain a property or operate a business of the debtor or of the bankrupt will face a vast array of environmental regulations of general application having impact on their activities. These would include requirements that various approvals, permits and licences be obtained and their terms complied with in the operation of the debtor's or the bankrupt's business. The failure of the debtor or of the bankrupt to have obtained or complied with these statutory requirements prior to the trustee's appointment would not relieve the trustee from the obligation to do so.

D. Quasi-Criminal Prosecution

The concept of "personal liability" under federal and provincial environmental legislation does not expressly operate to immunize trustees from prosecution for regulatory offences imposed under such legislation, most of which are strict liability offences which involve the "due diligence" standard as an exculpatory defence.[41] Accordingly, if the provisions of subs. 14.06(2) of the BIA are interpreted as not extending the standard of "gross negligence or wilful misconduct" to prosecutions of trustees for public welfare offences, this standard of "due diligence" would continue to apply in these circumstances.[42]

This "due diligence" standard may also be applied under environmental legislation to the conduct of directors, officers and employees of corporate trustees (including former employees of the bankrupt or the insolvent person who continue to be engaged by trustees in the operation of the debtor's or the bankrupt's business) who are not expressly included in the statutory protections in subs. 14.06(2) in circumstances in which the conduct of corporate trustees which direct or control their conduct will be measured by the "gross negligence or wilful misconduct" standard.[43]

A similar concern may apply in circumstances of a private receivership, under which the appointing secured creditor, as principal of the receiver whose liability is statutorily limited, may not have the same protection that it would have if it were to directly realize upon its security.

E. Summary

In circumstances of default in loan and security arrangements with a debtor, secured creditors have faced the uncertainties of whether their conduct in negotiating and implementing the terms of an informal debt restructuring would implicate them as "persons responsible" under environmental legislation.

While statutory protections will provide some comfort for secured creditors to take possession (or to appoint a trustee to take possession) of environmentally sensitive properties should they elect to enforce their security, these protections may also operate as a disincentive for secured creditors to elect forbearance and monitoring of the debtor's activities in circumstances in which there would be potential exposure to liability as persons in charge, management or control of environmentally affected properties.

Compliance with Orders/Abandonment of Environmentally Sensitive Properties:

14.06(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.

A. Trustees' Response to Administrative Orders

Under the provisions of subs. 14.06(4) of Bill C-5, where an order is made which has the effect of requiring trustees to remedy any environmental condition or damage affecting any property involved in a bankruptcy, proposal or receivership, trustees will not be personally liable for failing to comply with such an order, or for any costs that would be incurred in carrying out the terms of such an order, if the order is issued subsequent to the trustee abandoning, renouncing or being divested of any interest in the real property affected by the environmental condition or damage.

If the order requiring such remediation of property in a bankruptcy, a proposal or a receivership is issued either prior to or following the appointment of the trustee, the trustee has four options. The trustee can:

(a) comply with the order;

(b) apply to obtain a stay of proceedings from a court or from the regulatory authority having jurisdiction to grant such a stay in order to contest such order;[44]

(c) apply to obtain a stay of the order from the bankruptcy court on the sole ground that the trustee requires a stay in order to assess the economic viability of complying with the order; or

(d) abandon, dispose of or otherwise release an interest in the affected property on notice to the authority which has issued the order.

The time frame within which such option must be exercised is within the time specified for compliance in the order, within ten days of the issuance of the order if no time is specified for compliance or within 10 days of its appointment if the order is then in effect.

B. Abandonment of Environmentally Sensitive Sites

The BIA does not include a general abandonment power for trustees in bankruptcy for properties which are burdensome to, or which are of inconsequential value and benefit to, the estate,[45] and the provisions of Bill C-5 do not impose any express restrictions on the right of trustees to abandon an environmentally affected sites.[46]

Accordingly, a trustee in bankruptcy's right to abandon or to divest itself of a property affected by adverse environmental conditions or damages may have to be implied by the courts from the provisions of subs. 14.06(4) in circumstances in which a trustee in bankruptcy is appointed. In the circumstance of a receiver or an interim receiver, its powers and authority in a court-appointment order should specifically incorporate such a right.[47]

What is unclear are the circumstances in which the right to abandon will apply. A reading of the provisions of subs. 14.06(4), which are expressed to be subject to subs. 14.06(2), would suggest that the abandonment right would only apply to circumstances in which a remedial order addresses an environmental condition which arose, or an environmental damage which occurred, before the trustee's appointment or where the abandonment does not result in a breach by the trustee of the standard of care of "gross negligence or wilful misconduct."

This would effectively result in the trustee's right to abandon a property in circumstances in which the trustee has not attracted personal liability under the provisions of subs. 14.06(2).

However, in order for a trustee to avoid personal liability where an order has or may be issued, the subsection requires that the trustee abandon the environmentally affected property or comply with the order. This may in fact operate to encourage trustees to "orphan" sites in circumstances in which non-abandonment would result in exposing all of the assets under administration to the costs of remediation, either by the personal liability of the trustee or as costs of administration.

Trustees will have to weigh considerations of the "commercially reasonable" standard when they obligate themselves to remedy environmental conditions to the possible detriment of claims of creditors in the estate (and, in particular, secured creditors with security on properties which are not environmentally affected) if they do not abandon such a property.

It may in fact prove impractical for trustees in circumstances in which an order has issued prior to their appointment to make an assessment of the economic viability of an affected real property within the prescribed 10-day period (subject to the permitted stay of proceedings or enforcement).

Where the trustee (as may often be the case) has not had the opportunity prior to its appointment to make such an assessment and in circumstances in which adequate environmental investigations and other information requisite to an informed decision are not available, trustees may in fact be precipitously compelled to consider abandonment as an alternative to charging all of the assets under their administration with, or exposing themselves to personal liability for, the costs of compliance with the order.

It does, however, remain unclear whether any standard of care will apply to site abandonment or whether actions such as securing a property against vandalism and personal harm, removing waste or other sources of contaminants or taking other steps to prevent the continuation of any adverse environmental condition will only be imposed for post-appointment environmental conditions and damages as a prerequisite to the discharge of a standard of care that does not amount to "gross negligence or wilful misconduct" on the part of the trustee.

It is also a precondition to the protection from personal liability that notification of abandonment be given after an order has issued. It would nonetheless be appropriate for trustees to consider that such notification be given to environmental regulatory authorities where an order has not issued, particularly in light of the need to quantify any governmental claim for clean-up for purposes of determining provable claims in a bankruptcy estate and valuing the "superiority" charge under subs. 16.04(7) in favour of the Crown for remediation costs.[48]

C. Variance of Terminology in Trustees' Power to Abandon

The exculpation of a trustee occurs, in varying terms in s. 14.06(4), in circumstances in which a trustee "abandons," "renounces," "disposes of," "otherwise releases an interest in" or "has been divested of" any interest in any real property affected by an adverse environmental condition or damage. It is assumed that this terminology will not apply to differentiate the rights of a trustee depending upon whether an administrative order has been or will have been issued before or after the appointment of the trustee.

Because the language is intended to apply to a trustee in varying capacities, it may be inappropriate when applied to any particular category of trustee. Specifically, the assets of a debtor do not vest in any trustee other than a trustee in bankruptcy and the divestiture language is therefore misplaced when applied to other than the bankruptcy context.

While there is latitude for a trustee to exculpate itself from personal liability by disposing of an environmentally affected property, the "superpriority" charge for remediation costs in subs. 16.04(7) of Bill C-5 may impede the ability of the trustee to convey an affected property without the concurrence of the environmental regulatory authority to the "discharge" of this priority claim on the property.

D. Scope of Administrative Orders

The language of s. 14.06(4) is directed to orders which have the effect of requiring a trustee to remedy any environmental condition or damage. Preventative or other administrative orders (which may not be remedial in nature) may issue under environmental legislation, and it would be appropriate if a broad interpretation were applied by the courts to the nature and type of orders which are encompassed in the subsection.[49]

End of Part I

Endnotes

[1] See, for example, s. 7 of the *Environmental Protection Act*, R.S.O. 1990, c.E.19, as am. ("EPA") (control orders), s. 8 of the EPA (stop orders), s. 17 of the EPA (remedial orders), subs. 18(1) of the EPA (preventative orders) and s. 43 of the EPA (waste removal orders). An order for negotiation of a restoration plan can be made by the courts in prescribed circumstances in an action based on a harm to a public resource under the *Environmental Bill of Rights*, S.O. 1993, c.28. Under the EPA, there is not, with one noted exception, an affirmative statutory liability to remediate contaminated sites once the contamination is discovered before such a liability is triggered by the issue of one of these administrative orders. The exception is under Part X of the EPA, where the owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment (subsection 93(1) of the EPA). *The Gasoline Handling Code*, published by the Ministry of Consumer and Commercial Relations and revised in January, 1993 and incorporated in the regulations under the *Gasoline Handling Act*, R.S.O. 1990, G.4, as am., includes remediation requirements which are activated upon the removal of unused underground storage tanks that have been used to store gasoline or an associated product or in circumstances in which such tanks continue to be used and are leaking. In this paper, the statutory references are to legislation currently in force in the Province of Ontario. Similar provisions may be incorporated in environmental legislation of other provinces as well.

[2] See, for example, subs. 186(2) and s. 187 of the EPA and subs. 107(2) of the *Ontario Water Resources Act*, R.S.O. 1990, c.O.40, as am. ("OWRA").

[3] There has been some divided authority in Ontario on the principles which should apply in relation to the liability to carry out environmental protection orders, particularly in light of the current Compliance Guideline of the Ministry of Environment and Energy ("MOEE") (MOEE, Guideline F-2, last revision date: June 16, 1995) which suggests that "fairness" factors should be irrelevant to the exercise of discretion when an order is issued. The Ontario Environmental Appeal Board ("EAB"), however, constituted under subs. 144(1) of the EPA with broad discretion to substitute its opinion for that of the director appointed under the EPA, has applied principles of substantive "fairness" or "liability allocation" factors to its decisions: See *Bell and Harris v. Director, Ministry of Environment and Energy*, EAB, April 15, 1994 (reported as *Re 724597 Ontario Ltd.* (1994), 13 C.E.L.R. (N.S.) 257 (EAB), (*aff'd* (1995), 18 C.E.L.R. (N.S.) 137, (sub nom. *Ontario (Ministry of the Environment and Energy) v. 724597 Ontario Inc.)* 26 O.R. (3d) 423 (Ont. Div. Ct.), *leave to appeal to C.A. refused* (March 11, 1996), Doc. CA M17227 (Ont. C.A.)). For a discussion of this EAB decision, see Alan D. Levy, "The Scope of Liability and Exercise of Discretion in Recent Decisions of the Ontario Environmental Appeal Board" (1996), 6 J.E.L.P. 223.

[4] Once a receiving order is made or an assignment has been filed with the Official Receiver, the property of the bankrupt forthwith passes to and vests in the trustee in bankruptcy, subject to the rights of secured creditors and all of the equities and rights which could have been asserted by or against the debtor before bankruptcy (subs. 71(2) of the BIA).

[5] Appointment orders have included provisions to the effect that nothing vests in or requires such court-appointed officer to assume the ownership, control, possession or management of any pollutant or contaminant that would attract liability under environmental legislation. The response of courts in Canada to such exempting language is discussed in this paper. Trustees in bankruptcy are statutorily obligated to take possession of all of the property of the bankrupt as soon as possible after their appointment (subs. 16(3) of the BIA).

[6] A multi-stakeholder working group created in Ontario to provide practical ways to achieve greater certainty for lenders, recommended in its discussion paper, "Clarifying the Liability of Secured Creditors" dated March 17, 1995 (at page 5) that the MOEE undertake a broader consultation on a number of issues which this Lender Liability Working Group identified as relevant to the potential liability of lenders, including "clarifying the meaning of language found in the EPA which describes potentially responsible persons as having 'charge, management and control' of a source of contaminant, or having 'caused or permitted' the discharge of a contaminant," but to date, there have been no amendments to implement this recommendation. A useful review of Canadian and U.S. authorities on the meaning of "charge and control" may be found in the

EAB's decision in *Karge v. Director, Ministry of Environment and Energy*, EAB, Sept. 12, 1996 reported as *Re Karge* at (1996), 21 C.E.L.R. (N.S.) 5.

[7] In *Re Lamford Forest Products Ltd.* (1991), 86 D.L.R. (4th) 534, 10 C.B.R. (3d) 137 (B.C.S.C.) and *Panamericana de Bienes y Servicos, S.A.* v. *Northern Badger Oil & Gas Limited* (1989), 80 C.B.R. (N.S.) 84, *rev'd* (1991), 81 D.L.R. (4th) 280, [1991] 5 W.W.R. 577, 8 C.B.R. (3d) 31 (Alta. C.A.), *supplementary reasons at* (1991), 86 D.L.R. 567, 8 C.B.R. (3d) 31 at 55, *leave to appeal to S.C.C. refused* 8 C.B.R. (3d) 31n, 86 D.L.R. (4th) 567n (S.C.C.). In *Re Lamford Forest Products Ltd., supra*, the court held that under the specific statutory provisions in that case, no personal liability attached to the trustee. The court did indicate that a trustee could be personally liable under other environmental statutory provisions. In that case, trustee's fees were to be paid in priority to remediation costs as a matter of public policy, although no legal (as opposed to policy) basis for this limitation was justified in the decision. In circumstances where environmental regulatory authorities assumed responsibility for clean-up prior to bankruptcy and asserted a provable claim against the estate for reimbursement of costs of clean-up (although the order against the bankrupt for payment of clean-up costs was not made until after the receiving order was made and most of the costs were incurred after the making of the receiving order), the Ontario Court of Justice (General Division) has held that the claim of the environmental regulatory authorities was a provable claim in the estate: see *Re Shirley* (1995), 36 C.B.R. (3d) 101, 18 C.E.L.R. (N.S.) 43, 129 D.L.R. (4th) 105.

[8] Interim receivers are usually appointed to preserve the debtor's assets prior to enforcement of security by a secured creditor or during the proposal period for an insolvent person (ss. 47 and 47.1 of the BIA). However, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176, 27 C.B.R. (3d) 148 (Ont. Ct. (Gen. Div.)), the proposition was supported that the court had jurisdiction in an interim receivership to approve the sale of a debtor's assets and to vest the assets in a purchaser free and clear of all of the estate, right, title, interest and claims of creditors of the debtor.

[9] See *Panamericana de Bienes y Servicos, S.A. v. Northern Badger Oil & Gas Limited, supra*, fn. 7; *Canada Trust Company v. Bulora Corporation Limited* (1980), 34 C.B.R. (N.S.) 145 (Ont. S.C.), *aff'd* (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.).

[10] *Ibid.* But see *Bank of Montreal v. Lundrigans Ltd.* (1992), 92 D.L.R. (4th) 554, 12 C.B.R. (3d) 170 (Nfld. T.D.S.C.), in which the court made an appointment order for a receiver and manager in which its liability was limited to the net proceeds realized for particular properties over which the receiver and manager assumed control. The decision in *Bank of Lundrigans Ltd., supra*, was not followed in *Standard Trust Co. v. Lindsay Holdings Ltd.* (1994), 29 C.B.R. (3d) 297, 15 C.E.L.R. (N.S.) 165, [1995] 3 W.W.R. 181 (B.C.S.C.) or in *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 20 C.E.L.R. (N.S.) 19 (Ont. Ct. (Gen. Div.)). Based upon the judicial authorities canvassed in this paper, the MOEE has taken the position, subsequent to the enactment of subsection 14.06(2) of the BIA, that a trustee in bankruptcy is liable for cleaning up a site up to the value of the assets under its administration. The Ontario Court (General Division) made an order on April 22, 1996 on consent of the MOEE, the mortgagees, the City of Brampton and a trustee in bankruptcy in Court Files Nos. 32-073999/32-0734000 (In the Matter of the Bankruptcy of 716270 Ontario Inc. and In the Matter of the Bankruptcy of A.C. Valley Contracting Inc.) in circumstances in which the director had issued orders requiring four parties prior to the bankruptcy of the corporate owners and their principals to remove large quantities of waste illegally dumped at a site. The MOEE's position was that the trustee in bankruptcy was required by law to remove the waste, although deposited prior to the bankruptcies, and the trustee applied to court for directions on the priority of MOEE claims against the proceeds of the realized and unrealized assets of one of the corporate bankrupts. The order declared that the clean-up of waste dumped on the property was in the public interest, and required the trustee to provide the proceeds (net of the trustee's fees and disbursements) then realized from the sale of unsecured assets in the estate to the MOEE for the costs of removal of the waste; granted a first priority lien to the MOEE over the property in priority to the mortgagees and all other encumbrancers to the extent of costs of removal; and required that the lien be satisfied out of the proceeds of sale of the property in priority to payments to mortgagees or unsecured creditors.

[11] *Standard Trust Co. v. Lindsay Holdings Ltd., supra*, fn. 10 and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp., supra*, fn. 10.

[12] See *Peat Marwick Ltd. v. Consumers' Gas Co.* (1980), 29 O.R. (2d) 336, at 342 (Ont. C.A.).

[13] See S.D.N. Belcher, executive vice-president, The Bank of Nova Scotia, "Monitoring and Managing Risk-Risk Assessment, Legal Liability and the Environment," paper delivered at The Insolvency Institute of Canada, Fifth Annual General Meeting and Conference, Nov. 19-21, 1994.

[14] In *Re Guisto* (1994), 25 C.B.R. (3d) 227 (Ont. Ct. (Gen. Div.)), the court found that there were "special circumstances" that would support the making of a receiving order even if (as was not the case before the court) the secured creditor was the only creditor in the estate. The court was of the view that the circumstance which made it essential for the bankruptcy to go ahead for the protection of all of the creditors was a potential environmental situation which might affect the secured creditor's ability to realize on its security. See the commentary of Sara Albin at Case Comment, 25 C.B.R. (3d) 239.

[15] A number of factors have been weighed and balanced by courts in assessing due diligence, which include the nature and gravity of the adverse effect; the foreseeability of the effect including abnormal sensitivities; the alternative solutions available; legislative or regulatory compliance; industry standards; the character of the neighbourhood; efforts made to address the problem; over what period of time; the promptness of response; matters beyond the control of the accused, including technological limitations; skill level expected of the accused; the complexities involved; preventative systems; economic considerations and actions of officials: *R. v. Commander Business Furniture* (1993), 9 C.E.L.R. (N.S.) 185 (Ont. Prov. Ct.) (affirmed (Feb. 18, 1994), Doc. 179/93 (Ont. Ct. (Gen. Div.)).

[16] The principles which have evolved in determining whether the "due diligence" standard has been satisfied cannot readily be translated to an insolvency circumstance. These include the principle that the standard imposed on operations which inherently pose greater risk to health and welfare will not be diminished by the cost to the person carrying on the commercial endeavour: *R. v. Canchem Inc.* (1989), 4 C.E.L.R. (N.S.) 237 (N.S. Prov. Ct.); *R. v. Placer Developments Ltd.* (1983), 13 C.E.L.R. 42 (Yuk. Terr. Ct.).

[17] Under the EPA, an obligation to report will apply to a person that has caused or permitted the discharge of a contaminant (ss. 13 and 15) or that has control of a pollutant that has spilled or that has spilled or caused or permitted a spill of a pollutant (subs. 92(1)) in the circumstances which are specified in those sections. There is not, however, a general obligation under the EPA to report the existence of an adverse environmental condition of which a "person" responsible becomes aware: see *infra*, fn. 40.

