ENVIRONMENTAL ISSUES IN CORPORATE INSOLVENCIES AND REORGANIZATIONS

Jeffrey C. Carhart*

When I began the practice of law in the early 1980's, I seldom heard bankers, insolvency practitioners or indeed other lawyers relate environmental issues to the world of corporate finance. Things have changed a lot since then.

Today environmental issues are at or near the top of the "checklist" of matters considered when money is raised by corporations and when banks or other institutional lenders have to deal with an insolvent borrower. This current reality reflects a turbulent period in which, among other things, the Courts considered a series of cases dealing with the "ranking" of environmental claims in various types of insolvency proceedings, and insolvency practitioners and lenders came face to face with the issue of potential personal liability for environmental transgressions committed by companies they were asked to take carriage of and/or had lent money to. During that period, governments also grappled with amendments to the legislation, endeavoring to strike a balance between a tough stance while still allowing the credit and insolvency system to function effectively. Many of these issues surfaced particularly during the recession of the early 1990s.

At this time, the economy is again troubled. Businesses are failing in a host of industries. Many of these cases involve environmental issues in the context of both private and court appointed receiverships and bankruptcies. Other such cases involve efforts to save companies through the reorganization of their affairs. Sometimes these re-organizational efforts involve a sale of all or part of the business as a going concern. In Canada, most major reorganizations are pursued under the *Companies' Creditors Arrangement Act*, although the *Bankruptcy and Insolvency Act* is also available for this purpose.

In this paper, I will endeavor to discuss briefly the fundamental principles affecting environmental issues in the context of corporate insolvencies and reorganizations in Canada. I will address how statutory provisions and governmental

* Partner, Miller Thomson LLP (Toronto).

enforcement of those provisions[1] have evolved and the manner in which practitioners and the Courts have responded to those developments. I will focus particularly on the subject of environmental issues in the context of commercial reorganizations. It is my submission that, while the process has been far from perfect or complete, the various constituents in this area have struggled towards a balance between the protection of legitimate governmental regulation and the environment, and the allowance of the credit and insolvency system to function effectively.

Generally speaking, a company can become subject to an "environmental liability" in two ways. First, liabilities can arise in the ordinary course as a result of the specific type of business in which a company occupying a particular property is engaged. For example, mining companies may become subject to remediation programs after a mine has been developed and oil and gas exploration companies can become subject to orders governing the manner in which they close down wells.

Second, liability can arise as a result of some unusual problem arising from the company's operations. In 1990, Ontario strengthened the provisions of its *Environmental Protection Act*[2] relating to the creation of what are referred to as "control" or "stop" orders. Such orders seek to enforce the provisions of the legislation which prohibit the discharge of improper contaminants into the natural environment. Under the *Environmental Protection Act*, such orders could be made not only against owners or people who specifically caused the contamination but also people who "had the charge, management or control"[3] of the source of the contaminant. Those simple words can encompass a mortgagee such as a bank who takes possession of a property in an attempt to sell it, or an insolvency firm who acts as a receiver or a trustee in bankruptcy of such a property.

In retrospect, the case law in the early 1990s was neither overly harsh *vis-a-vis* lenders and insolvency practitioners nor did it always involve situations where such parties were genuinely "innocent bystanders." For example, the 1991 Alberta case of *Panamericana de Biens y Servicios S.A.* v. *Northern Badger Oil & Gas Ltd.*[4]

---

[1] Being an Ontario lawyer, I will refer to the Federal *Canadian Environmental Protection Act*, S.C. 1999, c.33 and the Ontario *Environmental Protection Act*, R.S.O. 1990, c. E-19. However, as discussed, even in Ontario these statutes by no means represent all of the grounds under which environmental liability may arise. Also, case law and statutory provisions from other provinces are discussed.

[2] *Environmental Protection Statute Law Amendment Act*, S.O. 1990, c. 18.

[3] *Environmental Protection Act*, R.S.O. 1990, c. E-19, s.7(1).