[18] The term "insolvent person" is defined in s. 2 of the BIA as a person which is not bankrupt and is either commercially insolvent (fails to meet obligations as they become due or to pay current obligations in the ordinary course of business) or balance sheet insolvent (whose assets are not of sufficient value to enable payment of all obligations due or accruing due).

[19] It is noted that protection similar to that embodied in Bill C-5 for trustees is extended to monitors appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as am., under the amendments proposed in Bill C-5.

[20] The MOEE will sometimes enter into an agreement limiting the liability of trustees. In December 1995, the MOEE finalized a standard lender's agreement to allow lenders to conduct environmental investigations and take certain actions to protect their security, designed to extend to all of the properties from time to time held by a secured creditor, which many financial institutions have entered into with the MOEE. The MOEE continues to confer with interested parties to develop a standard agreement limiting the liability of secured creditors for other activities designed to protect such persons' interests or investments in collateral.

[21] In *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1996), 20 C.E.L.R. (N.S.) 37 (Ont. Ct. (Gen. Div.)), Mr. Justice Farley granted leave to the MOEE to bring an action in negligence against the court-appointed receiver and manager in the management of a landfill and to adjoining landowners to bring an action in nuisance and under Part X of the EPA for "spills liability." The latter is a statutory civil action created by s. 99 of the EPA, which permits the Crown or any third party to seek compensation from the owner of a pollutant or a person having the control of a pollutant for prescribed losses, damages, costs and expenses. *Quaere* whether the "notwithstanding" language in subs. 14.06(2) would operate to exonerate a trustee from this

statutory civil liability unless the spill resulted because of the trustee's "gross negligence or wilful misconduct" because the cause of action is created under provincial law? A general discussion of the bases for liability in the common-law environmental actions of trespass, nuisance, strict liability and negligence is included in the judgment in *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.*, *supra*, at 45-49.

[22] It would be simplistic to describe the standard of care of "due diligence" as being one of negligence, when compared to the proposed standard of "gross negligence or wilful misconduct." However, courts have, in instances, addressed the due diligence exercise of all reasonable care as being one which is tantamount to an absence of negligence: see *R. v. Sault Ste. Marie (City of)*, [1978] 2 S.C.R. 1299, at 1321, (1978), 40 C.C.C. (2d) 353, 7 C.E.L.R. 53, 85 D.L.R. (3d) 161 (S.C.C.).

[23] See ss. 16 to 33 of the BIA.

[24] For the statutory codification of certain of these duties, see s. 247 of the BIA and subs. 63(2) of the *Personal Property Security Act*, R.S.O. 1990, C.P.10, as am.

[25] See, for instance, with respect to trustees in bankruptcy, *Re Reed* (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.) and with respect to receivers and managers, *Re Philip's Manufacturing Ltd.* (1992), 92 D.L.R. (4th) 161, 12 C.B.R. (3d) 149 (B.C.C.A.).

[26] *Bayhold Financial Corp. v. Clarkson Co. Community Hotel Co. (Receiver of)* (1991), 86 D.L.R. (4th) 127, 10 C.B.R. (3d) 159 (N.S.C.A.) and *Integrated Building Corp. v. Bank of Nova Scotia* (1989), 75 C.B.R. (N.S.) 158, 71 Alta. L.R. (2d) 320 (Alta. C.A.).

[27] See, for instance, with respect to a trustee in bankruptcy, *Re Niagara Crushed Stone Ltd.* (1961), 2 C.B.R. (N.S.) 271 (Ont. H.C.) and with respect to a receiver and manager, *Cuckmere Brick Co. Ltd. et al. v. Mutual Finance Ltd.*, [1971] 2 All E.R. 633 (C.A.) and *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1 (Ont. Ct. (Gen. Div.)).

[28] See, for instance, with respect to a trustee in bankruptcy, *Clifford Van & Storage Co. v. Clifford Van & Storage Co. (Trustee of)* (1989), 73 C.B.R. (N.S.) 129 (Ont. S.C.); *Glick v. Jordan* (1967), 11 C.B.R. (N.S.) 70 (Ont. S.C.) and with respect to a receiver and manager, *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 76 C.B.R. (N.S.) 241, 62 D.L.R. (4th) 243 (Sask. C.A.).

[29] See, in the circumstance of a trustee in bankruptcy, *Re Lamford Forest Products Ltd.*, *supra*, fn. 7, and, in the circumstance of a receiver and manager, *Canada Trust Company v. Bulora Corporation Limited*, *supra*, fn. 9 and *Panamericana de Bienes y Servicos, S.A. v. Northern Badger Oil & Gas Limited*, *supra*, fn. 7.

[30] See *Standard Trust Co. v. Lindsay Holdings Ltd.*, *supra*, fn. 10, *Bank of Montreal v. Lundrigans Ltd.*, *supra*, fn. 10 and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.*, *supra*, fn. 10. See as well the comments of Mr. Justice Farley in *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.*, *supra*, fn. 10, at 35, that the authority in the appointment order of the receiver and manager to continue operating a landfill site did not constitute judicial authorization to do so in a way as to create a trespass of contaminant or otherwise allow a nuisance. The obligation of a receiver and manager to comply with environmental laws of general application was specifically commented upon in *Bank of Montreal* v. *Lundrigans Ltd.*, *supra*, fn. 10 and *Standard Trust Co. v. Lindsay Holdings Ltd.*, *supra*, fn. 10.

[31] Klar, Linden, Cherwick, Kryworlk, *Remedies in Tort*, Vol. 3 (Carswell, 1987--), ch. 16, at § 126.

[32] *Kingston (City) v. Drennan* (1897), 27 S.C.R. 46, at 60 (S.C.C.)

[33] *Moore v. Robertson* (1980), 40 N.S.R. (2d) 361, at 364, *aff'd* 16 C.C.L.T. 173 (C.A.)

[34] *Cowper et al. v. Studer et al.* [1951] 2 D.L.R. 81, at 92, [1951] S.C.R. 450 (S.C.C.)

[35] See *McCulloch v. Murray* [1942] 2 S.C.R. 141, at 145 (S.C.C.). Most Canadian judicial authorities which have considered the terms "gross negligence" or "wilful misconduct" are with respect to liability under motor vehicle or municipal legislation, and not in the context of trustees.

[36] *Cowper et al. v. Studer et al.*, *supra*, fn. 36, at 92.

[37] See *Holland v. Toronto (City)*, [1927] 1 D.L.R. 99, at 102, [1927] S.C.R. 242, 59 O.L.R. 628 (S.C.C.) and *German v. Ottawa (City)* (1917), 56 S.C.R. 80, at 82, 39 D.L.R. 669 (S.C.C.).

[38] *Ogilvie v. Donkin*, [1949] 1 W.W.R. 439, at 441 (B.C.C.A.).

[39] See *Scardina v. La Roche*, [1950] 2 W.W.R. 1057, at 1060, [1951] 1 D.L.R. 117 (B.C.C.A.).

[40] In prosecutions under the EPA, this principle has been upheld by the courts in a number of decisions: *J. Brett Hill and the Queen* (unreported, May 24, 1988 (Ont. Dist. Ct.)) *aff'd on appeal without reasons* (unreported, June 26, 1990 (Ont. C.A.); *R. v. Liverance* (1986), 1 C.E.L.R. (N.S.) 97 (Ont. Prov. Ct.); *R. v. Blackbird Holdings Ltd. (sub. nom. Blackbird Holdings Ltd. and George Crowe)* (1991), 6 C.E.L.R. (N.S.) 138 (Ont. Prov. Ct.) *leave to appeal sentence reduction denied to Crown* (1991), 6 C.E.L.R. (N.S.) 116 (Ont. C.A.); *R. v. Canadian Cellulose Company Ltd.* (1979), 2 F.P.R. 256 (B.C. Co. Ct.); and *R. v. Amoco Fabrics and Fibers Ltd.* (1992), 9 O.R. (3d) 306, (Ont. Prov. Ct.). These cases have been difficult to reconcile with the Divisional Court decision in *Canadian National Railway v. Ontario (Director appointed under the Environmental Protection Act)* (1991), 6 C.E.L.R. (N.S.) 211 (Ont. Div. Ct.) *aff'd* (1992) 87 D.L.R. (4th) 603, 8 C.E.L.R. (N.S.) 1, 7 O.R. (3d) 97 (Ont. C.A.) in which the court indicated that a "discharge" occurs only the first time that a contaminant is released into the natural environment, and that there is no discharge when contaminants subsequently move from one part of the natural environment to another. In the decision in *Re Hen-Sieg Holdings Limited et al.*, EAB, Sept. 6, 1995, the EAB limited this pronouncement of the Divisional Court to control orders under the EPA and not to other orders under the EPA (such as preventative orders under subs. 18(1) of the EPA). Mr. Justice Farley, in *Mortgage Insurance Corp. v. Innisfil Landfill Corp., supra*, fn. 23, at 51, came to a similar conclusion on the continuing occurrence of a spill under Part X of the EPA. For a contrary view, noted in this judgment, see Diane Saxe, *Ontario Environmental Protection Act Annotated*, Vol. 1 (Aurora, Canada Law Book, 1991 --), at page X-2.

[41] The EPA and OWRA contain a broad range of offences, most of which are of a strict liability nature. The EPA and OWRA impose significant fines and/or imprisonment for persons convicted of offences (see ss. 186, 187 and 190 of the EPA and ss. 111 and 112 of the OWRA).

[42] It is interesting to note that in the MOEE global agreement referenced in fn. 20, secured creditors are deemed not to be "persons responsible" for purposes of those persons against which administrative orders may issue, but nothing in the agreement "constitutes a commitment by the [MOEE] not to prosecute a person in the event the person commits an offence" under environmental legislation.

[43] The liability of directors, officers and employees may derive from being a principal (with operational responsibility or other influence or control over an activity): *R. v. Fell* (1981), 131 D.L.R. (3d) 105 (Ont. C.A.); *R. v. Maahs and Teleprompter Cable Communications Corp.* (1974), 5 O.R. (2d) 523 (Ont. Prov. Ct.) *aff'd* 5 O.R. (2d) 523 (Ont. Dist. Ct.); from "causing" or "permitting" the discharge of a contaminant: s. 14 of the EPA and s. 61 of the OWRA, *R. v. Sheridan* (1973), 2 O.R 192 (Ont. Dist. Ct.); from being the "person responsible" for a source or contaminant (being one in occupation or who has charge, management or control of a source of contaminant): subs. 1(1) of the EPA, *R. v. Woodington Systems Inc. and McVicar* (unreported, Oct. 7, 1987) (Ont. Prov. Ct.): *R. v. Maurice Harkin* (unreported, June 14, 1988) (Ont. J.P.), *aff'd on appeal* (unreported, July 11, 1989) (Ont. Prov. Ct.)), *leave to appeal granted* Aug. 31, 1989 (Ont. C.A.) *appeal abandoned* Sept. 29, 1994; or from breaching a statutory duty to have all reasonable care to prevent the corporation from causing or permitting the discharge of a contaminant into the natural environment: s. 194 of the EPA and s. 116 of the OWRA. Directors and officers have also been held to properly be the subject of administrative orders under the EPA as "persons responsible": *Re Blackbird Holdings Ltd. and George Crowe*, EAB, July 24, 1990 and *Bristol Myers Industries of Canada Ltd., J.L. Golden and Toronto Harbour Commissioners*, EAB, Dec. 18, 1991.

[44] Under the EPA, a person to whom an order of the director is directed may, by written notice served within 15 days after service of the order, require a hearing by the EAB (subs. 140(1) of the EPA). This time may be extended by the EAB only where it is just to do so because service did not give the person notice of the order (s. 141). The commencement of a proceeding before the EPA does not stay the operation of an order made under the EPA (other than an order to pay the costs of work made by the minister or the director), but the EAB may on application stay the operation of an order (other than an order to monitor, record and report), unless the stay would result in danger to the health or safety of

any person, the impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it or injury or damage or serious risk of injury or damage to any property or to any plant or animal life (s. 143 of the EPA). The EAB has also held that it has power to issue an interim stay pending an application for a stay pending appeal, and the test for the granting of an interim stay is the same as that for the granting of a stay pending hearing of the proceeding before the EAB.

[45] The U.S. *Bankruptcy Code*, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code") specifically permits the abandonment of any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate, after notice and a court hearing (11 U.S.C. § 554). Courts in the U.S. have, however, imposed restrictions on the right of a trustee in bankruptcy to abandon environmentally affected properties. See, for instance, *Midatlantic National Bank v. New Jersey Department of Environmental Protection; Quanta Resources Corp. v. New York (City)*, 474 U.S. 494, 88 L. Ed. (2d) 859, 106 S. Ct. 755 (1986)).

[46] Under the BIA, a trustee in bankruptcy may under clause 20(1)(a), with the permission of the inspectors, divest itself of all or any part of its interest in real property of the bankrupt by notice of quit claim or disclaimer. However such disclaimer would normally be used where foreclosure or power of sale proceedings have been commenced by a creditor whose indebtedness is secured on the real property and no equity remains for the benefit of the estate. The comment in The Honourable Mr. Justice L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, Third Edition, Revised (Carswell), at 1-75 is instructive: "During the administration of the estate, a trustee should be careful about giving a disclaimer or quit claim, if no consideration is being received by the bankrupt estate. It is more satisfactory if the trustee permits the interest of the bankrupt estate to be terminated by foreclosure or sale under power of sale." Subsection 40(1) of the BIA requires the trustee in bankruptcy, with the permission of the inspectors, to return to the bankrupt any property found incapable of realization before the trustee's application for discharge. The purpose of this provision is to permit a trustee to complete its administration of the estate (see Houlden and Morawetz, *supra*, at 1-153) and accommodates the absence of any provision for the revesting of the property of a bankrupt on the bankrupt's discharge or upon discharge of the trustee. This would not be an option in circumstances of a corporate bankrupt that cannot be discharged except in the unlikely circumstance that it has satisfied the claims of all of its creditors in full (subs. 169(4) of the BIA). The BIAC Environmental Task Force had recommended that a standard of "due diligence" be imposed upon trustees in circumstances of abandonment of environmentally sensitive sites under codified situations in which trustees had "utilized" the property. This recommendation was not incorporated in Bill C-5.

[47] Such right of the trustee in bankruptcy would, at a minimum, be exercisable with the consent of the inspectors. Trustees, concerned about this right to abandon, may apply to the court for specific directions before abandonment (subs. 34(1) of the BIA). In circumstances of a court-appointed receiver and manager or interim receiver, it would be appropriate to expressly provide for this right in the appointment order in wording which incorporates the terms of subs. 14.06(4). Even in this event, a court-appointed receiver and manager or interim receiver might consider obtaining directions from the court before exercising this power or authority. A privately appointed receiver and manager, deriving its powers from the security agreement under which it is appointed, should be afforded a specific authority in such an agreement to abandon in the circumstances prescribed in subs. 14.06(4).

[48] There is no affirmative obligation on the part of trustees in Bill C-5 to report adverse environmental conditions of which the trustee becomes aware or to provide environmental site assessments in the possession of trustees to environmental regulatory authorities, as had been recommended by the BIAC Environmental Task Force, where the reporting or disclosure requirements of general application would not mandate such reporting or deliveries: see *supra*, fn. 17.

[49] Remediation may be the proper subject of a preventative order as well: see *R. v. Consolidated Maybrun Mines Ltd.* (1992) 9 C.E.L.R. (N.S.) 34 (Ont. Prov. Ct.); *rev'd* (1993), 12 C.E.L.R. (N.S.) 171 (Ont. Div. Ct.); *aff'd* (1996), 19 C.E.L.R. (N.S.) 75 (Ont. C.A.).

TAB 3

Cited as:

724597 Ontario Inc. (c.o.b. Appletex) v. Ontario (Minister of Environment and Energy)

IN THE MATTER OF sections 137, 140 and 144 of the Environmental Protection Act as amended, and IN THE MATTER OF an application by 724597 Ontario Inc. c.o.b. "Appletex", Ralph Brown, Isadore Bell and Mike Harris dated March 10, 1993 for a hearing before the Environmental Appeal Board with respect to the order of the Director, Southeastern Region, Ministry of Environment and Energy requiring the securing of chemicals, flammable materials and waste and the removal of wastes from waste disposal sites and lagoons located at Lot 4, Concession 9, Township of Ramsay in the Hamlet of Appleton.

[1994] O.E.A.B. No. 17

File No. 00270.A1

Ontario Environmental Appeal Board

J. Swaigen, Chair, J. Jackson and C. Siller, Members

Heard at Almonte: November 17, 18, and 19, 1993 and January 19 and 20, 1994
Decision: April 15, 1994

(54 pp.)

For a list of witnesses and exhibits in this matter, please see the Appendix 2.

Appearances:

Percy Ostroff, counsel, for Isadore Bell and Michael Harris, applicants.
Ronald W. Thompson, counsel, for James E. Collie, witness, and Ralph Brown, applicant.
Ramani Nadarajah, counsel, for the Director.
Patrick Dorion, on his own behalf.
Neil Smitheman and Sidney Lebowitz, counsel and student-at-law respectively, for the Federal Business Development Bank and the Ontario Development Corporation.

DECISION, REASONS FOR DECISION, AND ORDER

INTRODUCTION

Two businessmen invest their money in a bankrupt company which appears to have an experienced management team. When profits fail to materialize despite dramatic increases in production and sales, they find themselves increasingly involved in making management decisions in an attempt to safeguard their investment. Despite their efforts, the business fails and they lose their entire investment. The Ministry of Environment and Energy then orders them personally to pay for an extensive environmental clean-up of the abandoned site of the business. As none of the other persons subject to this order has any financial capacity to comply, this means that the entire clean-up cost falls on their shoulders. The Director's decision to attach personal liability to these individuals is based primarily on three factors. The first is what the Director's counsel refers to as the "deep pocket" theory of responsibility: among all the individuals and corporations involved in the ownership and operation of this business over the years, they are the only ones with any money. The second factor is what might be called the "negligent investment" theory of liability: that any investor who fails to determine the potential negative environmental impacts of a business before investing in it and who fails to ensure as a condition of investing that the company has an adequate environmental protection system in place and funds to carry it out must suffer the consequences of this failure. The third factor is that once an investor crosses the line from passive investment to active participation in management, if the only choices are between the investors paying for a clean-up and the Ministry of Environment and Energy doing so, then participation in management requires the investors to pay, regardless of degree or kind of involvement and even in the absence of fault.

The investors take the position that participation in management does not give the Director jurisdiction to make such an order against them personally unless their participation relates directly to the environmental problems and unless their participation contributed to those problems. They also take the position that the Director should consider whether it is equitable and fair to impose personal liability, taking into account such factors as the contribution of others to creating the problems, the limited scope of their involvement in the corporation, their lack of any formal legal ownership or control as shareholders, officers or directors of the corporation that owned the land and carried on the business, their lack of negligence, the contribution their participation in the business made to the community, unjust enrichment of others if they are made solely responsible for clean-up costs, the fact that they lost all of their investment, and the Ministry's sanctioning of their on-site activities related to environmental management.

Which position is correct? This is the central issue in this appeal.

BACKGROUND TO THE DIRECTOR'S ORDER

The Director's order requires the decommissioning of a bankrupt wool knitting and dyeing mill at Appleton, Ontario. Among other things, it requires securing the premises against vandalism; removing a variety of wastes, including drums and pails of waste chemicals and oils, tanks containing oil, engines and transformers containing oil and possibly PCBs; disposing of light fixtures containing PCBs, paper, wood, and textile fabrics and yarns that are fire hazards; monitoring groundwater quality around two or more waste disposal sites and three sewage lagoons; and draining these sewage lagoons, and disposing of the liquid and sludge contained in them.

Collie Woolen Mills began operation on the bank of the Mississippi River in the 1930s. The plant moved to its present site farther from the river bank in 1940. Between 1940 and 1942, two sewage lagoons were constructed near a marshy area adjacent to the river to hold effluent generated by the operation. The business was incorporated as Collie Woolen Mills Limited ("CWM") in 1947.

In time, James E. Collie, the founder's son, took over management of the company. He was joined later by his son, James S. Collie. Around 1973, Ralph Brown, the son-in-law of James E. Collie, became an employee of the business.

In the mid-1970s, CWM and its principals began to experience financial problems which led to the insolvency and ultimately the bankruptcy of the corporation. A receiver was appointed by the company's creditors on April 24, 1987.

The Ontario Development Corporation ("ODC"), which had loaned money to CWM, became the legal owner of the assets of CWM. Mr. Brown incorporated 724597 Ontario Limited, of which he was the sole officer, director and shareholder. In August of 1987, this corporation purchased from the receiver the assets of CWM, including the land owned by ODC. Under the business name "Appletex", this numbered company continued the business that had been carried on by CWM. In this decision, we will refer to this corporation as "Appletex". Mr. Collie, Sr. and Mr. Collie, Jr. became employees of Appletex. Mr. Brown was its president.

Among the assets of CWM purchased by Appletex was a plant at Almonte, near Appleton, which had experienced a serious fire in 1984. One of the steps taken by Appletex was to move the operation of dyeing wool which had been carried on at the Almonte plant, to the Appleton plant. This resulted in a need to take water from the river for use in the production process and to expand the two existing sewage lagoons to store or dispose of the effluent resulting from the dyeing process. Various studies and discussions between Appletex and MOEE occurred. They resulted in the existing lagoons being used as storage lagoons for the effluent from the dyeing operation. It was expected that liquid in the lagoons would evaporate at a rate that would result in no need to discharge effluent from the lagoons into the river.

Appletex in turn became insolvent, resulting in bankruptcy proceedings. Enter Isadore Bell and Mike Harris, who agreed to invest in the company. In February of 1989, the trustee-in-bankruptcy made a proposal to creditors, which was accepted. The proposal involved an injection of capital into the business by Mr. Bell*[Below] and his brother Phil and by Mr. Harris. This capital would be used to expand production.

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* In this decision, all references to "Mr. Bell" mean Mr. Isadore Bell, the applicant, rather that his brother Phil Bell. To avoid any confusion, when we refer to Phil Bell we will use his full name.

Mr. Brown continued to be the president and the sole director and officer of the company and was in charge of the day-to-day operation of the plant. Mr. Brown and Messrs. Collie each received a salary of $600 per week.

Mr. Harris found markets for the company's products, which resulted in increased sales, requiring expanded production. This resulted in an increased volume of effluent which began to exceed the capacity of the lagoons. In November of 1989, one lagoon ("the second lagoon") was found to be overflowing into the wetlands. To prevent the lagoons from overflowing, the company raised and strengthened the walls of the second lagoon and constructed a third lagoon ("lagoon 3").

In the spring of 1990, effluent overflowed from the third lagoon to the wetlands adjacent to the river. By October of 1990, as a result of increased production, the amount of effluent being discharged into the three lagoons was in danger of exceeding their capacity. Mr. Bell requested approval from MOEE to construct a fourth lagoon. Permission was refused. As a result, the company started trucking effluent off-site for disposal, which increased its operating costs.

As a long-term solution, the company began to construct a dyeing facility in Perth, where the effluent could be discharged to the existing sewer system. The construction of this new facility was a substantial unanticipated expenditure. According to Mr. Brown, by March of 1991, the Perth facility had begun operation and no further effluent was put into the lagoons at Appleton.

However, despite dramatically increased production and sales, the business continued to lose money. Several factors appear to have contributed to this, including a fire in one of the main pieces of equipment in 1991, the cost of trucking effluent off-site for disposal, the construction of the new dyeing facility in Perth, and additional costs and damage to product caused by trucking wet wool between the dyeing operation in Perth and the knitting operation in Appleton. According to Mr. Harris, poor management of the production and shipping aspects of the operation by the management team of Mr. Brown and Messrs. Collie was also a major factor.

Mr. Bell's efforts to obtain further loans and grants from government agencies and banks failed, and Isadore and Phil Bell and Mr. Harris decided not to invest more of their own money in the business. In March of 1992, Mr. Bell and Mr. Harris decided to cease operations and dismissed all the employees. The premises were abandoned, leaving behind the potential sources of harm to the environment and to public health and safety described earlier.

As a result of the overflow of the third lagoon in the spring of 1990, the Ministry had launched a prosecution against Mr. Brown and Appletex. When the matter came to court in September 1992, the court ordered Mr. Brown and Appletex to drain all three lagoons and dispose of their contents. By this time, of course, the company was insolvent and the premises were abandoned. They did not comply with the court order.

THE DIRECTOR'S ORDER

On February 19, 1993, the Director, Southeastern Region, Ministry of Environment and Energy ("the Director") issued an order under sections 17, 18, 43 and 197 of the Environmental Protection Act. Section 17 authorizes the Director to order both remedial and preventive measures once a discharge of a contaminant has occurred. Section 18 is primarily preventive, allowing the Director to require preventive action if there is reason to believe that a future discharge to the environment might occur which would cause harm. Section 43 authorizes the Director to require the removal and disposal of any illegal waste deposits. Under section 197 of the EPA, an order can be issued prohibiting any person having an interest in the property from dealing with the land in any way without first notifying anyone acquiring an interest in the property of the Director's order.

The order is a typical two-phase order requiring first that studies be done to identify whether corrective action is needed, then requiring that any measures identified by the consultants be carried out, as long as they are satisfactory to the Director.

As indicated earlier, the order required securing the property; disposal of fire hazards such as paper, wood, textile fabrics and yarns, drums and other containers of waste chemicals and oils, oil in tanks, engines and transformers; monitoring groundwater for contamination; preparation of a study of the environmental concerns and the steps needed to rectify them; carrying out the steps recommended by the study; and draining the lagoons and disposing of their solid and liquid contents. The order also prohibits any dealings with the property without first giving a copy of the order to anyone who acquires an interest in the property and registering on title notice of this prohibition. Appletex, the registered owner of the property, was required to register notice of this prohibition on title. The provisions of the order setting out the work required are reproduced in Appendix 3.

The order does not actually state that waste disposal sites where waste has been buried must be dug up and the waste removed; but this is implicit in the fact that the order is based in part on section 43 of the Act. Section 43 provides for removal of waste; and the order requires the applicants to carry out a study, then implement whatever the consultant says should be done. Thus, if the consultant recommends digging up the waste disposal sites and removing them, this must be done.

The order is confusing as to what it actually requires, as it lumps together under the heading "waste" both the liquids in the lagoons and the solid wastes on the surface of the ground as well as solid waste buried in garbage dumps on the property. It suggests that all this waste is subject to Part V of the Act, is illegal, and must be removed. In fact, sewage lagoons are not generally considered subject to Part V, but are dealt with either under Part VIII of the Act or under the Ontario Water Resources Act, neither of which are referred to in the order. Moreover, the evidence shows that the Ministry does not consider such lagoons to require a certificate of approval unless they are designed to discharge their contents to a watercourse or to the groundwater. (Ex. 62, Letter, R.E. Stiles to James E. Collie, February 24, 1987).

Thus, the sewage lagoons did not become illegal as a result of not having a certificate of approval, but only by virtue of a 1992 court order requiring Appletex and Mr. Brown to drain the lagoons and remove all contaminated soil below them as part of the sentence imposed on conviction for causing or permitting the overflow in the spring of 1990.

Moreover, it is hard to understand why the Ministry has included the contents of the sewage lagoons in the parts of the order dealing with Part V waste when they appear to be dealt with comprehensively in paragraph 2.6.6 of the order, requiring the decommissioning of the lagoons in accordance with the court order. Accordingly, it is difficult to determine exactly what the order requires in relation to each of the various deposits of waste and effluent.

The order was issued to Appletex, Mr. Brown, Mr. Isadore Bell, and Mr. Harris. No order was issued to others who were involved in financing or operating the business that generated the pollution such as James E. Collie, James S. Collie, Phil Bell, the Federal Business Development Bank, the Ontario Development Corporation, the International Mercantile Factors, or Collie Woolen Mills Ltd. (While CWM was bankrupt, an order against it might still be effective as its insurers could be required to pay for carrying out the order if the company had had certain forms of insurance coverage).

THE APPEAL

Mr. Percy Ostroff, a lawyer, filed a notice of appeal on behalf of all the persons named in the order, who are collectively referred to in this decision as "the applicants". Their grounds for appeal were set out in the notice of appeal. The position of Messrs. Bell and Harris was set out further in Mr. Ostroff's written argument at the end of the hearing. As is frequently the case, the issues were somewhat modified, clarified, and expanded between the issuance of the notice of appeal and the final argument. In our view, no prejudice to the Director resulted from this evolution and no serious objection was taken to it. We will deal later in more detail with the issues that emerged, but the main issues may be summarized as follows:

1. Do Mr. Brown, Mr. Bell and Mr. Harris fall within the class of persons to whom the Director is authorized to issue orders?
2. Do the conditions and risks found at the site fall within the categories of conditions and risks that give the Director jurisdiction to issue orders under sections 17, 18, and 43 of the EPA?
3. If the Director has jurisdiction to require the actions set out in the order, are these steps reasonable ones given the kind and degree of risks associated with failure to take such steps?
4. Should the poverty of Mr. Brown absolve him from compliance with the order, and if so, should Messrs. Bell and Harris have to carry out his share of compliance or should they be relieved from a proportion of the overall liability for carrying out the order?
5. If Messrs. Bell and Harris do fall within the categories of people who may be ordered to carry out work and the Director has the jurisdiction to order the work, should they be relieved of compliance, in whole or in part, because of what might be described as "mitigating circumstances"?
6. If fairness or equity requires that Messrs. Bell and Harris be partially or wholly relieved of liability, does the Board have jurisdiction to grant this relief?

THE HEARING

THE PARTICIPANTS AND THEIR REPRESENTATIVES

The Board's hearing commenced on November 17, 1993. Mr. Ostroff appeared on behalf of Messrs. Bell and Harris. He was no longer representing Appletex or Mr. Brown. Mr. Ostroff had earlier made an application on behalf of Messrs. Bell and Harris for a stay of the Director's order. This stay was granted. At the hearing of the motion, he represented only Mr. Bell and Mr. Harris and made arguments only in relation to the reasons why the order should be stayed against them. Accordingly, the order has not been stayed against Appletex and Mr. Brown.

Mr. Brown attended the first day of the hearing. The Director advised that the Ministry was not pursuing the order against Mr. Brown, but had not revoked it. The order therefore remained in effect in regard to Mr. Brown pending any decision by the Board.

The Ministry called Mr. Brown as a witness. Mr. Brown retained Mr. R.W. Thompson, a lawyer, to represent him during the course of his testimony. Following Mr. Brown's examination in chief and cross-examination by other parties, Mr. Thompson questioned Mr. Brown. Mr. Thompson also appeared as counsel to a witness, Mr. James E. Collie, during his examination and cross-examination. Following this, Mr. Thompson advised the Board that his retainer had been terminated and he withdrew from the hearing. Mr. Brown also left the hearing and did not participate further in the hearing, although it had been made clear to him at the beginning of the hearing that he was still subject to the Director's order unless the Board relieved him of liability.

As the sole director, officer, and shareholder of Appletex, Mr. Brown was the person in a position either to represent Appletex at the hearing or to appoint a lawyer or agent to do so. Mr. Brown did not indicate at any time that he was representing Appletex at the hearing nor did anyone else appear to represent Appletex. Accordingly, Appletex was unrepresented throughout the hearing.

Mr. Patrick Dorion, a neighbouring resident of the Village of Appleton, was granted party status. His interest and concerns were the protection of his family and the community from any public health or safety hazards the site and its abandonment might pose; the maintenance of his property value and the effect that the condition of the site and publicity about it might have on property value; and ensuring that liability for clean-up is distributed equitably among those who caused and contributed to the environmental concerns and who benefitted from the operation of the undertaking over the years.

In passing, we should note that the Director's action in leaving the issue of Mr. Brown's liability with the Board rather than revoking the order against him was an appropriate way to deal with the fact that the Director did not wish the order to be upheld. Once an order has been issued, other parties and members of the community who have an interest in whether the order is sustained and may be directly or indirectly affected by its revocation, should have an opportunity to make their views known to the Director and to the Board. For example, in this case, three other parties, Mr. Bell, Mr. Harris and Mr. Dorion, objected to the revocation of the order against Mr. Brown as they felt this could adversely affect their interests. Leaving the final determination to the Board gave them an opportunity to protect their interests.

Mr. Neil Smitheman also appeared on the first day of the hearing to argue that the Board had no jurisdiction to make an order against the Federal Business Development Bank or the Ontario Development Corporation or to direct the Director to make such an order, as requested by counsel for Messrs. Bell and Harris. He withdrew from the hearing when the Board ruled that it had no such jurisdiction. The reasons for this ruling are set out in Appendix 1 to this decision.

DETERMINATION OF THE ISSUES

The process of deciding whether to uphold an order has two stages. The first stage consists of determining the Director's jurisdiction over the problems addressed by the order and the work required by it (jurisdiction over the subject matter) and determining the Director's jurisdiction over the persons named in the order. Secondly, if the Director is found to have jurisdiction, the Board must determine the reasonableness of the order; that is, whether there are any reasons for changing the nature or timing of steps required by the order or relieving persons who have potential liability from compliance with the order.

In relation to the reasonableness of the actions required by the order, once the Board has determined that the environmental conditions or risks that can justify an order exist, the Board must determine whether each of the steps required by the order is reasonable in the sense that it is necessary or advisable to take this step to reduce the risk or correct the problem that gives rise to the order.

In relation to the liability of the persons ordered to carry out the steps, the Board first determines whether they fall within the category of persons to whom such an order can be issued. If so, the Board considers whether there are mitigating factors that dictate that they be relieved from compliance in whole or in part.

Jurisdiction over the subject matter

Section 17

Section 17 provides that where there has been a discharge of a contaminant into the natural environment, the Director may order measures to repair or prevent damage that this discharge is likely to cause. For the Director to have jurisdiction there must be an actual discharge and actual or likely harm from that discharge. There is evidence that discharges of effluent from lagoons 2 and 3 to the marsh adjacent to the river occurred respectively in the fall of 1989 and in the spring of 1990. However, there is no evidence that those discharges resulted in any effect or likely effect that remains to be addressed by this order.

The Water and Earth Science report (ex. 42) indicates that there is evidence of discharge to groundwater either from the lagoons or the waste disposal sites on the property, but minimizes the significance of these discharges. Thus, there is sufficient evidence of effects to support study of possible effects on soil and groundwater, but not enough to justify decommissioning of the lagoons or waste disposal sites because of actual or possible injury or damage.

There is evidence of the discharge of unidentified chemicals to the floor of the plant which creates reason for apprehension. The plant floor is not the natural environment. There is also evidence that precipitation could infiltrate the building and wash spilled chemicals into a floor drain. Nevertheless, the possibility that such discharges may eventually leave the building and enter the natural environment through fire, flood, or vandalism, does not give the Director jurisdiction to order their clean-up under section 17.

There is evidence of past discharges through this floor drain to the natural environment. There is evidence that the contents of such discharges probably flowed along a depression or pipe into one or more of the lagoons. There is visual evidence to suggest that any pipe that may have existed may have lacked integrity and may not have been present at all times when discharges may have occurred.

Thus, there is evidence that suggests that it is likely that the soil between the plant and the lagoons along the path of this past and potential future flow is contaminated to some degree.

There is some hearsay evidence of spillage of oil outside the plant. (ex. 62, occurrence report supplement, p. 1).

Despite the sketchiness and hearsay nature of some of this evidence, we are of the view that it is sufficient to support any parts of the order under section 17 that require analysis of material in and around the floor drain and in other areas of spillage outside the plant to determine such matters as its composition and age; analysis of any water and other materials in the floor drain; analysis of the soil and groundwater along the probable route of this discharge and monitoring for possible impacts to soil or groundwater from the lagoons and waste disposal sites, to determine what action, if any, is required.

Section 18

Section 18 provides the Director with authority to require measures even if there has been no discharge. The Director can take measures that on reasonable grounds appear necessary or advisable to prevent or reduce the risk of a discharge that would likely result in an adverse effect or that would mitigate the effects of such a discharge if it were to occur.

The presence on the site of chemicals in containers and chemicals discharged within the plant, of engines that probably contain oils, of tanks that would contain oil or oil residues, of transformers and capacitors that contain oil and probably contain PCBs, and fluorescent light ballasts that appear to contain PCBs, all create a substantial risk of discharge, which can occur in a variety of ways, including fire, vandalism, infiltration of rain, and deterioration of containers and structures holding contaminants. The presence of wooden objects, large amounts of paper strewn about the plant floors and other flammable materials within the building add to the fire risk. There is also evidence of discarded fabric and other garbage behind the plant and drums of unidentified chemicals outside the plant, which could add fuel to a fire. Fire produces smoke, which is likely to create an adverse effect given the proximity of residences to the site. Even without knowing the nature of the chemicals and what the by-products of their combustion might be, alone or in combination with each other and with other flammable substances, it is clear that to the extent that they would contribute to the smoke, they are likely to cause adverse effects.

Therefore, the evidence supports the Director's jurisdiction to require securing of the site and the removal of all these objects from the premises and/or their disposal.

There is also evidence of past and potential future vandalism and infiltration of precipitation into the plant. In the event of either a fire or excessive infiltration of precipitation into a building which is partially open to the elements, because of openings which include a partially collapsed roof, it is likely that a portion of any chemicals spilled on the floors or into the floor drain will be incorporated into the smoke or washed into the surrounding soil, as the case may be.

This gives the Director jurisdiction to require clean-up of spilled materials within the plant and in the floor drain.

Evidence of past discharges from the lagoons together with evidence that beavers or muskrats can burrow into the berms of the lagoons, undermining their stability and impermeability (testimony of Paul Kehoe), is evidence of the possibility of future discharges and of the likelihood of such discharges reaching an aquatic environment. The Board also heard evidence of the contents of those discharges and of their potential deleterious effects on aquatic organisms and on human health (testimony of David Dillenbeck and Dr. Fernandez-Marion). This evidence is sufficient to give the Director jurisdiction to order measures to prevent future discharges from the lagoons.

However, the Director can require only those measures that in his view, based on reasonable grounds, are necessary or advisable to prevent discharges or their effects. Clearly, a study is necessary and advisable under these circumstances. Accordingly, the Director has jurisdiction to require a study of what should be done to prevent future discharges. Once the Director has determined which prevention measures are needed, that determination must be subject to appeal.

Monitoring of groundwater: The Director's order requires the monitoring of groundwater, but is vague as to the purpose or location of such monitoring. In the absence of any evidence to the contrary, the Director, and hence the Board, can take notice that all sewage lagoons and waste disposal sites are capable of discharging contaminants to surrounding soil and groundwater and are likely to cause some degree of degradation. This is a fact so obvious that, where there are abandoned waste disposal sites and sewage lagoons, a Director need not carry out studies at public expense to establish the possibility of a discharge or the likelihood of an adverse effect should a discharge occur. Therefore, the Director's requirement to study groundwater movement in relation to any waste deposits on site is within his jurisdiction under section 18.