[4] (1991), 8 C.B.R. (3d) 31 (Alta.C.A.).

involved the following situation. Northern Badger Oil & Gas Limited was in the oil and gas exploration and production business in Alberta and Saskatchewan, with 31 licenced wells in Alberta. Panamericana de Biens y Servicios S.A. was one of Northern Badger's secured creditors. Under a debenture granted by Northern Badger, Panamericana had a security interest over, among other things, those 31 wells.

Northern Badger defaulted under the terms of the Panamericana debenture and in the time-honored tradition, Panamericana moved to have the Court appoint a receiver "of all of the undertaking, property and assets of...Northern Badger...with authority to manage, operate, and carry on the business and undertakings of [Northern Badger]." Approximately two months after this Court Order was made, the Alberta Energy Resources Conservation Board wrote to the Receiver requiring confirmation that no wells would be abandoned without full compliance with all relevant laws.

The Receiver responded to this correspondence by indicating that it was involved in negotiations to sell "all of the assets and liabilities" of Northern Badger. During this period of correspondence between the Receiver and the Board, Northern Badger went into bankruptcy. After a lengthy period of operation of Northern Badger's business, the Receiver negotiated an agreement to sell certain assets to a company entitled Senex Corporation. This agreement "included" all remaining wells. However, the agreement also contained a provision that Senex could elect to exclude from the sale any assets that were worth less than their costs of abandonment.

Eventually, the Receiver went to Court for approval of the Senex agreement. The Receiver apparently did not specifically draw the Court's attention to the "back out" clause nor did the Receiver give the Board notice of the Court application. The Court approved the Senex Agreement and approved the Receiver's proposed disbursement of the proceeds to various creditors, none of whom was the Board or related to the cost of properly abandoning the wells. On the day of closing, Senex exercised its right to exclude seven wells. The cost to close those wells in accordance with the Board's requirements was in the range of $200,000. The Receiver then sought to pay out Panamericana to the greatest extent possible and to turn the "remaining" assets, including the seven wells not taken by Senex, over to the trustee in bankruptcy. The trustee, of course, would have no assets to pay for closing down the wells. When the Board became aware of the situation, it issued an Order requiring the Receiver to abandon the seven wells in accordance with the Board's requirements.

The Alberta Court of Appeal overturned the trial decision in holding that the Board was not a "creditor" of Northern Badger, with an unsecured claim ranking behind Panamericana's secured claim in Northern Badger's bankruptcy, *per se*. Instead, the Court of Appeal focused on the Receiver's obligation as an officer of the Court to act honestly and in good faith. The Court of Appeal also examined the broad nature of the Receiver's appointment over the assets of Northern Badger and applied the 1980 Ontario case of *Canada Trust Co. v. Bulora*[5] in holding that the Receiver must comply with the Board's requirements. In plain terms, the funds to do that work came out of the funds which otherwise would have gone to Panamericana. Leave to appeal the Alberta Court of Appeal's decision was denied by the Supreme Court of Canada.

Regardless of the "equities" of cases like *Panamericana*, the fact is that in the early 1990s lenders and their agents, the insolvency practitioners, were jolted into an awareness of environmental legislation. In particular, they were forced to note the provisions of that legislation contemplating personal liability and a status for environmental claims ranking ahead of secured debt. The resulting wariness on the part of lenders and insolvency practitioners was sufficiently strong that — in situations which did not result in reported cases — lenders began "walking away" from environmentally troubled properties over which they held mortgage security. Likewise, insolvency practitioners simply refused to accept appointments to serve as receivers or trustees in bankruptcy of companies who held such property. No good can come from this state of affairs, as it is in everyone's interest to have a qualified professional take carriage of an insolvent company's affairs where significant assets as well as liabilities are involved. In a 1991 paper entitled *Regulating the Risks of Environmental Law Liability in Bankruptcy*, W. Clare of The Canadian Superintendent of Bankruptcy's Office acknowledged this "new and novel problem in Canada - the bankrupt estate with substantial assets that no trustee wants to administer."[6]

---

[5] (1980), 34 C.B.R. (N.S.) 145.