In any event, evidence of the potential for leakage through the floors of lagoons 1 and 2 is found in the Dames and Moore Phase I Environmental Audit, particularly at sections 3.9 to 3.11 and in parts of exhibit 62.

There is evidence that lagoon 3 was constructed with a clay liner by experts in accordance with the specifications of other experts. However, there is hearsay evidence that "trees, now dead, left growing through the liner may cause a potential vertical movement of water" (Dames and Moore, p. 10). As this evidence is uncontradicted, it is sufficient evidence of a possibility of discharge from lagoon 3 to the surrounding soil or groundwater to give the Director jurisdiction to order groundwater monitoring in relation to potential discharges from lagoon 3.

Section 43

In relation to waste dumped or deposited in the ground, as opposed to sewage in lagoons, the Director has jurisdiction to order removal of all such waste unless a certificate of approval has been issued for the establishment and operation of a waste disposal site. No evidence of potential or actual harm is required to establish jurisdiction. As there is evidence that no certificate of approval has been issued, the Director has jurisdiction to require the removal of all such waste.

The Director can also use section 43 to require removal of all the chemicals and other waste materials abandoned inside or outside the buildings.

Reasonableness of steps required

Once we have determined whether the actions required by the order are within the Director's jurisdiction, we must determine whether there is some reason why they should be delayed or some other action taken that would be equally effective but more advisable.

The reasonableness of the order involves consideration of matters such as whether the harm or risk of harm to the environment justifies the steps required by the order, whether these steps are feasible, and whether they can be carried out within the timeframes specified in the order.

Mr. Harris and Mr. Bell argue that by securing the site in the manner that has occurred, namely, constructing a fence around the property, posting "No Trespassing" signs, and having a watchman living on site with watchdogs, they have made the other measures unnecessary or inadvisable.

In our view, all the measures which we have found the Director has jurisdiction to carry out are reasonable and should be carried out, with the exception of the removal of buried solid waste deposits and decommissioning the lagoons, which require further consideration. The fence that has been constructed would have limited effect in keeping vehicles off the site and is completely ineffective to keep individuals from entering the site. The site is of sufficient size that a security guard cannot accomplish adequate surveillance. Even if a much more effective fence were constructed, we would still be of the view that all the steps required are supportable, except for the removal of the waste buried in the dump sites and decommissioning of the lagoons.

In relation to the dump site beside the lagoons, the study carried out by Water and Earth Science Associates Limited (ex. 42) concludes that "the environmental impacts from the presence of this waste do not appear to be significant". This study recommends alternatives to removal of this waste.

Accordingly, it is necessary for the Director to consider this evidence and determine whether to require further study or a different approach to managing these wastes. When the Director decides upon a preferred course of action a new order can be issued which specifies what action should be taken. This will ensure that the persons to whom the order is issued are not deprived of their appeal rights.

No study was done of the other dump site(s) on the property.

Accordingly, this portion of the order will not be upheld.

In regard to the possibility of discharges from breaches in the top or sides of the lagoons, if the Director wishes remedial action, as opposed to study, to prevent discharges, he must specify the nature of that action and give the applicants an opportunity to appeal it. Accordingly, the Director's order to implement the court order will not be upheld.

Of course, these findings as to the need to carry out the work specified in the court order relate only to the order issued by the Director, and our comments are not intended to deal with the validity or enforceability of the order issued by the court. That is a matter to be determined in a different forum.

Given our conclusion in regard to the advisability of draining the lagoons, it is unnecessary to express any opinion as to whether the alleged misdescription of the property in the court order affects the validity of the Director's order incorporating the court order.

Based on the findings we will make below in relation to liability, it appears that some of these measures will not be carried out unless they are carried out by the Ministry or voluntarily by a third party. In that event, we wish to make it clear that our finding that these requirements are necessary or advisable implies that we recommend that if no one else carries them out, the Ministry do so to protect the environment and public health and safety.

In light of the fact that we are not ordering that the lagoons be drained, we feel it is advisable to order that steps be taken to monitor the condition of the lagoon walls and maintain their integrity to prevent any discharges from the berms pending a decision on how the lagoons are to be decommissioned. This finding will be reflected in the Board's order.

Jurisdiction over the person

Appletex and Ralph Brown

Liability under section 18

The corporation is the registered owner of the property on which the undertaking was carried out, and it is and was its occupant. It was the owner of the undertaking for a period of its operation, and had charge, management and control of the undertaking. Therefore, the Director has jurisdiction to make orders against Appletex under section 18 to take any steps necessary to prevent discharges or negative effects of discharges.

The Ministry initially took the position in the Director's order that Ralph Brown was "the Director of the Company (Appletex) and was the General Manager of the Company and either personally or as Director of the Company has had the charge, management and control of the property and responsibility for the operation of the undertaking since on or before 1987".

At the hearing, counsel for the Director, who argued that Mr. Brown should be relieved of liability under the order, took the position that Mr. Brown was only "nominally" the directing mind of Appletex, despite being its sole director, officer and shareholder. The reason for this was that he was, as he testified, merely "fronting" for the Collies to help them evade creditors. Mr. Brown testified that the Collies retained all the real power. He stated that later he was subservient to Messrs. Harris and Bell, who retained total financial control over the corporation. Through this financial control, Messrs. Harris and Bell effectively dictated policy and made all major decisions despite Mr. Brown's apparent authority. During the course of her argument, counsel for the Director conceded that Mr. Brown "technically" fell within the class of persons subject to sections 17 and 18 of the EPA.

In the past, this Board has tended to focus on actual or de facto control rather than legal indicia of control, or potential control, as the deciding factor in determining whether a person has charge, management, or control. Thus, in Blackbird Holdings (Board file no. EPA.001.89), nominal directors of a corporation who were not officers and took no role in the management or operation of the business were held not to have the requisite degree of control to come within the ambit of the legislation.

However, this should not be taken to mean that legal indicia of control or legal authority which creates potential to control will never be sufficient to bring a person within the ambit of section 18. As the Board indicated in relation to Mrs. Musitano in P & L Tire Recycling Inc. v. Director, Ministry of the Environment, May 23, 1992, (Board file no. EPA.001.90), there is a substantial difference between a person who is a merely nominal director and a person who holds title to land through a corporation and is the sole director, officer, and/or shareholder of a corporation. There is a very significant difference in the degree of potential control that can be exercised.

Moreover, if a person transfers all legal indicia of ownership and control to a third party for the sole purpose of insulating himself or herself from legal requirements that would otherwise be incurred and the third party agrees to participate in such a scheme, in appropriate cases the Director, and therefore the Board, may be able to prevent both of them from thwarting the scheme of the legislation by finding the requisite degree of control in both.

The Board accepts Mr. Brown's testimony that, before Messrs. Bell and Harris became involved, the Collies retained substantial de facto control over the management of the plant despite Mr. Brown's formal title and his legal control. To some extent, as he testified, he was "fronting" for the Collies. However, in agreeing to front for the Collies by accepting the formal title and all legal indicia of ownership and control, as well as participating in management decisions to some degree, Mr. Brown voluntarily assumed the liabilities that come with legal ownership and control. As an officer and director of a corporation, for example, he is personally responsible under employment standards legislation, to ensure that certain wages are paid to employees if the corporation fails to pay them. Would it be reasonable for Mr. Brown to attempt to avoid this liability by arguing that he was just a "front" for someone else? Under these circumstances, legal control is sufficient to bring Mr. Brown within the ambit of section 18 regardless of the degree of actual control.

However, Mr. Brown also had actual control of the undertaking. We do not accept Mr. Brown's testimony that he was completely subservient to Messrs. Collie and later to Messrs. Bell and Harris, to others whom Messrs. Bell and Harris brought into the operation, and to other employees. From at least July of 1988 to the Spring of 1990, the Ministry dealt with Mr. Brown regarding environmental problems. (See for example ex. 62; and testimony of Paul Kehoe). From the totality of the evidence we conclude that Messrs. Bell and Harris relied to some extent on Mr. Brown's experience in deciding to invest and that initially he fulfilled the role of general manager, with considerable control over the day to day management of the company as well as considerable influence in formulating policy and making strategic decisions. However, as time passed, the confidence of Messrs. Bell and Harris in Mr. Brown's management of the operation waned and his influence and control diminished. Messrs. Bell and Harris used their almost complete control over release of funds to gradually reduce the degree of control and management exercised by Mr. Brown to a point where he could no longer be said to exercise de facto control or management.

Accordingly, Mr. Brown falls within the class of persons who can be subject to orders under section 18.

Liability under section 43

Section 43 applies to owners and former owners, occupants and former occupants, and persons who have or previously had charge and control of land and buildings where waste has been deposited. In his capacity as general manager of the business overseeing production and shipping, Mr. Brown had control over the buildings in which waste is found and had charge or control over the land containing one or more waste disposal sites. Appletex owned the land and buildings where waste was deposited.

Liability under section 17

Under sections 18 and 43, the Director has jurisdiction over persons because of their status as owners, occupants, or persons who had charge, management or control. Section 17, however, makes persons subject to orders based on exercising control in a way that leads to a discharge or failing to exercise control in a way that would have prevented it.

A person can be issued an order only if he or she "caused or permitted" a discharge. To cause or permit a discharge, a person must have a sufficient degree of control over the underlying factors that led to the discharge to be able to prevent it and must fail to exercise his or her control in a manner that prevents the discharge. (See for example, R. v. Gonder (1981), 62 C.C.C. (2d) 326 at 333) In relation to the offence of causing or permitting a discharge, the Supreme Court of Canada has stated that the "discharging" aspect centres on direct acts of pollution; the "causing" aspect of the offence centres on the defendant's active undertaking of something which it is in a position to control that results in pollution; and the "permitting" aspect centres on the defendant's passive lack of interference, or, in other words, its failure to prevent an occurrence which it ought to have foreseen (R. v. City of Sault Ste. Marie (1978), 85 D.L.R. (3d) 161 at 184).

As the words "cause" and "permit" incorporate both the concept of control and the concept of failure to exercise the control appropriately, it is necessary to discuss which aspects of "causing" and "permitting" the Director must show to establish jurisdiction over the person and what the person subject to the order must establish to avoid a finding that they caused or permitted a discharge. In our view, the Director need only establish that the persons ordered had control of the underlying factors leading to the discharge. The onus then would shift to those persons to establish on a balance of probabilities that they took all reasonable care to prevent the discharge. The justification for this reverse onus is that these persons will usually be in the best position to know what steps they took and what options were open to them.

This approach is consistent with the approach accepted by the Supreme Court in Sault Ste. Marie and in R. v. Wholesale Travel Group Inc., (1991), 67 C.C.C. (3d) 193, as applied by the Provincial Offences Court in R. v. Mac's Convenience Stores Inc. (1985), 14 C.E.L.R. 20.

In regard to section 17, the court order issued following their conviction is uncontradicted evidence that Appletex and Mr. Brown caused or permitted the spring 1990 discharge from lagoon 3. But as indicated earlier, there is no evidence of effects from this spill or from the November 1989 spill which must be remedied or prevented. Therefore, section 17 does not apply to this discharge. There is insufficient evidence that Mr. Brown or Appletex caused or permitted any other discharges to the natural environment. There is no evidence as to when the groundwater contamination, spills outside the plant and discharges from the floor drain occurred, and thus no evidence that Mr. Brown or Appletex had any influence over the underlying factors leading to those discharges or were in a position to prevent them.

Isadore Bell and Michael Harris

Sections 18 and 43

Neither Mr. Bell nor Mr. Harris was ever a shareholder, officer, director, or employee of Appletex. Both testified that they had no formal title as an agent or representative of Appletex. Nor did they have any formal written agreement of any kind with Appletex or any of its principals, other than a memorandum which they signed in August of 1989 expressing an intention to form an agreement.

Mr. Bell is a principal in companies based in the Montreal area involved in the spinning of fabrics. Mr. Harris is a principal in a Toronto-based company involved in importation, distribution and sales of fabrics.

Mr. Bell was made aware of an investment opportunity by a factoring company, International Mercantile Factoring, which extends credit to manufacturers. A principal in IMF introduced Mr. Bell to Messrs. Collie and Brown, who were seeking financing. The financing was needed to provide sufficient relief or assurance to creditors of Appletex that they would support the proposal put forward by the trustee in bankruptcy and would allow Appletex to continue operating, and to finance the expansion of production that would be needed to make Appletex profitable.

Mr. Bell had meetings with the Collies and Mr. Brown and with officials of the FBDB and ODC around February 1989 and reached an agreement with Messrs. Collie and Brown at that time. Mr. Bell and his brother Phil were to invest $150,000 between them. Mr. Bell advised a business associate, Mr. Harris, of this business opportunity. Initially, Mr. Bell asked Mr. Harris to sell the new company's product in return for a share of profits. Later, Mr. Bell advised Mr. Harris that a potential investor, Mr. Lou Gordon, had decided not to participate. Mr. Harris agreed to invest $150,000, which was paid to IMF. In return, IMF extended credit to the new company.

Messrs. Bell and Harris had an oral agreement with Messrs. Collie and Brown that in return for their investments, Mr. Harris would be entitled to 30% of profits and Isadore and Phil Bell would each be entitled to 15% of profits. There was also discussion of issuing a proportionate number of shares so that the "Bell-Harris group", as they were sometimes referred to in testimony, would receive 60% of the Appletex shares. However, the uncontradicted evidence is that no shares were transferred.

Mr. Brown testified that the agreement between the Bell-Harris group and Messrs. Collie and Brown was that financial matters would be handled by Mr. Bell and Mr. Harris, and Mr. Brown would be responsible for managing the day-to-day "mechanical" operations at the plant. Mr. Brown said that Messrs. Bell and Harris took almost total control of these day-to-day matters as well. Mr. Bell and Mr. Harris disagreed with this testimony. They indicated that initially their role was to be limited to providing funds and customers for Appletex's services and products. In particular, Mr. Harris's salesforce would sell Appletex products to the regular customers of Mr. Harris's companies.

Regardless of the initial division of functions, it is clear that Messrs. Harris and Bell retained ultimate control of all significant expenditures by Appletex through their signing authority. Most cheques issued by Appletex had to be co-signed by either Mr. Bell or Mr. Harris. They therefore had a veto over all major expenditures by the corporation and its sole officer and director, Mr. Brown. One or the other - usually Mr. Bell - was involved in all decisions on major expenditures, if not initially, then at least within a few months, when the expected profits were failing to materialize and Messrs. Collie and Brown were seeking further capital from them to keep the business in operation.

Mr. Bell became much more involved in the management of Appletex than Mr. Harris. According to Mr. Kehoe, a Provincial Officer responsible for inspection of this operation for MOEE, Mr. Bell tried to persuade the Ministry to approve a fourth lagoon when efforts by Mr. Brown to obtain approval were unsuccessful. According to Mr. Brown, Mr. Bell made other key decisions, including authorizing the funds to remedy a spill from the lagoon in the spring of 1990, authorizing the funds to retain a lawyer to defend the company and Mr. Brown on charges laid by the Ministry, authorizing moving the dyeing operation from Appleton to Perth, terminating the employment of Mr. Collie, Sr., and making the decision to cease operations and terminate the employment of all the employees. Mr. Bell also dealt with the FBDB in advising it that the company had ceased operations and giving the FBDB the keys to the property, a symbolic act of offering possession of all the corporate assets to the FBDB. Mr. Bell testified that he also represented the company in approaches to the FBDB and government agencies in unsuccessful attempts to obtain further loans and government grants.

Mr. Harris was much less involved in making financial decisions than Mr. Bell. However, he authorized expenditures in Mr. Bell's absence; visited the operation on occasion; and was consulted by Mr. Bell in making major decisions on expenditures. He brought Mr. Herb Lepofsky into the company. Mr. Lepofsky took an active role in day-to-day management of production and shipping on behalf of Messrs. Bell and Harris. Mr. Harris also made many decisions on day-to-day management such as the order in which goods were to be produced and shipped, and on quality control. He testified that he did this because of frequent customer complaints about product quality and shipping errors and delays.

We accept the evidence of Messrs. Bell and Harris that their initial intention was to be investors whose role would be to find or provide markets, and that they relied initially on the experienced management team of Mr. Brown and Messrs. Collie to make all operational decisions, including those relating to pollution control. They became involved in financial and operational matters only when and to the extent that they came to perceive that the management team was unable to carry out these functions efficiently and profitably. This conclusion is consistent with the fact that both had their own businesses to run far from the Appletex plant, that they had no expertise in the production and dying of wool or the handling of wastes generated by these activities, and that the collective experience of Messrs. Collie and Mr. Brown in operating this business for several decades together with other financial information provided to them could well lead an investor to believe that the day-to-day operations could be left in the hands of this management team and that what was required of an investor was financial acumen and involvement in finding markets and selling the product.

Mr. Ostroff argues that the kind of control and management described above do not constitute management or control of the undertaking or property and therefore these activities do not bring Messrs. Bell and Harris within the parameters of sections 17 and 18 of the EPA. He submits that an "undertaking" must mean the operations of an undertaking related to the environmental conditions contemplated by the EPA. Similarly, management of the undertaking must relate to management activities in relation to the aspects of the operation of the undertaking causing the environmental concerns. He states that involvement in the management of the company's financial affairs is not sufficient to constitute management or control because it does not relate directly to the operations causing environmental concerns.

We think that this is too narrow a definition of management and control. No such words of limitation are found in the Act and we do not think they should be read in. In our view, these limitations in the type and degree of management and control do not remove the activities from the Director's jurisdiction but are factors to be taken into account in the second stage of the Board's analysis - the determination of whether the persons named in the order should be relieved in whole or in part of the requirement to comply with the order. "Control" does not only encompass the formal legal control available to officers and directors, but also de facto control by others in a position to significantly influence the management of the undertaking. It can incorporate control of the pursestrings through means other than direct or daily participation in the corporation or its business. Similarly, "management" of the undertaking is not restricted to management of the operations creating a risk of pollution. Indeed, as will be seen below, in the view that we take of this matter, the real issue in this case in regard to Messrs. Bell and Harris is not how the business was conducted as an operating entity, but how the property was decommissioned when the business was abandoned. The aspects of management and control that are most important to our decision are not those that relate to operating decisions but those relating to the decision to abandon the business and the premises.

In determining that Messrs. Bell and Harris had charge, management or control, it has not been necessary to rely on any evidence of steps they took voluntarily to comply with the order after the premises were abandoned. Mr. Ostroff had objected to such evidence being used to prove control on two grounds. First, he argued that steps taken after-the-fact on a voluntary basis cannot support an inference of control at an earlier time, and secondly, he argued that as a matter of public policy such evidence should be inadmissible since its use would discourage voluntary actions to improve the environment. The Board ruled the evidence admissible, but it is unnecessary to rely on this evidence because there was ample evidence of steps taken between their initial involvement and the abandonment of the premises to establish the kind and degree of control needed to give the Director jurisdiction.

We have also not accepted statements in FBDB documents (ex. 39) that Mr. Bell held himself out to the FBDB as a principal or president of Appletex. These alleged statements were denied by Mr. Bell and the Ministry called no witnesses to substantiate them.

We are satisfied that Messrs. Bell and Harris had the requisite degree of management, charge or control necessary to bring them within sections 18 and 43.

Section 17

The only actual discharges to which the Director's order applies under section 17 are the past discharges from lagoons 2 and 3 to the marshy area, discharges from the floor drain to the outdoors, some possible spillage outside the plant which was not described with any specificity, and a discharge from an undetermined source - likely either the lagoons or the waste disposal sites -into the ground water. There is insufficient evidence that Messrs. Bell and Harris had sufficient control over the underlying causes of any of those discharges to conclude that they caused or permitted them.

Relief from Liability

Where the Board has determined that the Director has jurisdiction over the person and the subject matter, the Board must then determine whether there are mitigating circumstances that justify relieving a person of the requirement to comply.

Appletex

The Board treats the liability of corporations and the availability of individuals' investments in corporations to pay for environmental clean-up differently from the liability of individuals to spend their personal funds on compliance with Director's orders. Individuals who invest in corporations know that their entire investment is at risk as a result of many contingencies. They generally have no reasonable expectation that any loans to the corporation or assets of the corporation will be immune from the requirement to comply with environmental protection laws. If corporations are able to carry out needed clean-ups required by parts of the EPA that impose liability regardless of causation or fault, the fact that they did not cause the problem will often be less of a consideration than it is in regard to individuals.

There is no reason to relieve Appletex of the need to comply with all aspects of the order that are within the Director's jurisdiction.

Principles of Individual Liability

In the past, when environmental offences occurred, government agencies generally only prosecuted the corporation carrying on the offending operations. When preventive or remedial action was required, orders were generally issued only to such corporations. This practice had two problems. First, by the time action was taken, the corporations were frequently insolvent, so orders and sentences imposed after prosecution were unenforceable. The public often had to pay the costs of remedying environmental problems. Secondly, this corporate liability did little to raise the standard of care to be desired from those who owned, controlled, or managed corporations or from individuals and institutions in a position to influence the affairs of the polluting corporations through their business dealings with them.

Accordingly, in an effort to make the enforcement and implementation of environmental laws more effective and to avoid clean-up costs being incurred by the Crown rather than those involved in business activities, a practice has recently evolved of prosecuting individuals and others in a position to exercise control, and of issuing orders against such actors. In the case of prosecution, liability rests on proof of fault or negligence. In the case of orders, fault or negligence is not a prerequisite. This distinction is defensible because of the different purposes of prosecution and orders. The purpose of the former is to punish past wrong-doing. The purpose of the latter is, like civil tort remedies, to redistribute loss in an efficient and fair manner.

However, when the law allows the imposition of substantial liabilities on individuals regardless of fault, this raises questions as to when it is fair to do so. It is important to be able to do so for the purpose of stimulating individuals to raise their standards of diligence in dealing with environmental matters. However, it is also important to exercise reasonable restraint.

As a result of this evolving practice, questions are being asked as to when it is appropriate to issue orders against such actors as lenders, landlords, receivers and trustees in bankruptcy, officers and directors, and shareholders. Much of this ongoing discussion of what is fair, effective, and efficient, is useful in determining appropriate standards to apply to the liability of individuals such as Messrs. Bell and Harris.

Under most laws, with a few limited exceptions, individuals who participate in corporate activities are not personally liable for failures of the corporation except to the extent that their own negligence or wrong-doing have caused or contributed to it. Even the laws that specifically make officers and directors personally responsible to carry out certain duties of the corporation, such as payment of employees or remitting taxes collected by the corporation, generally are limited to a relatively specific subject matter, easily ascertainable obligations, and limitations on the likely liability. Generally, such individuals have a reasonable expectation that in the absence of wrong-doing there will be reasonable limits on their personal liability for acts and omissions of the corporation. Liability under the Environmental Protection Act is much more open-ended.

There are opposing views on what principles should apply in relation to the liability of actors such as officers, directors, lenders and receivers to carry out environmental protection orders. An article dealing with the liability of lenders and landlords puts forward one view:

> ...there are two related rationales that support decisions which expand the scope of liability of landlords and lenders. First, as a result of such decisions, a larger pool of private parties able to pay for the costs of cleaning up contaminated sites will be created. Although this has been scorned by some as amounting to nothing more than an attempt to attach liability to "deep pockets", the fact is that landowners and lenders are in a favourable position to pass forward the costs of rehabilitating contaminated sites. For example, landlords and lenders can insist on indemnities and guarantees from their tenants or borrowers and, in appropriate circumstances, demand that properties be insured against potential environmental impairment liability.

> Furthermore, lenders are generally in a position to structure financial arrangements to account for the risk of environmental liability. In short, by expanding the scope of liability of landlords and lenders and, in turn, having the costs of cleaning up contaminated sites redistributed through market mechanisms, it will be possible to ensure that these costs are more fully internalized by the private sector, rather than borne and thus subsidized by the public treasury.
>
> The second rationale for expanding the liability of landlords and lenders draws on the fact that the enforcement activities of regulatory agencies have failed substantively to deter the unlawful discharge of hazardous materials by industry. The hope is that, by having the costs of cleaning up contaminated sites internalized by the private sector, more powerful incentives will be created to compel the private sector to implement responsible environmental practices. As the courts in Maryland Bank and Fleet Factors have observed, landlords and lenders are in a position to require that environmental audits be conducted to identify potential problems on their properties. Indeed, for many landlords and lenders, the conduct of such audits has become routine. It is therefore unnecessary for the law to absolve landlords and lenders from responsibility for their mistakes of judgment or, more regrettably, from their reluctance to engage in responsible environmental practices.
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> Jimmy Y. Levy, "Landlord and Lender Liability for Hazardous Waste Clean-up: A Review of the Evolving Canadian and American Case Law", (1992), 20 Canadian Business Law Journal 269 at 303-4

An example of the type of argument that is made against this "deep pockets" approach is found in another article. Although the comments below were made in relation to the fairness of making past owners and operators responsible for clean-up through the retrospective operation of statutes, they can be applied to the more general question of expanding clean-up liability beyond those at fault and beyond the corporation to individuals:

> There is an obvious alternative... : payment of the clean-up costs by society as a whole. This would recognize that society as a whole benefitted from the past economic activity which led to the pollution, through, for example, provision of jobs, payment of taxes, creation of foreign exchange. It would also give weight to the responsibility of society as a whole for its laws which allowed the pollution to occur. On the other hand, the Crown will argue that those who benefitted financially from cheap waste disposal should pay now for its consequences.
>
> In this balancing of competing interests, as in the evaluation of "fundamental justice", the deciding factors will probably be the good faith of the defendant, the economic benefit it received from the pollution, and the impact upon it of the impugned order. It would be harder for the Crown to justify a clean-up order which would financially devastate an old age pensioner than it would be to justify an order which caused no hardship to a wealthy multinational. Similarly, it would be harder for the Crown to justify a clean-up order imposed on a conscientious company which complied fully with the laws of its day, obtained all government permits, used the best available technology, and honestly believed its acts were innocent, than it would be to justify an order imposed on a company which knew its wastes were dangerous, yet simply hid them in a hole in its yard next to its neighbour's well. In the large middle ground of substantial but imperfect compliance, the result will depend less on the law than on the judge's sense of what is fair in the circumstances.

Dianne Saxe, "Retrospective Liability for Environmental Contamination" (1992), 7 Canadian Bar Review 492

Ontario's legislation provides little guidance as to which of the approaches described above is appropriate. It gives an official - the Director - broad discretion to issue orders against a broad variety of actors - but provides little or no guidance as to how the Director should decide whether to exercise this discretion. Ministry policies are also limited in the guidance they give to the Director on this issue.

In the absence of legislative or policy guidance as to how this broad discretion will be applied, it results in a high degree of unpredictability and potential unfairness.

It is sometimes suggested that such legislative guidance is needed. For example, in the article cited above, Jimmy Levy suggests that, "Ideally, governments will in the near future enact comprehensive provisions to define the duties and liabilities of landlords and lenders for the clean-up of contaminated sites." In relation to lenders, another commentator has suggested that the lack of predictability has created a "lender liability crisis...crying out for legislative intervention". (J. Madeleine Donohue, "Contaminated Property and Lender Liability", paper delivered to the Canadian Bar Association - Ontario Annual Institute, Environmental Law, January 29, 1994). Similarly, a multi-stakeholder committee convened by the Canadian Council of Ministers of the Environment has recently suggested that legislation across Canada should spell out clearly the principles of liability that should govern the issuance of clean-up orders. (CCME, "Contaminated Site Liability Report: Recommended Principles for a Consistent Approach Across Canada", prepared by the Core Group on Contaminated Site Liability, March 25, 1993). This committee recommended that the legislation should continue to cast a wide net in relation to potential liability, but that in allocating actual liability, certain principles should be followed and certain factors should be taken into account. Canada's provincial and federal Ministers of the Environment endorsed these principles in May 1993.

The CCME Core Group recommended that the principles that should apply in framing contaminated site remediation legislation and policy should include:

* the principle of "polluter pays";
* the principle of "fairness", which incorporates among other things, certainty of process, effectiveness, efficiency, clarity, consistency, and timeliness in achieving environmental objectives;
* a process which enshrines the concepts of "openness, accessibility, and participation"; and
* the principle of "beneficiary pays", based on the view that there should be no "unjust enrichment".

The committee suggested that the following factors should be taken into account in deciding whether to impose clean-up liability or in apportioning it among various actors:

"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, did he contribute to further accumulation or the continued release of the substance;

g. what steps did the person take on becoming aware of the presence of the substance, including immediate reporting to and cooperation with regulatory authorities;

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

i. the degree of a person's contribution to the contamination, in relation to the 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."

Thus, the Core Group rejected a simplistic "deep pockets" approach in favour of an approach that takes into account the circumstances of each case and looks at a variety of factors that come into play in deciding whether it is fair in the circumstances to impose liability.

This Board supports the CCME approach. Although it is crucial to raise private sector standards of care, there is also a need to take into account the realities of the marketplace in which actors were operating at the time of their activities, the standards of conduct prevalent at the time the risk was created, the balancing of competing interests and the allocation of responsibility in a fair manner, and the potentially crushing impact that unlimited personal liability may have on individuals.

An approach which gives Directors unlimited discretion to impose liability on a broad range of actors has the benefit of promoting a higher standard of care among that entire range of actors. To reduce the possibility that they will be caught within the net, these actors may take greater steps than they would otherwise to ensure that those with whom they have business dealings do not pollute. This Board supports that goal and wishes to encourage business persons to raise their standards of care. However, when those persons have no way to know in advance what standard of care will be sufficient to excuse them from liability or if they feel that no amount of care will help them, there is a lack of fairness, effectiveness, and efficiency in how the law is being implemented.

This Board has previously explained its role as including ensuring that the law is administered fairly. Nykamp v. Director, Wellington-Dufferin-Guelph Health Unit, October 18, 1993, (Board file no. 00322.A1).

Accordingly, the Board has taken the approach in past cases of applying a set of factors based implicitly on principles of fairness in determining whether to uphold a Director's order in relation to some classes of individuals. In P & L Tire Recycling Inc., the Board suggested that it would look at factors such as the extent to which the person benefitted, the degree of influence the person could exercise over the factors creating the risk, and the steps taken by the person to reduce the risk. Collectively, the latter factors relate to the issue of whether the individuals ordered to prevent or remedy a problem took reasonable care, often referred to as "due diligence", to avoid creating the problem.

Whether individuals exercised due diligence depends on the degree of influence or control they could exert to prevent the harm or risk they are being ordered to address and whether they exercised that influence or control constructively. In determining this, the Board can look at many factors, including the skills and knowledge of those individuals, the standards of conduct prevalent at the time, the affordability of preventive steps, the likelihood and seriousness of the risks to the environment, the alternatives available to those individuals, the extent to which the underlying causes of the problem were within or outside their control, and the foreseeability of the risk or problem that occurred.

In determining the standard of care that such individuals should have followed, the Board will consider the standards prevalent at the time, but will not limit itself to those standards, because the standards of conduct in relation to many environmental protection matters have been and often remain far too low. It will be helpful to the Board in determining the appropriate standard of care if the Director and the applicants lead evidence of the custom of the trade at the time of their involvement in the matters before the Board. However, in the absence of such evidence, or where the evidence shows that those standards were or continue to be too low to give reasonable protection to the environment, the Board will impose a standard of care which it considers reasonable.

Thus, the liability of individuals will not be limited to cases where they failed to exercise reasonable care, but the Board will attempt to apply principles of fairness. This will mean in practice that in some cases where the problems occurred despite the exercise of reasonable care by the applicants to prevent them, they may still be held responsible to carry out the Director's order. This will apply especially where it appears that the individuals benefitted greatly from the activities that caused the problem or would benefit unduly if the liability were restricted to the corporation (for example, where the corporation has limited resources to carry out the order because the individuals have appropriated those resources to their own use).

In Hopkinson and Sky Harbour, the Board suggested that the extent to which various persons contributed to the creation of the environmental problem should also be taken into account. To the extent that it is possible to allocate responsibility in a manner commensurate with the degree of contribution, the Board should be concerned about a fair allocation of responsibility.

This list of considerations is not necessarily exhaustive. In this case, Mr. Ostroff argues that the Board should also consider the possibility of unjust enrichment of others should Messrs. Harris and Bell be solely responsible for all clean-up activities, as well as the acts of others in allegedly misleading his clients. Mr. Dorion and Mr. Ostroff also argue that the Board should consider the extent of the contribution of others to the problem and the benefits to others that accrued as a result of the involvement of Messrs. Bell and Harris in keeping this business going as long as it did, providing jobs and stimulating the local economy. Others who are alleged to have contributed to the problem include the bankrupt Collie Woolen Mills and its principals, James E. Collie and James S. Collie; the taxpayers of Canada and Ontario, since they invested in Appletex through loans by a federal government agency, the FBDB, and an Ontario government agency, the ODC; and the municipality, which is alleged to have dumped municipal garbage on the site. Those who have benefitted from the operation of this business and the involvement of Messrs. Bell and Harris include Messrs. Collie; the municipality through property taxes and by having a place to dump its garbage; the workers who obtained employment; and the general community through having such a source of local employment.

The Board's Jurisdiction to Consider Issues of Fairness

In our view, if the Legislature chooses not to legislate the kinds of principles and lists of factors described above, that is, those recommended by the CCME Core Group and those applied in past cases by this Board, the Board can create such guidelines and apply them in its own deliberations, provided that it does not fetter its discretion to decide each case on its merits.

Counsel for the Director argues that the Board has no jurisdiction to apply principles of fairness or equity if this would result in the order being vacated. She argues that the Board's discretion cannot be exercised in any way that thwarts the purpose of the Act. The purpose of the Act is the protection of the environment. If no one is required to clean up, the environment will not be protected. Thus, vacating the orders would thwart the purpose of the Act.

She argues that vacating the order against Mr. Brown is permissible, since Mr. Brown has no means to carry out the order. Therefore, relieving him of liability will not result in less clean-up. Thus, the Director argues that the Board's jurisdiction to apply principles of fairness is limited to the relief of the indigent on compassionate grounds, and cannot include the relief of anyone with means.

There are two flaws in this argument. The first is that the Act does not actually require environmental protection in any particular case. The power to issue an order is completely discretionary. The Director has no duty to issue an order, and thus has no legal duty to ensure the protection of the environment in any particular case. The legislature has presumably given Directors this broad discretion whether to order clean-ups for the purpose of allowing them to take into account a wide variety of factors and do what is fair in the circumstances of each case. The Board stands in the shoes of the Director. The Act gives the Board the power to substitute its opinion for that of the Director and states that a hearing before the Board will be a "new hearing". This means that the Board can take any steps the Director could have taken, including not issuing an order at all. This interpretation of the Board's powers is reinforced by the legislative history of section 144 of the EPA. (See Re Uniroyal Chemical Ltd. (1992), 9 C.E.L.R. (N.S.) 151 at 169-171). If the Director has no duty to require a particular clean-up, neither does the Board.

Secondly, vacating an order does not necessarily mean that the environment will not be protected. It may simply mean that the environment will be protected by a public agency rather than by the private sector. Directors have discretion to carry out clean-ups themselves, even without issuing an order. The Ministry has an environmental security fund used to carry out clean-ups at public expense when it is impractical to require the persons subject to orders to do so. In addition, the federal government has established a clean-up fund to be used for the same purpose. Thus, the scheme of the Act and its administrative machinery include means of accomplishing clean-ups at public expense as well as by the persons subject to sections 17, 18, and 43 of the EPA. Also, there may be different private individuals, corporations, or government agencies who could be named in additional orders.

The Board endorses the principle that environmental costs should be internalized by those who create the risks or who benefit directly from them rather than the public, wherever possible. However, this principle must be subject to considerations of fairness.

Statutes such as the Environmental Protection Act and the U.S. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") which cast a broad net, creating potential liability among a wide variety of actors without providing any guidance as to how the liability is to be imposed in a fair manner create a challenge for Boards and agencies required to administer them. Several commentators have noted that where the legislature does not give such guidance, that role will fall to the courts until the Legislature steps in. (In Canada, it will often be an administrative tribunal to which the function falls at first instance.)

For example, in discussing the potential liability of lenders under Ontario's EPA and other Canadian environmental statutes, one commentator said, "The courts and the legislature must strive to work in tandem toward creating an equitable balance of environmental and financial interests. Many of the policy considerations...can only appropriately be addressed in Parliament. Until clearer guidelines are provided on these important issues, however, the courts must restrict themselves to reasonable interpretations of the current laws, and to fair tests of 'control' which attempt to balance the competing legal concerns of debtor, creditor, and public at large". (Scott E. Requadt, "Lender on a Hot Tin Roof: The Developing Doctrine of Lender Liability for Environmental Cleanup in Canada", 50 U of T Faculty of Law Review 195 at 222).

Therefore, we reject the argument of counsel for the Director that we have no jurisdiction to apply principles of fairness to the matter at hand.

Limits to the Board's Jurisdiction to Ensure Fairness

The powers of the Board are not limited to ruling on whether a Director has acted within his or her jurisdiction. This is clear from the power given to the Board to substitute its views for those of the Director. Moreover, if the powers of the Board were limited to ensuring that the Director exercises his or her discretion in good faith and within the ambit of his or her statutory powers, there would be little need for such a Board, since judicial review is available for an excess of jurisdiction.

But neither is the Board's role to simply substitute its own view of what is fair for that of the Director. The substitution of one decision maker's unfettered discretion for the unfettered discretion of another does little to provide the clarity, certainty and predictability that should be a feature of a regulatory regime.

However, the Board may fulfill a variety of roles within the scope and purpose of the EPA, such as determining whether the Director has failed to follow Ministry policies guiding the exercise of discretion or has followed such policies slavishly without apparent regard to factors that would make following the policy inappropriate in the specific case, or the Board can fill a policy vacuum.

Where neither the Ministry nor the Director appear to have put their mind to principles of fairness, efficiency, and effectiveness to guide the exercise of discretion, the Board may attempt to enunciate and apply such principles.

Applying Principles of Fairness to Ralph Brown

The Director asked the Board to revoke the order against Mr. Brown on compassionate grounds.

The Board is satisfied by the evidence that Mr. Brown has no assets and minimal income. Having such an order "hanging over his head" would create needless stress. If Mr. Brown's financial circumstances should change and the work required by the order has not yet been carried out by others, the Director can issue another order, which can be appealed, and the merits of upholding it can be argued at that time.

Counsel for the Director did not address how her request conforms to Ministry policy. However, we note that revoking this order may be contrary to Ministry policy. Since 1987, the Ministry has had a policy that allows Directors to take into account financial hardship when deciding whether to impose an order on someone. However, there is a document, which has never been added to the Ministry's policy manual but which has been disseminated within and outside the Ministry, that purports to replace three of the enforcement and compliance policies found in that manual. We do not know whether this document, which is dated July 1991, has been formally adopted as Ministry policy, although a recent edition of a Ministry publication says that it has. ("Legal Emissions", volume 6, number 1, winter 1994, p. 18).