[6] W. Clare, *Regulating the Risks of Environmental Law Liability in Bankruptcy*, INSOL International New York Conference Papers, 1991 at page 1. The issue of the "need in modern society for trustees to take on the duty of winding up insolvency estates" is also discussed by Mr. Justice Harvey of the B.C. Supreme Court in *Re Lamford Forest Products* (1991), 10 C.B.R. (3d) 137. In that case (as with the *Bank of Montreal* v. *Lundrigans Ltd.* case discussed ahead) the insolvency firm in question dealt with the situation "up front" in the sense of seeking provisions in its "appointment order" dealing with these issues. In *Re Lamford* the Court was prepared to respect the priority of the trustee's fees over the costs of cleaning up a contaminated site. As also discussed ahead, not all courts have been prepared to go that far: see for example *Standard Trust Co.* v. *Lindsay Holdings Ltd.* (1994), 29 C.B.R. (3d) 297 (B.C. S.C.) [hereinafter *Standard Trust*].

Two major initiatives emerged in response to this "stand off." First, the regulatory authorities began reaching agreements with a number of lenders and insolvency practitioners as to limitation of liability in specific enforcement situations.[7] Eventually, this process led to the government agreeing on the terms of a standard global agreement concerning mortgage enforcement with several institutional lenders.[8]

Second, in 1992 the *Bankruptcy and Insolvency Act*[9] was amended to provide a basic measure of protection for trustees in Bankruptcy.[10] The new section 14.06(2) of the *Bankruptcy and Insolvency Act* provided that trustees in bankruptcy were protected from personal liability for environmental damage or conditions which occurred either before the trustee's appointment or after the trustee's appointment. An exception existed where the environmental problem arose as a result of the trustee's failure to exercise "due diligence."

The new section 14.06(2) did *not* apply to either private or court appointed receivers nor did it apply to "interim receivers," despite the fact that the 1992 amendments to the *Bankruptcy and Insolvency Act* expanded the potential scope of court appointments of interim receivers and signaled the start of a decade in which an increasing number of insolvent companies would come to be administered by

---

[7] An early important case in this regard was the *Cango Petroleums* case. That case involved the insolvency of Cango Petroleums which operated almost 300 service stations throughout Ontario. When the company became insolvent, it owed over $30 million to six different secured creditors. Many of the service stations were old and it was unclear as to how structurally sound the various gas storage tanks at all of these facilities were. Deloitte & Touche Inc., the receiver, was able to work out an agreement with the Ministry of the Environment which limited the Receiver's liability during the realization on the assets of Cango Petroleums. Some of the highlights of this agreement were:

- a percentage of the proceeds realized by the Receiver was set aside in a fund to be used for specified environmental expenses
- the purchasers of the service stations were to bear the expense of environmental clean ups on those stations

This situation is referred to in *First Treasury Financial Inc.* v. *Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 and in W. Beavers, "Managing the Risk of Environmental Liability by Dealing with the Regulators," (Insolvency Institute of Canada Papers, 1991).

[8] See K. M. Van Rensburg, *Update on Environmental Issues for Lenders*, (Smith Lyons Research Papers, 1998) [unpublished].

[9] R.S.C.1985, c. B-3, s.243(2).

[10] This was the first substantial amendments to this legislation in over 40 years.

interim receivers.[11] As enacted in 1992, section 14.06(2) left a significant gray area surrounding the issue of what would constitute the requisite "due diligence" on the part of a trustee in bankruptcy in a given situation. Of course, with a large file the judgement call in question could have enormous consequences. As a result, in 1994 senior commentators in the area continued to identify the problem that W. Clare of the Superintendent's Office had identified four years earlier - namely, that situations still existed where the environmental problems facing an insolvent company were sufficiently complex that trustees were reluctant to accept the assignment.[12]

The mid-1990s saw a practice develop of secured creditors and other stakeholders moving to appoint receivers or interim receivers pursuant to Court Orders which came to include lengthy provisions relating to environmental liability. In essence, these provisions sought to establish that such receivers did not have "charge, management or control" of certain properties and that accordingly they could not become subject to an "environmental liability" relating to a property belonging to the company over which they had become the receiver.