Section 8.5 of this "policy", which is entitled "Compliance", states:

> Financial constraints on the part of the person responsible will not be accepted as a reason for non-compliance with the requirements of a control document, but may be considered by the Director, in consultation with the responsible Division Head, in determining the compliance schedule contained in a control document.

"Person responsible" is defined in the "policy" to include persons such as Mr. Brown and "control document" includes the order issued to Mr. Brown.

Even if this is Ministry policy, we feel that it was appropriate for the Director to depart from the policy in this case.

The order is revoked in relation to Mr. Brown except for the requirements to notify others of the prohibition against dealings with the property and to register this prohibition on title. As the sole legal representative of the corporation that has legal title to the property, Mr. Brown is in a position to carry out this portion of the order and the Board directs him to do so. The Board upholds the order to Mr. Brown to register this prohibition and provide proof of this registration to the Director.

As the order has not been stayed against Mr. Brown this provision is already in effect and the deadlines set out in it apply. Thus, there is no need to set a time limit for complying with this provision.

Applying Principles of Fairness to Messrs. Bell and Harris

Following Mr. Bell's testimony, the Board asked him why, if the corporation had no resources and a choice must be made between the taxpayers of Ontario, through the Ministry of Environment and Energy, paying for the clean-up and Messrs. Bell and Harris paying for it, the responsibility should fall to the taxpayers. Mr. Bell advised that he and Mr. Harris were not trying to "walk away" from the problem. He testified that since the property had been abandoned, they had spent over $18,000 to remove and dispose of chemicals, had put up a barbed wire fence and had also hired a security guard with dogs to guard the property. They had also made a settlement offer of a substantial amount of money. However, Mr. Bell felt there should be some reasonable limitations on the extent to which he and Mr. Harris should be held responsible. He said,

> "What did we do wrong? We invested hundreds of thousands of dollars, employed close to 100 people, begged everyone to help us stay in business, continued to support the operation, and blew all that money for nothing. We never took out a dime. If we came here and took out our money you're absolutely right, 'Give it back. You're a thief. You grabbed money from an operation.' We didn't take one...not one cent.
>
> First of all, I don't feel that we did anything wrong in this. We gave 100 jobs at least to this area - a million and a half dollar a year payroll. ....The only thing I could say is we're involved in possibly the third lagoon. Why should I be responsible for something that happened, you know, 40 years ago. ...it's not a question of us walking away. We never said that from day one. But we don't want to be responsible for what happened in history. That has nothing to do with us. I was only there for a year."
>
> Mr. Bell made the same point more succinctly. He said,
>
>> "It appears to me that we're being blamed for everything that's ever gone on on that property. That's not right."

Discussion of Factors to be taken into account in determining whether to provide relief

1. Benefit from participation

The actual benefit obtained from participation in the polluting activity or enterprise will often be a fairer determinant of personal liability than potential benefit. In this case, the uncontradicted evidence is that neither Mr. Bell nor Mr. Harris obtained any benefit, other than experience, from their investment in and participation in the management of Appletex. Both lost all the time and money they invested as well as the money they have spent to comply with parts of this order.

Mr. Bell received no dividends, salary, equity or other financial remuneration. He spent around $300,000, including his initial investment of $150,000, and has, in his words, no hope of recovering any of this money. One of his companies, Zephyr, is owed $170,000 by Appletex. As a personal guarantor of a loan by IMF to Appletex, Mr. Bell was required to pay IMF approximately $90,000 when it called the loan. Suppliers of his other companies have cut off his credit because they were not paid for goods supplied by Appletex.

Mr. Harris lost his $150,000 investment, as well as some of his reputation and credibility in the business community in which he operates. He was also required to pay back loans to Appletex which he had personally guaranteed. In addition, Messrs. Bell and Harris have paid out over $30,000 for measures to comply with the Director's order, including removal of wastes, fencing, paying a security guard, and commissioning on environmental study (ex. 42) carried out during the course of the hearing.

The entity which appears to have benefitted most from the efforts of Messrs. Bell and Harris to resuscitate this operation is the Government of Canada, whose development bank has been paid over $600,000 in interest on its loan to Appletex, which was an extension of its previous unpaid loan to CWM.

Mr. Dorian argued that many people contributed to the environmental problems and benefitted from the operation of the mill, including the federal, provincial and municipal governments, and it would be unfair for Messrs. Bell and Harris to have all the liability.

2. The standard of care

a. "Investor negligence"

The reasonableness of the steps taken by Messrs. Bell and Harris must be viewed in light of the fact that they expected their role to be limited to providing funds and selling the product. They expected that an experienced management team knew how to take care of operational issues, including any environmental concerns.

One of the main arguments put forward by counsel for the Director is that an investor has a duty to investigate the potential environmental liabilities inherent in an undertaking before investing in it and to ensure that some of the money invested is allocated towards meeting environmental contingencies.

The extent of liability imposed under U.S. environmental clean-up legislation is instructive in this regard. In some ways, a passive investor who plays no role in the operation of a company in which he or she invests is similar to a passive lender. Under CERCLA, passive lenders are exempt from clean-up liability. They incur this liability only when they obtain a degree of actual or potential control over the operations of the borrower beyond the influence obtained merely by lending money. One court has ruled that once a lender actually participates in management in ways that give it actual control over waste management decisions, this will trigger such liability; another has said that it is sufficient to trigger this liability if the lender acquires the legal right to potentially influence waste management decisions by the borrower even if this influence is not actually used. The kind and degree of involvement or potential involvement in the affairs of the borrower that should trigger such liability is a matter of continuing debate both in Canada and in the United States.

However, the U.S. courts have not gone so far as to say that merely lending money creates an obligation to inquire into environmental concerns or make the loan contingent on specific environmental protection expenditures.

The Board wishes to encourage investors to meet the standard of care described by counsel for the Director. Making investors liable for clean-up orders when they do not take these steps will, in some cases, promote such a standard. The Board wants to encourage this, but a sense of fair play dictates that a person who does not otherwise deserve liability should not be made subject to liability for the sole purpose of encouraging others to meet such a standard.

A fairer and more effective way of doing this is to articulate the required standard of care in legislation or other publicly-disseminated rules or policies that will be available in advance to future investors.

The standard of care normally to be expected in the absence of clear rules is the custom of the trade at the time of the allegedly negligent act or omission. The only evidence given to the Board that has a bearing on this issue was the evidence of Mr. Bujold of the FBDB that it was not the policy of the FBDB in 1989 to inquire into environmental matters. The document prepared by FBDB's loans officer to justify the decision to loan CWM $1.7 million in 1985 makes no mention of any inquiry into or concern about environmental issues by that agency. Nor does the application form provided by the FBDB in 1987 make any reference to environmental contingencies. Whether the loans officer inquired into environmental matters in 1987 is unknown, since this person either provided no written explanation for approving the loan or the usual written justification document has disappeared from the FBDB's file. Nor did the Ministry lead any evidence that the custom of individual investors in early 1989 when Messrs. Bell and Harris began their participation included making such inquiries and tying their investment to specific environmental expenditures. An Ontario Government agency, the Ontario Development Commission, also "invested" in this undertaking by giving Appletex and its predecessor CWM a sizeable loan.

The Ministry led no evidence that its sister agency made any inquiries about environmental contingencies or tied any of its funding to expenditures on environmental protection.

Accordingly, we have no evidence to suggest that there was a common practice by small or even large investors of looking into environmental issues in early 1989. (Indeed, at least one commentator has suggested that it is only in the last two or three years that there has been a shift towards high levels of environmental due diligence, and then only by some "major lenders". (J. Madeleine Donohue, "Contaminated Property and Lender Liability", paper delivered to the Canadian Bar Association - Ontario Annual Institute, Environmental Law, Toronto, January 28, 1994.)

We do not wish this discussion to be taken to mean that we condone the low standards of environmental diligence that appear to be the norm. However, when governments suggest that private investors should carry out environmental audits before investing and should ensure that some of the money invested is ear-marked for environmental improvements, it is relevant to enquire into what these governments do in this regard when they invest or loan money, and to question the fairness of their efforts to apply a higher standard to the private investors than the government agencies applied to themselves in relation to the same transaction.

b. Foreseeability

Whether a person is negligent is also usually determined by looking at what a person in that situation knew or should have foreseen. This will depend on factors such as the education and experience of the person. Messrs. Bell and Harris both testified that their experience in the garment trade related to aspects of the business that did not generate the kinds of effluents and wastes or use the kinds of equipment involved in this kind of operation. They were led to believe by others that the operation was carried out by an experienced management team. The objective evidence would support their testimony.

There is no evidence that the FBDB, ODC or IMF drew any potential environmental problems to their attention. Nor is there any evidence of ongoing environmental problems of immediate concern to the Ministry at that time. There is no evidence that the Ministry, even if asked about environmental concerns, would have given a prospective investor useful information. The Ministry is required by law only to give specific information such as the existence of outstanding orders and certificates of approval.

When asked by the Board whether the fact that an increase in production would be required to make this operation profitable, which in turn would require an increase in effluent, should not have alerted him to possible environmental problems, Mr. Harris pointed out that financial statements given to him showed that production had been much higher in the past than at the time of investment. He therefore assumed that the lagoons had handled higher production in the past and could do so in the future. There is no evidence that this was an unreasonable conclusion for a person of his experience to draw.

When the Board suggested to Mr. Bell that he should have foreseen that expanding production would create more effluent, he pointed out that the FBDB and ODC knew the only way the business could be made viable was by expanding production, and the problem of increased effluent doesn't seem to have occurred to them. He also said that Mr. Brown assured him that the liquid in the lagoons would evaporate. This is consistent with the position being taken by Appletex at that time, which led the Ministry to allow it to operate the lagoons without a C of A.

We are satisfied on the basis of all the evidence that the failure of Messrs. Bell and Harris to foresee many of the problems that have arisen was not unreasonable under the circumstances.

2. Degree of influence over the underlying factors creating the risk and extent of contribution to creating the risk

In P & L Tire Recycling, the Board indicated that "the degree of influence the person could exercise over the factors creating the risk" and the extent to which the person contributed to creating the risk would be taken into account in deciding whether to relieve the person from compliance with an order.

In this case, many of the potential sources of pollution existed long before the involvement of Messrs. Bell and Harris. Two lagoons had been used since the 1940s, and there existed a solid waste dump into which municipal garbage is alleged to have been dumped. Counsel for the Director disavowed any intention to make Messrs. Bell and Harris responsible for the removal of the municipal waste, but there is nothing in the order that suggests such an exemption.

Transformers containing PCBs and tanks containing oil were on the premises before Messrs. Bell and Harris came on the scene.

The size of the operation was increased by Messrs. Bell and Harris, but its nature was not changed. Thus, there is no evidence of any change in the kinds of chemicals used or effluents created during their period of participation. It must be remembered that this company would have failed earlier but for their participation, and even earlier but for the assistance of the ODC and FBDB. Had this happened, presumably the same kinds of chemicals would have been abandoned, and in light of the use of fewer chemicals as a result of moving the dyeing operation to Perth, possibly in as large or larger quantities.

Thus, with the exception of the construction of the third lagoon, there is little evidence that the participation of Messrs. Bell and Harris increased the risks already associated with this undertaking, and there is evidence that by moving the dyeing operations they may have decreased some aspects of the risk.

Mr. Bell, with the concurrence of Mr. Harris, did authorize the construction of the third lagoon. However, the degree to which this increased the environmental risk is problematic. As indicated above, it appears to have been constructed by experts and lined with clay. There is no evidence to suggest Messrs. Bell and Harris had any responsibility for experts leaving tree stumps sticking through the clay liner.

Their influence over the risk was also limited by their relative lack of knowledge of the potential risks associated with this kind of operation. This has been discussed previously.

Messrs. Bell and Harris did have substantial influence over the degree of risk through their power to make available and allocate funds to Appletex. The extent to which they used this influence to contribute to the creation of environmental risks will now be discussed.

Had Messrs. Bell and Harris remained passive investors, it is unlikely that they would have had any potential liability. Since their active involvement made them subject to potential liability, it is only fair to ask whether this involvement made things worse or better. Many of the potential environmental hazards existed before Messrs. Bell and Harris became involved. There is no doubt that had Messrs. Bell and Harris not invested or become involved in control or management, the operation and premises would still have been abandoned, leaving behind many environmental problems. On the whole, it appears that the involvement of Messrs. Bell and Harris left matters no worse than had they not participated.

The Board has indicated previously that as between persons who are parties to a hearing, it may sometimes be fairest to allocate responsibility taking into account their relative contributions to the creation of the problem. There may be legal and practical limits to the extent that the Board can cap or allocate liability. These difficulties include the lack of any explicit statutory authority to do so or statutory principles governing how this would be done; the fact that the statute permits the Director, and thus the Board, to order work to be done, not payment for work; the difficulty of ordering half a clean-up or half a study; and the difficulty of determining precisely how much of the problem was created by each party in the absence of adequate records of historical waste management and production practices and purchases of materials and equipment that are hazardous.

Certainly, by finding markets which led to dramatically expanded production which exceeded the capacity of lagoon 3 in the Spring of 1990, Messrs. Bell and Harris contributed to that overflow. However, there is no evidence of continuing danger from that historic situation, and they took steps to prevent its recurrence by moving the dyeing operation to Perth. Thus, the only problem they can clearly be said to have created is the existence of an additional lagoon.

There is insufficient evidence to determine when various engines, light fixtures, tanks, and drums were purchased or when spills occurred. The evidence, including exhibit 13, makes it clear that dyes and chemicals were kept on the site before Messrs. Bell and Harris became involved. The evidence, including the Phase I audit at paragraph 3.5 suggests that there were probably fewer chemicals on-site when Messrs. Bell and Harris abandoned the property than when they first became involved, as a result of moving the dye operation to Perth. Exhibit 13, which contains a list of assets, does not list the containers of contaminants of concern in this hearing, such as tanks, light fixtures, capacitors and transformers, and drums of materials. This exhibit indicates the existence of a detailed inventory, but it was not put before the Board. Mr. Bell, however, did refer the Board to an inventory prepared by the Trustees in Bankruptcy of CWM (Ex 33) which showed that at the time of its bankruptcy there were chemicals, motors, three transformers and a 10,000 gallon outdoor above ground oil storage tank on the premises. In summary, it is impossible to determine precisely which risks the applicants caused and which were created by past owners and operators, and there is an onus on anyone who wishes to take advantage of the contribution of others to alleviate his or her responsibility to establish that contribution by keeping accurate records. Nevertheless, it is reasonable to draw the inference that the contribution of Messrs. Bell and Harris to the creation of the environmental problems was small in comparison to past owners and operators, and that they had nothing to do with many of these problems.

They were certainly responsible for creating the risk that vandalism would result in further spills of chemicals by failing to properly secure the premises. The extent to which additional spills have occurred as a result of vandalism since the abandonment is unknown. The Phase I audit concluded that this has occurred, but the basis for this conclusion is unknown. In his Provincial Officer's Report, Mr. Kehoe also concluded, as a result of his October 27, 1992 inspection, that vandals had spilled chemicals in several areas of the plant, increasing the environmental and public safety risks associated with the abandonment of the plant. For the most part, Mr. Kehoe does not present any evidence in support of his conclusion that the chemicals were spilled after closure by vandals rather than before closure by employees. In one area, however, he did note evidence of footprints which he felt supported this conclusion.

As these conclusions were not challenged by the applicants during the hearing, we find on the balance of probabilities, that the failure to safeguard the premises before abandoning them not only increased the risk of spills and discharges, but actually resulted in additional spills within the plant which have increased the risk and the cost and difficulty of clean-up.

3. The steps taken to reduce the risk

Having looked at the extent to which Messrs. Bell and Harris used their influence to contribute to the risk, we now turn to the question of the extent to which they used their influence to prevent or reduce the risk to the environment. The Director suggests that as the persons with overall financial control of expenditures, Messrs. Bell and Harris had a duty to take steps to reduce the risk of environmental harm.

In considering what steps should have been taken, it is necessary in our view to distinguish between steps that Messrs. Bell and Harris should have taken in operating the company and steps that they should have taken in abandoning the premises.

In determining what steps Messrs. Bell and Harris should have taken, it is useful to look at the state of their knowledge, experience, and expertise. As mentioned earlier, they had little or no prior experience or expertise in relation to this kind of operation and relied initially on the assumed expertise of the management team of Messrs. Collie and Mr. Brown.

There is no evidence that prior to their involvement the FBDB, the ODC, the IMF, or the MOEE brought any actual or potential environmental problems to their attention. When they did become aware of environmental concerns arising from the operation of the business, they acted on them.

The evidence presented was that Messrs. Bell and Harris never refused or neglected to carry out any request made by the MOEE or to deal with any environmental problem brought to their attention. They were led to believe by Mr. Brown that the effluent in the lagoons would evaporate, and no discharge of effluent to the river would be required. The reasonableness of this belief is supported by documentation that shows that the Ministry also appears to have accepted this premise.

When it became apparent that the second lagoon was inadequate to contain the effluent, they authorized Appletex to spend money on improving its stability and to construct a third lagoon. Experts were retained for this purpose. When the Ministry refused permission to construct a fourth lagoon, they did not do so illegally or allow the existing lagoons to continue to overflow, but moved the dyeing operation - at great expense - to a different location where sewers were available.

Although there was a spill from the third lagoon in the spring of 1990, this was dealt with by moving the dyeing operation. The order to decommission all lagoons was not issued by the court until September of 1992, at least six months after the premises were abandoned and the company was insolvent. There is no evidence that the Ministry suggested at any time while the plant was still operating that this decommissioning was necessary.

It is also interesting to note that had the Ministry considered that Messrs. Bell and Harris failed to take steps to prevent the spill from the lagoon, it was open to it to charge them with causing or permitting the spill at the time it charged Appletex and Mr. Brown with causing or permitting the spill. This was not done.

Thus, there is little or no evidence of any steps taken or not taken in the operation of the business that are blameworthy or show a lack of cooperation with the Ministry or disregard of the environment.

The Ministry's real concern appears to be the failure of Messrs. Bell and Harris to build into the operation of the ongoing business a contingency plan for its failure and to set aside funds for decommissioning.

It is tempting to rule that everyone involved in the operation of a plant has a duty to foresee and plan for its eventual failure and to set aside sufficient funds to deal with all environmental contingencies arising from a plant closure. As an environmental protection tribunal, we feel that such a high standard of care is in the public interest.

However, the steps that should have been taken by Messrs. Bell and Harris must be considered in light of the prevailing standard of care. There is no evidence that such precautions are routinely undertaken by business persons. Nor is there any law requiring such precautions.

Under Ontario legislation, the operators of pits and quarries and of mines are required by law to set aside funds for rehabilitation and to file site rehabilitation plans. The Mining Act specifically states that the officers and directors of mines are personally liable to prosecution for failure to do so.

By contrast, the Environmental Protection Act leaves the standard of care for decommissioning a facility to be determined by Ministry Directors on a case-by-case basis. There is nothing in the Act that states that business operators must establish a site decommissioning plan or set aside funds for contingencies that may arise upon decommissioning.

Instead, the Act authorizes Directors to impose such terms and conditions on certificates of approval, to issue orders incorporating such provisions, and to require companies to provide financial assurance to meet such contingencies. The Ontario Government knew about the kinds of operations being carried out at Appletex and the wastes being generated. It knew about problems with the stability of the lagoons. Through a Crown agency, the ODC, the Ontario government knew since at least 1985 of the possibility of failure of this undertaking and still loaned public money to the company. Yet the government never chose to impose any decommissioning or financial assurance requirements on the various owners and operators of this facility.

Again, while we do not condone the low standard of care followed by the ODC, all of this is relevant in determining the appropriate standard of care for Messrs. Bell and Harris and the steps they should have been expected to take to provide for environmental concerns arising out of plant closure before the business failure became imminent.

Notwithstanding the low standard of care imposed by the Environmental Protection Act and by custom of the trade, we feel we must impose a higher standard, at least when the likelihood of failure becomes obvious. In our view, different considerations apply when the likelihood of business failure becomes imminent than before the failure is expected. What is the appropriate standard of care at that time?

To begin with, one must acknowledge that by definition those responsible for a failing business will not have the resources needed to meet all their responsibilities. Such persons will have a variety of competing obligations. Officers and directors will have certain statutory obligations to pay employees and to remit certain taxes; officers and directors of a corporation have a fiduciary duty to the shareholders to preserve the assets of the corporation for them; there will be duties to creditors as well; in addition, individuals will have an obligation to themselves and their families to protect their interests. In some cases, such as this one, such interests may include the responsibilities, arising from having personally guaranteed debts of the company.

Neither environmental legislation nor corporate-commercial legislation clearly states what priority should be given to environmental concerns under these circumstances. In our view, it would be unreasonable therefore to expect investors who have already lost their entire investment, and who are neither officers, directors, employees or shareholders of the failing corporation to take every possible step, regardless of cost, to commit all remaining unencumbered corporate resources to deal with every possible environmental contingency, to the detriment of other legal and moral obligations.

However, we do feel that it is reasonable to expect the person having financial management or control of a failing company to take reasonable steps to safeguard the property against imminent and obvious environmental hazards.

If funds have not earlier been set aside for decommissioning, it becomes incumbent upon such persons as soon as it becomes apparent that failure is likely, to begin to commit a reasonable proportion of the available resources of the corporation 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.

Accordingly, we propose to uphold the Director's order against Messrs. Bell and Harris to the extent that it requires such steps, but not to the extent that it requires study of potential soil and groundwater contamination, decommissioning of deposits of buried waste and sewage lagoons, or removal of large tanks and equipment containing PCBs and oil.

4. Other factors

In addition to the factors mentioned in the P & L case, there are other factors that should also be considered.

(a) The contribution of others who are not before the Board

An additional factor is the contribution of others to creating the risks. Should the Board "cap" or apportion the liability of those who have been ordered to carry out a clean-up because of the contribution of others who have not been required to contribute?

A tribunal should always approach with caution the prospect of making adverse findings of fact against any persons who are not before it to defend themselves. The unfairness which can result from doing so is obvious. This makes it very difficult to give force to arguments that persons before the Board should be relieved of responsibility because of the alleged involvement of others who are not before the Board.

In such cases, the Board has tended to recommend to the Director that he or she look into such allegations and consider whether an additional order should be issued, rather than make findings adverse to such parties.

In light of the view we have taken of the limited responsibility of Messrs. Bell and Harris in this case, it is not necessary to determine whether others also should bear some responsibility for clean-up of these facilities. However, we note that although Messrs. Bell and Harris argued that they were misled by the FBDB and the ODC, which allegedly knew about environmental problems and failed to disclose them, there is no evidence to support these allegations. Indeed, to the extent that there was any evidence about this, it suggested that these agencies had little or no regard to environmental matters and probably made no inquiries about them at the time Messrs. Bell and Harris invested in Appletex.

(b) Unjust enrichment

It is possible that when this Board imposes unlimited joint and several liability on a person before it without regard to apportionment or capping of liability, this may result in unjust enrichment of others who may benefit from the clean-up of the land. For example, if, as alleged, the municipality dumped waste on this property, it could be unfair if Messrs. Bell and Harris removed this waste, making the property more valuable, and the municipality then reaped the benefit of this added value when selling the property to recover unpaid municipal taxes.

Unjust enrichment does appear to be a relevant factor when considering the fairness of a clean-up order. However, it may be impossible for the Board to determine whether there will be unjust enrichment without adequate evidence. There are many legal and factual contingencies that make it difficult for this Board to determine which creditors will ultimately recover money, how much each will recover, how much the clean-up will eventually cost, and how the clean-up will affect the value of the property. In this case, the Board does not have sufficient evidence to deal with this issue.

ORDER

It is hereby ordered that

1. In relation to 724597 Ontario Inc., the Director's order is upheld with any necessary modifications to reflect the Board's findings of fact and law. The description of the fencing in paragraph 2.4 and of the signs in paragraph 2.5 are replaced with the descriptions in paragraph 3(a) of this order. In addition, 724597 Ontario Inc. is hereby ordered to inspect regularly the condition of the walls of the lagoons and to maintain the integrity of the walls to prevent discharges until a decision on

how to decommission the lagoons has been made and implemented.

2. In relation to Ralph Brown, the Director's order is revoked except for paragraphs 2.13 and 2.14 and paragraphs 3.1 to 3.11 which are upheld to the extent that they apply to the duties under 2.13 and 2.14.

3. In relation to Isadore Bell and Mike Harris, the Director's order is amended in the following ways:

(a) The following provisions are upheld and amended as follows:

In paragraph 2.1, the words "Within one (1) day of service on you of this order" are replaced by "Within fourteen (14) days of the date of release of the Board's decision".

In paragraph 2.2., the words "Within two (2) days of service on you of this order" are replaced by "Within sixteen (16) days of the date of release of the Board's decision".

In paragraph 2.4, the words "Within ten (10) days of this order being served upon you" are replaced by "Within thirty (30) days of the date of release of the Board's decision". The words "properly installed fencing" are replaced by "properly installing standard metal fencing of a type and height typically used to prevent entry and vandalism at industrial facilities".

In paragraph 2.5., the words "Within seven (7) days of this order being served on you " are replaced by "Within fourteen (14) days of the date of release of the Board's decision". After the word "signs" in line 2, the following words are added "of a design and size that will ensure that they are clearly visible" and after the word "posted" are added "and securely fastened in a manner that will make their removal difficult".

To the extent that these requirements have already been carried out voluntarily by the applicants, this is deemed to be compliance with these provisions.

In the event that the District Officer refuses approval of any of the steps which he or she is required to approve, either party may bring the dispute back before the Board within a reasonable time and on notice to all other parties to the hearing, and after hearing any submissions and evidence the Board will determine what steps must be taken to comply with the order.

(b) Paragraphs 2.6 to 2.11 are revoked and the following is substituted for them:

Within ninety (90) days of the date of the release of this order remove and dispose of in accordance with the provisions of the Environmental Protection Act and regulations and any other applicable legislation all remaining paper, wood, textile fabrics and yarns and other similar flammable or combustible materials in and around the buildings, all remaining containers of chemicals and oils in and around the buildings, all remaining readily removable spilled chemicals in and around the buildings, and any oil remaining in the two aboveground storage tanks referred to in paragraph 3.6 at page 6 of the Dames and Moore Phase I Environmental Audit, and secure the transformers in the shed, referred to on page 18 of the January 1994 Water and Earth Sciences report if the District Officer does not consider the shed to be sufficiently secure.

If the District Officer and the applicants cannot agree on what is included in this part of the order or clarification is needed any party may apply to the Board in accordance with the procedure set out above.

(c) Paragraphs 2.12, 2.13, 2.14 and 3.1 to 3.11 are upheld to the extent applicable to these applicants.

If clarification or revision of this order or the Board's decision is required for the purpose of implementing the order, any of the parties may request this by written submissions addressed to the Board Secretary, giving all other parties an opportunity to respond, or by bringing a motion for directions.

APPENDIX 1

RULING ON JURISDICTION OVER THIRD PARTIES

On October 19, 1993, the Director, Southeastern Region, Ministry of Environment and Energy, issued an order to Isadore Bell and Mike Harris, among others, to clean up pollution at an abandoned textile mill.

In appealing this order, Messrs. Bell and Harris alleged that two lenders, the Federal Business Development Bank and the Ontario Development Corporation, should also be ordered to contribute to the clean-up. They alleged that the FBDB and the ODC had failed to disclose to them information about environmental problems of this operation. They said that if they had known about these problems, they would not have become involved. They also alleged that FBDB and ODC were now in possession of the property, and therefore were potentially subject to a Director's order. If such an order were imposed on them, this might relieve Messrs. Bell and Harris from some of their potential liability.

Messrs. Bell and Harris, through their counsel Mr. Percy Ostroff, asked the Board to order that FBDB and ODC be made parties to the hearing so that the Board would be in a position to make findings of fact adverse to their interests. During a motion heard by member Alan Levy, counsel for the Director and for FBDB and ODC argued that the Board has no jurisdiction to order a person to be made a party against that person's will. Mr. Levy ruled that the Board has jurisdiction to add parties against their will, but declined to exercise that jurisdiction. (See 724597 Ontario Inc. c.o.b. Appletex v. Director, Ministry of Environment and Energy, Ruling, Alan D. Levy, Released August 31, 1993, Board file no. 00270.M1/S1).

He stated, "I am not persuaded that it is necessary to make FBDB and ODC parties in order to extend an invitation to them to participate. It seems to me that as long as they have been put on notice that Bell and Harris intend to lead evidence at the hearing as to the extent of their liability, and have been informed that the Board will be asked by Mr. Ostroff to make findings against them, no issue of procedural unfairness can arise. FBDB and ODC can hardly complain after a hearing they chose not to attend that there had been a denial of natural justice because they were not given an opportunity to protect their interests. If they do decide to attend the hearing, they will no doubt be granted party status if they request it."

Counsel for FBDB attended the hearing on November 17, 1993 to request a ruling as to what kinds of action in relation to his clients the Board might take in order to help them decide whether they should seek party status.

He argued, supported by counsel for the Director, that the Board has no jurisdiction to issue a clean-up order against persons who have not been ordered to do anything by the Director or to order the Director to issue an order to such persons, regardless of whether they are parties to the hearing.

Mr. Ostroff argued that based on the wording of section 144 of the Environmental Protection Act, the Board does have the power to issue an order or direct the Director to issue an order against third parties.

In Nanni v. Director, Middlesex-London Health Unit (Board file no. SWO.002.89), the Board directed the Director to issue an order against two persons who were not parties to its hearing. This case must be considered in light of its unusual facts. The Director had ordered a developer and a sewage system installer to correct a sewage outbreak from a septic system on the Nannis' property. Neither appealed the order. The Nannis were ordered to provide these persons with access to their property for the purpose of carrying out the work. They appealed this order not because they were unwilling to carry it out, but because they felt that an appeal was the only forum in which they could convince the Director that the steps he was ordering these persons to take would not solve the problem of overflowing effluent, which not only affected their property, but also the property of their neighbours. In fact, there was evidence throughout the hearing that the Nannis were correct. The work being undertaken throughout the course of the hearing was not preventing the sewage outbreaks.

The developer who had been ordered to correct the problem was given party status in the Nannis' hearing, but later withdrew from the hearing. The Director withdrew the orders against both the developer and the installer during the course of the Nanni hearing, leaving the sewage outbreaks uncorrected. Thus, the person for whose benefit the orders were issued was left with no remedy unless the Board intervened. The Board, in effect, directed the Director to reinstate and strengthen the withdrawn orders. A similar situation arose in relation to another sewage system installer in the same housing subdivision and was resolved in a similar manner. (Johnson v. Director, Middlesex-London District Health Unit, Board file SSO.003.90, Gupta v. Director, Middlesex-London District Health Unit, Board file no. SSO.004.90).

In LeLarco v. Director, Ministry of Environment and Energy (Board file no. 00171.A1), counsel for the Director stated that it is the position of the Ministry's Legal Services Branch that the Board's authority under section 144(1)(d) of the EPA to "direct the Director to take such action as the Board considers the Director should take in accordance with the Act and the regulations" includes the power to order the Director to issue orders against third parties. However, counsel pointed out certain practical difficulties in doing so:

> First, the Board would be making adverse findings in relation to persons who had not appeared before it; this raises concerns about denial of natural justice. Second, if the Board directs the Director to issue an order and the order is appealed to the Board, there may be an appearance of bias when the Board hears this appeal. Third, the particular kind of order made against LeLarco can be issued only to the landowner, and not to the person who deposited the waste or to former tenants. Finally, much or all of the work to be carried out under the order may already have been carried out by the time an order has been issued to others.
>
> As Ms Jack pointed out, the EPA gives the Director authority to order people to carry out work, but gives him or her no authority to order third parties to pay for work or to repay a person ordered to carry out work who has already made the expenditure.

To these concerns, the Board added its own:

> We would add that the power to direct the Director to take action "in accordance with the Act" may mean that where the Act requires the Director to first have a provincial officer's report prepared and to give notice and an opportunity to comment before issuing an order, these steps

> must first be carried out regardless of any direction of the Board and the Director's duty to act in accordance with the findings of this report and to take into account what he finds out through the applicant's submissions can't be fettered by the Board's direction. Moreover, if the Act requires the Director to have certain beliefs or objective grounds before issuing an order, any direction of the Board that would require the Director to issue an order without having those beliefs or grounds would not be "in accordance with the Act".

In LeLarco, the Board found it unnecessary to determine whether it had this jurisdiction.

There are two aspects to jurisdiction. There are the powers conferred on the Board by legislation and there is the duty to exercise those powers in accordance with the rules of natural justice or procedural fairness. It is this second aspect of jurisdiction which prevents the Board from issuing an order or directing the Director to issue an order against third parties, even though the bare words of the statute appear to permit it.

As indicated in the passage above, directing the Director to issue an order against a third party offends natural justice if the "direction" is mandatory, because it prevents the Director from carrying out his or her statutory duty to consider the merits of an order and be persuaded of the wisdom of issuing it before doing so. If the Board's direction is not mandatory, but merely a recommendation, then the Board's direction is not legally binding on the Director or the applicant, and is permissible. However, if this is the case, the direction should be clearly stated as a direction to consider issuing an order, rather than a direction to issue an order.

Secondly, if the Board issues an order or directs the Director to issue an order against a third party who is not a party to a hearing, this deprives that person of its right under the legislation or written into the legislation by the common law rules of procedural fairness to be informed of the Director's intention and to make representations before the order is issued.

This problem can be alleviated if the third party is given notice that the Board may issue an order binding on it or may direct the Director to do so, and therefore is given an opportunity to attend the hearing and defend itself against this possibility. However, fair procedure requires that a person should not have to expend sums of money in this manner to protect itself against such a possibility. Had we ruled that there was a possibility that the Board would make a ruling that legally bound them, the ODC and FBDB would have had to pay counsel to attend a five-day hearing. A person should not have to spend money to defend itself before the Board until allegations have been made formally by a Director, not just allegations by a party to a hearing.

We interpret Mr. Levy's ruling to mean that the Board has jurisdiction to hear evidence and make findings of fact adverse to a third party, which findings may persuade a Director to issue an order against that person. The Board may do this where it is satisfied that the person has been given adequate notice of the allegations against it and an opportunity to participate in the hearing.

In our view, the Board's jurisdiction is limited to making such findings and recommending to the Director that he consider issuing an order. A party who has been given notice that such findings may be made has the choice of attending the hearing to persuade the Board not to make such findings or to wait and see whether the Director proposes to act on such findings before spending money to defend its interests.

However, where the person has been notified of the possibility that a recommendation will be made by the Board and chooses not to attend the hearing, the best approach may be not to make findings of fact against that person, but to recount the evidence given in relation to the liability of that person and to suggest to the Director that if such evidence is correct, an order against the person should be considered. This provides the Director with the information he or she will need to conduct his or her own investigation and come to his or her own conclusions.

For the Board to make specific findings of fact or law in the absence of the person has the potential to be unfair even if the person has been given notice; because there is a danger that such findings may be incorrect.

In summary, the Board's jurisdiction over third parties is restricted to making findings of fact adverse to them and making recommendations to the Director to consider making an order against them. Even then, it will usually be fairer to indicate that the evidence suggests an order should be issued and to recommend that the Director consider the evidence and consider issuing an order, than to make definitive findings of fact in the absence of a person potentially affected by those findings.

A person who is subject to these possibilities should be given notice that this may happen. If that person is sufficiently concerned about these possibilities that he or she wishes to participate in the hearing, the Board will undoubtedly give them the opportunity unless there is good reason not to.

Accordingly, we ruled that we have jurisdiction to make findings of fact in relation to the conduct of the FBDB and ODC and to make recommendations to the Director to consider issuing an order against them, but not to issue an order or require the Director to do so.

APPENDIX 2

WITNESSES:

For the Director

Mr. Paul Lambert Kehoe
Mr. Craig R. Lawrie
Mr. James E. Collie
Mr. Ralph Leslie Brown
Mr. Grant Purdy
Ms Christina Fernandez-Marion
Mr. David L. Dillenbeck

On their own behalf

Mr. John Pollock
Mr. Patrick Dorion

For applicants Isadore Bell and Mike Harris

Mr. Isadore Bell
Mr. Mike Harris
Mr. Pierre Alfred Bujold

EXHIBITS:

1. Notice of Hearing - Affidavit of Service sworn September 23, 1993
2. Provincial Officer's Report
3. Appletex Building Plan - Prepared by MOEE
4a. Skywatch photo of Appletex site - October 22, 1990
4b. Small photo lagoons - October 22, 1990
4c. Photo - Collapsed roof - October 22, 1990
4d. Photo - Vandalized Main Office - October 22, 1990
4e. Photo - Spill area - October 22, 1990
5. Analysis results from samples taken May 16, 24 and June 12, 1990

6. Letter to Lowry from Kehoe - November 30, 1992
7. Letter to Trimble from Kehoe - November 30, 1992
8. Letter to Allen from Reynolds - November 17, 1992
9a. Photograph - Sump with spillage - January 6, 1993
9b. Photograph - Chemical storage room - January 6, 1993
9c. Photo - Storage area with drums - January 6, 1993
9d. Photo - Storage area blue drum - January 6, 1993
9e. Photo - Laboratory with reagents
9f. Photo - Sump close up - January 6, 1993
9g. Photo - Spillage exit door interior - January 6, 1993
9h. Photo - Exit door exterior - January 6, 1993
9i. Photo -Discharge pipe to lagoon - January 6, 1993
9j. Photo -Discoloured grass from drain pipe - January 6, 1993
9k. Photo - Transformers - January 6, 1993
9l. Photo - Building exterior - January 6, 1993
9m. Photo - Building exterior close up - January 6, 1993
10. Letter from Allen to Brian Ward - November 12, 1992
11. Notes of August 22, 1989 meeting
12. Letter to James E. Collie from Isadore Bell, October 1989
13. Thorne, Ernst & Whinney Receiver's Report
14. Guarantee
15. Statement of Assistance
16. Letter from FBDB dated July 29, 1987
17. Debenture from Appletex to FBDB
18. Schedule A to Debenture
19. Certified copies of 40 pages of Land Registry and Titles documents
20. Lab results November 1993
21. California Water Quality Criteria - Fluorides
22. Cheque from Perth Fabrics to Grant Purdy
23. Lagoon Effluent Discharge Analysis
24. Provincial Water Quality Objective - Pg 32
25. Provincial Water Quality Objective - Pg 34
26. 5 pages of lab results sampled April 28, 1993
27. David Dillenbeck Curriculum Vitae
28. Letter from Bell to FBDB
29. Agreement between United Textile Workers of America and Appletex
30. Letter from Ontario Ministry of Labour to R. Brown - March 23, 1990
31. List of sales to Appletex from Bayer Canada Inc.
32. Transcript of Cross-examination of Isadore Bell
33. Shaffer and Max inventory list - Collie Woolen Mills Ltd.
34. Guarantee and Postponement of claim on Collie Woollen Mills
35. July 2, 1992 - demand letter from Brown to Appletex and to Collies
36. Demand letter
37. Letter from Bujold to Bell May 6, 1992
38. Liability Report Update - March 16, 1992
39. March 3, 1992 - FBDB file memorandum re: approach for financing
39a. Appletex Working Capital Analysis
39b. Appletex spreadsheet
40. July 18, 1990 - memorandum from P.E. Lauzon, FBDB to file
41. FBDB Record of Financial Results of Appletex

42. Water and Earth Sciences Associates Ltd., "Environmental Investigations at the former Appletex site" - January 1994
43. Statement of Affairs
44. Bankruptcy Proposal
45. Statement of Affairs
46. Letter, Richter & Partners Inc. to Les Promotions Savoir Faire - February 16, 1989
47. Notice of Proposal to Creditors published in the Ottawa Citizen
48. Notice of Proposal to Creditors published in the Montreal Gazzette
49. Notice of Proposal to Creditors with registration list
50. Mail affidavit
51. Minutes of Meeting of Creditors - March 2, 1989
52. Proposal, as amended, March 2, 1989
53. Mail affidavit sworn by Nancy La Pointe, March 1, 1989
54. Report to Court of Trustee - March 28, 1989
55. Petition to approve proposal - March 28, 1989
56. Order on Bankruptcy - April 6, 1989
57. Ministry of Consumer and Commercial Relations corporate documents
58. Certificate of Status relating to 724597 Ontario Inc.
59. Voting letter
60. Information Sheet
61. Proof of Claim
62. Historic document from MOEE and Appletex correspondence

APPENDIX 3

Excerpts from Director's Order issued February 19, 1993

PART 2

WORK ORDERED

Pursuant to the authority vested in me by Sections 17, 18 and 43 of the EPA, I hereby order you, both jointly and severally, to take all steps necessary to do the following:

2.1 Within (1) day of service on you of this order provide details in writing for the approval of the District Officer, Ministry of the Environment, 2435 Holly Lane, Ottawa, Ontario K1V 7P2 (District Officer) on 24 hour security to be arranged for the Property and buildings.

2.2 Within two (2) days of service on you of this order provide 24 hour security on the Property and buildings as approved by the District Officer until such time as the property and buildings have been permanently secured in the manner approved by the District Officer against access by the public.

2.3 Within three (3) days of service on you of this order provide details in writing for the approval of the District Officer of permanent security measures to render the Property and buildings secure against access by the public.

2.4 Within ten (10) days of this Order being served upon you, ensure that the Property has been permanently secured against unauthorized access in the manner approved by the District Officer which shall include properly installed fencing and locked gates and provide proof satisfactory to the District Officer that this work has been done.

2.5 Within seven (7) days of the Order being served upon you, ensure that signs have been posted at all access points into the Property prohibiting trespassers.

2.6 Within fourteen (14) days of service on you of this order, retain a consultant licensed to practice Consulting Engineering in the Province of Ontario satisfactory to the District Officer (Consultant) to carry out a study which shall include, but not be limited to, the following (study):

2.6.1 Identification and labelling of all waste, flammable materials and chemicals on the Property;

2.6.2 Classification and registration of all waste on the property in accordance with Regulation 309;

2.6.3 Measures to remove and dispose of all wastes, flammable materials and chemicals from the Property in accordance with all applicable laws;

2.6.4 Subsurface investigation of the groundwater and soils on the Property where waste has been deposited;

2.6.5 Identification of any adverse effects and recommendations for remediation of the Property;

2.6.6 Measures to comply with the Court Order made under Section 71 of the Ontario Water Resources Act, referred to in paragraph 1.21 of this Order; and

2.6.7 A proposed schedule to carry out the work referred to in this paragraph which shall not be after September 1, 1993 with respect to the lagoons.

2.7 Within twenty-one (21) days of service on you of this order, provide evidence satisfactory to the District Officer that the approved Consultant has been retained.

2.8 Within one hundred and twenty (120) days of service on you of this Order, submit in writing for approval of the Director, the completed study.

2.9 Within one hundred and twenty (120) days of approval of the Study or such longer period as is specified in writing by the Director, implement the recommendations of the approved Study.

2.10 All work shall be carried out under the supervision of the consultant and you shall cause the Consultant, upon request of the District Officer, to submit to the District Officer certificates attesting to the progress of work and, ultimately, to the completion of the work required by the approved Study including details of the arrangements made for the removal of wastes, flammable materials and chemicals.

2.11 Within thirty (30) days of completion of the work required by the approved Study, submit in writing for approval of the Director, a final report on all work done on the Property prepared by the Consultant including a statement that the approved Study and Court Order have been complied with.

2.12 Exercise due diligence and take all reasonable steps to ensure that all consultants, contractors, employees, agents, haulers and others implementing the requirements of this order are exercising reasonable care to prevent any discharge of contaminants and any adverse effect that may be caused by such discharge.

2.13 Pursuant to section 197 of the EPA, I prohibit any dealing with the property in any way without first giving a copy of this order to each person acquiring an interest in the property and you shall register a certificate of prohibition (Certificate) on the title of the property in the form prescribed by Ontario Regulation 14/92.

2.14 Within thirty (30) days of the date the Certificate is signed by the Director pursuant to section 197 of the EPA, register the Certificate on title to the Property in the appropriate Land Registry Office and return a duplicate registered copy to the Director.

Indexed as:

Ontario (Ministry of Environment and Energy, Southern Region) v. 724597 Ontario Inc. (c.o.b. Appletex)

Between
The Director, Southeastern Region Ministry of the Environment and Energy, appellant, and
724597 Ontario Inc. COB "Appletex", Ralph Brown, Isadore Bell and Mike Harris, respondents, and
Environmental Appeal Board, intervenor

[1995] O.J. No. 3713

26 O.R. (3d) 423

18 C.E.L.R. (N.S.) 137

Court File No. 680-94 (Ottawa)

Ontario Court of Justice (General Division)
Divisional Court - Ottawa, Ontario

Southey, Bell and Feldman JJ.

Heard: May 10 and 11, 1995.
Judgment: November 14, 1995.

(13 pp.)

Pollution control -- Water -- Effluent control -- Administrative law -- Boards and tribunals -- Powers -- Procedure -- Respecting evidence -- Exercise of powers, grounds for review.

Appeal by Director of the Ministry of Environment and Energy from a decision of the intervenor, EAB, in which the Board varied an Order of the Director requiring the respondents B and H to take steps to deal with contaminants at the site of an abandoned wool knitting and dyeing mill. A previous owner of the mill, who had constructed two sewage lagoons to hold effluent, became bankrupt in 1987. The respondent corporation purchased the assets, but became bankrupt as well. The creditors managed to keep the corporation running for a few years, but in 1992, B and H terminated operations and dismissed all employees. The premises were abandoned, leaving effluent behind and a variety of wastes. The Director's order required the decommissioning of the mill, including removal and disposal of the wastes. The order required the respondents to carry this out. The order was issued to the respondents only and not to others involved in the financing and operation of the business that generated the pollution such as the previous owners. B and

H appealed the order of the Director to the Board. The Board applied principles of fairness to relieve them of much of the liability, although they still had to secure the property and remove hazardous wastes. The rationale was that they had lost time and money in the enterprise and had not added to the environmental problems, but should have taken reasonable steps to safeguard the property against obvious environmental hazards. The Director appealed on the basis that the Board erred in basing its decision on equitable considerations, that it breached natural justice by taking a CCME report into consideration, and that it interfered with the Crown's spending prerogative.

HELD: Appeal dismissed. Considerations of fairness were perfectly valid since the powers of the Director were permissive and not imperative. A tribunal was entitled to use its own knowledge to make decisions, and this included an awareness of current publications. Therefore, the reference to the report was valid. There was no interference with the Crown's spending prerogative since the Board did not order the Ministry to do anything but merely recommended that the Ministry take the remedial measures if no one else did so.

Statutes, Regulations and Rules Cited:

Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 18, 43, 144(1), 144(2).

Counsel:

Leah Price and Alison Hall, counsel for the appellant.
Percy Ostroff, counsel for the respondents Bell and Harris.
Mario D. Faieta, counsel for the intervenor.

The judgment of the Court was delivered by

SOUTHEY J.:--

The Facts and the Order under Appeal

1 This is an appeal by the Director, Southeast Region, of the Ministry of Environment and Energy (the "Director") from a decision of the Environmental Appeal Board (the "Board"), dated April 15, 1994, in which the Board varied an Order of the Director requiring the respondents to take steps to deal with contaminants at the site of an abandoned wool knitting and dyeing mill at Appleton on the bank of the Mississippi River in Southeastern Ontario.

2 A previous owner, Collie Woollen Mills, had moved the mill operation to the site in 1940 and had constructed two sewage lagoons near a marshy area adjacent to the river to hold effluent generated by the operation.

3 The Collie firm became bankrupt in 1987. In August, 1987, the respondent corporation was incorporated by the respondent Brown, who was its sole officer, director and shareholder. The respondent corporation purchased the assets of the Collie firm from the receiver in bankruptcy in August 1987, and continued the business under the name "Appletex". I shall refer to the corporate respondent as "Appletex".

4 Appletex became bankrupt within a year or two. In February, 1989, the creditors accepted a proposal involving the injection of capital into the business by the respondents Bell and Harris. Sales and production increased through the efforts of Harris, but the business continued to lose money. In March, 1992, Bell and Harris terminated operations and dismissed all employees. The premises were abandoned, leaving behind 3 lagoons into which effluent had been discharged and a variety of wastes, including drums and pails of waste chemicals and oils, tanks and light fixtures containing PCB'S, and paper, wool and textile fabrics and yarns that were fire hazards.

5 The Director's Order required the decommissioning of the mill, including securing the premises against vandalism, removal and disposal of wastes, monitoring groundwater quality around disposal sites and lagoons, and draining the lagoons and disposing of the liquid and sludge in them. The Order required the respondents to carry out a study and then implement whatever the consultant said should be done. The Order was issued to the respondents only and not to others who had been involved in financing or operating the business that generated the pollution, such as members of the Collie family, the Federal Business Development Bank and the Ontario Development Corporation.

6 Bell and Harris appealed the Order of the Director to the Board. The Board applied principles of fairness to relieve Bell and Harris from much of their liability under the Director's Order. Bell and Harris nevertheless remained responsible for securing the property and the removal of flammable and hazardous wastes. The Board's rationale was that Bell and Harris, who had lost all the time and money they had invested in the enterprise, had not added to the environmental problems at the site, but that they, as persons having financial management or control of a failing company, should have taken reasonable steps to safeguard the property against imminent and obvious environmental hazards.

7 The Board upheld the Order of the Director in respect of Appletex "with any necessary modifications to reflect the Board's findings of fact and law".

8 As to the respondent Brown, the Board was satisfied that he had no assets and minimal income, and that having such an order flagging over his head would create needless stress. The Board revoked the Order in relation to Brown, except for the requirements to notify others of the prohibition against dealing with the property and to register this prohibition on title.

The Issues on Appeal

9 Section 144(2) of the Environmental Protection Act, R.S.O. 1990, c. E.19 (the "EPA") provides that any party to a hearing by the Board may appeal to the Divisional Court from the decision of the Board on a question of law.

10 Counsel for the Director advanced 4 grounds of appeal in this Court:

1. The Board erred in law or exceeded its jurisdiction in basing its decision on equitable considerations or the factors listed in a report issued by the Canadian Council of Ministers of the Environment (the "CCME Report").
2. The Board breached the rules of natural justice by relying upon the CCME Report without giving the appellant the opportunity to respond.
3. The Board erred and exceeded its jurisdiction by making a decision that interfered with the Crown's spending prerogative.
4. The Board erred in ruling that the respondents were denied a right of appeal in respect of the Director's order to implement studies regarding buried waste and the sewage lagoon.

11 The respondents Bell and Harris cross-appealed on the ground that no order should have been made imposing liability on them, because they were not owners of Appletex and at no time had management or control of its undertaking or property.

12 The Board was granted status to intervene. Counsel for the Intervenor submitted that the appeal should be dismissed. The position of the Intervenor in this court was that the power of the Director to issue orders under the EPA was permissive, not mandatory, and that it must be exercised fairly and reasonably, as was done in this case. Counsel for the Intervenor also submitted that the Board's recommendation that the Minister carry out the required work if it was not performed by anyone else, was not a part of its Order, was not enforceable, and did not purport to be enforceable. As such the recommendation did not interfere with the Crown's spending prerogative and was an unobjectionable part of the Board's reasons for decision.

Decisions on the Issues

(i) Validity of Order Against Bell and Harris

13 Neither Bell nor Harris was an officer, director, shareholder or employee of Appletex at any time. Each of them invested at least $150,000 in Appletex by providing funds for the company's operating capital, but they had only an oral agreement with Brown and the Collies to receive 60% of any profits. The Board found that Bell and Harris retained ultimate control over all significant expenditures by Appletex through their authority to sign cheques. They had a veto over such expenditures. One or the other of them was involved in all decisions on major expenditures. The Board's reasoning respecting control is found in the following statement in its reasons, at p. 19:

> "Control" does not only encompass the formal legal control available to officers and directors, but also de facto control by others in a position to significantly influence the management of the undertaking. It can incorporate control of the purse-strings through means other than direct or daily participation in the corporation or its business. Similarly, "management" of the undertaking is not restricted to management of the operations creating a risk of pollution. Indeed, as will be seen below, in the view that we take of this matter, the real issue in this case in regard to Messrs. Bell and Harris is not how the business was conducted as an operating entity, but how the property was decommissioned when the business was abandoned. The aspects of management and control that are most important to our decision are not those that relate to operating decisions but those relating to the decision to abandon the business and the premises.

14 I am satisfied on the facts as found by the Board that Brown and Harris had control of the Appletex undertaking and property within the meaning of ss. 18 and 43 of the EPA. The cross appeal is dismissed.

(ii) Fairness

15 Having found that Bell and Harris might be made personally liable by orders under ss. 18 or 43 for the reasons and in the circumstances described above, the Board went on to consider the extent to which it was fair to impose such liability. The Board made reference in its reasons to factors relating to fairness mentioned in the CCME Report, which may be more fully described as a report prepared by the Core Group on Contaminated Site Liability of the Canadian Council of Ministers of the Environment, entitled "Contaminated Site Liability Report: Recommended Principles for a Consistent Approach Across Canada". It was submitted on behalf of the Director that the Board exceeded its jurisdiction in applying considerations of fairness.

16 I am unable to agree with that submission. Both ss. 18 and 43 of the EPA provide that the Director may make orders against persons who have or have had control of an undertaking or property. Neither section uses the word shall, which might impose an obligation on the Director to make an order in the case of every contaminant. The ordinary meaning of the word "may" is to make a power permissive, although the context in which "may" is used may require that the legislation be construed as imperative. (See Driedger: Construction of Statutes (2nd ed., 1983) pp. 9-15).

17 In my judgment, there is nothing in the context in which "may" is used in ss.18 and 43 to indicate that it was used in other than its ordinary meaning of being permissive. Indeed, the reverse is the case. The definitions of "adverse effect" and "contaminant" in the EPA are so broad that, if the powers of the Director under ss. 18 and 43 were imperative, and he had no discretion with respect to orders, the Director would be required to make orders in respect of all adverse effects on the environment, regardless of how trivial. In my opinion there was no error in jurisdiction.

(iii) Use of CCME Report

18 Ms Price also argued that there was a denial of natural justice because the Board relied on the CCME Report. That Report was not submitted to the Board by any of the parties in attendance at the hearing before the Board, nor did the Board advise of its intention to rely on the recommendations contained in the Report.

19 I am not prepared to hold that a denial of natural justice occurs whenever a tribunal refers with approval to a decision or article supporting its decision that was not mentioned in argument before the tribunal. A tribunal is entitled to use its own knowledge and expertise in making its decisions, without limiting itself to matters referred to in the submissions made by the parties appearing before it. Such knowledge and expertise may include an awareness of current publications relevant to the issues before the tribunal.

20 In the case at bar, the Board did not apply the CCME Report. The Board referred to the CCME Report as support for its decision to apply principles of fairness and as illustrating, along with the principles applied in its own prior decisions, the kinds of principles and lists of factors which the Board might include in the guidelines for fairness to be created by it. Wisely, the Board warned itself at p. 27 that such guidelines must not fetter its discretion to decide each case on the merits.

21 The Board then enunciated a number of factors to be considered in applying principles of fairness to Bell and Harris and gave detailed and persuasive reasons for the decision it reached as a result of such application. I can find no denial of natural justice.

(iv) Crown's Spending prerogative

22 I can see no merit in the third ground of appeal advanced by the Director, namely, that the Board erred by making a decision that interfered with the Crown's spending prerogative. The Board did not order the Ministry to do anything. It merely recommended in its reasons that the Ministry take the remedial measures found necessary or advisable to clean up the site, if no one else did so. There is no legal obligation on the Ministry to accept such recommendation. The recommendation was not part of the Board's order.

(v) Alleged Misapprehension As to Right of Appeal

23 The fourth ground of appeal relates to the provision in the Board's decision revoking paragraphs 2.6 to 2.11 of the Director's Order and replacing them with an order requiring Appletex, Bell and Harris within 90 days to remove and dispose of all remaining paper, wood and textile fabrics and yarns and other similar flammable or combustible materials in and around the buildings, all remaining containers of chemicals and oils in or around the buildings, all remaining readily removable spilled chemicals in or around the buildings, and any oil remaining in the above ground storage tanks.

24 Paragraphs 2.6 to 2.11 of the Director's Order required Appletex, Brown, Bell and Harris to retain a consulting engineer to make a study of contaminants at the site, and to prescribe corrective measures which must be approved by the Director. The revoked paragraphs then required that the prescribed corrective measures be carried out within a stipulated time. The reason given by the Board for this part of its decision appears to have been that the Director should consider the evidence and prescribe the remedial measures to be carried out. The Board also mentioned that the persons involved would then have the opportunity to appeal the imposition of such measures.

25 Ms Hall submitted on behalf of the appellant that the Board erred in law, because the Director had preserved a right of appeal in paragraph 3.5 of his Order. Alternatively, it was argued that the Board erred by failing to recognize that it could have altered the Director's Order to provide or preserve appeal rights.

26 The powers of the Board on an appeal are contained in s. 144(1) of the EPA, which reads as follows:

> 144--(1) A hearing by the Board shall be a new hearing and the Board may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Board considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Board may substitute its opinion for that of the Director.

27 It is clear that the Board had power to substitute its specific requirements for the removal and disposal of contaminants for the two-stage scheme set out in the Director's order. The Board did not make any erroneous statements regarding the right of appeal, and I am unable to accept that its alteration of the Director's Order constituted or resulted from an error in law.

Result

28 For the foregoing reasons, the appeal is dismissed. The only parties asking for costs are Bell and Harris. Although they failed on their cross-appeal, they have achieved substantial success in upholding the principle of fairness. The Director will pay their costs of the proceedings in this Court after assessment.

SOUTHEY J.
BELL J.
FELDMAN J.

qp/s/mmr/DRS/mjb/DRS/DRS/DRS

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act)*

N. 500-11-036133-094

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

In the matter of Plan of Compromise or Arrangement of:

ABITIBIBOWATER INC. *et al*
Petitioners

- and -

ERNST & YOUNG INC.
Monitor

BS0350 **n/dos.:** 041053-1170

BOOK OF AUTHORITIES OF THE ATTORNEY GENERAL OF ONTARIO

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