Often such Orders were sought, with the "protective" environmental language included, without notice to the Ministry of the Environment.[13] In those circumstances, it was always questionable just how far the protection really went. In the 1994 case of *Standard Trust Co.* v. *Lindsay Holdings Ltd.*[14] the British Columbia Supreme Court refused to grant an Order appointing a receiver with language sought by the receiver to protect it from liability for environmental matters where the Ministry did in fact appear and speak to the matter. The 1995 Ontario case of *Mortgage Insurance Company of Canada* v. *Innisfil Landfill Corp.*,[15] which involved a complicated Court appointed receivership of an environmentally troubled garbage dump, also served to indicate that the Courts were not prepared to extend "blanket" protection for receivers for environmental matters.

---

[11] See J.C. Carhart, A. Rutman & J. Varley, *Interim Receivers Under the Bankruptcy and Insolvency Act* (1999) 9 C.B.R. (4th) 89. It may be noted that while receivers may be appointed both privately and by Court Orders, Interim Receivers always derive their authority from a Court Order under sections 46-47.1 of the *Bankruptcy and Insolvency Act*.

[12] D. Baird, D. Belcher & M. Jackson, *Environmental Responsibilities in Insolvencies* (Insolvency Institute of Canada Papers, 1994).

[13] Although such Orders might contain a "comeback clause" allowing the Ministry (and other affected parties) to seek to vary the Orders at a later date.

[14] *Standard Trust*, *supra* note 7.

[15] (1995), [1996] 20 C.E.L.R. (N.S.) 19 (Ont. Gen. Div.).

At least two fundamental lessons seem to emerge from cases dealing with the scope of Court appointments of receivers and interim receivers of environmentally troubled properties. First, at the end of the day, the emphasis should properly be on what the receiver or interim receiver actually *does* from an environmental viewpoint. In other words, issues of responsibility and liability should not turn on some generic language in a Court Order which may or may not be sought or granted on notice to the Ministry of the Environment. Rather, it should hinge on the real facts and what the receiver or interim receiver actually does with respect to the property in question. In this regard, although it may seem a subtle point, I think that the proper language in Orders protecting receivers and interim receivers from responsibility for environmental matters should be to the effect that "neither the making of the Order nor anything in the Order" shall, for example, vest in the receiver "charge, management or control" of an environmentally troubled property or otherwise give rise to environmental responsibility on the part of the receiver or interim receiver. That is, what the Order should clarify is that while the receiver may not have stepped into a pit of liability just by having taken the appointment, he may well become subject to liability if he takes certain steps with respect to an environmentally troubled property.

Following naturally is the second fundamental lesson, that receivers and their principals, the secured lenders are best served in this area by trying to communicate pro-actively and comprehensively with the environmental authorities before and during receiverships involving environmentally troubled properties. Even "global agreements" can only go so far where difficult issues are involved. Of course, that may encompass a costly, time consuming process in some cases. Insolvency files are ones where time and money always seem to be inadequate to deal with all of the issues at hand. It also requires a good faith effort to be made by both sides.[16] However, it is an effort which both parties have a responsibility to make in these situations.

In 1997, the *Bankruptcy and Insolvency Act* was again amended. At that time, the level of protection against environmental liability for situations arising *after* the

---

[16] One is struck by the dysfunctional communication between the Receiver and the Energy Resources Conservation Board in the *Panamericana* case as well as Mr. Justice Farley's observation in the *Innisfil Landfill* case: "There is. . . contention between the [Ministry of the Environment] and [the Receiver] . . .. It seems reasonably clear that shortly after [the Receiver] took over the operation of the dump and made its application for expansion. . . the parties became antagonistic for some reason(s) which may or may not have validity or justification (on either side). Suffice it to say that it does not appear to have been a happy relationship but one marred by mutual mistrust."

appointment of a trustee in bankruptcy was elevated. Instead of being liable only where they had failed to exercise "due diligence," section 14.06(2) now provided that trustees would be liable only where their conduct amounted to "gross negligence or willful misconduct." Also, in a tricky and one might say oblique drafting technique discussed further below, the Act provided that for purposes of certain subsections of section 14.06 the word "trustee" would also encompass receivers and interim receivers as defined in the *Bankruptcy and Insolvency Act*. Section 14.06(2) did not use the words "receivers" or "interim receivers;" however, if you cross-referenced section 14.06(1.1) you would find that the word "trustee"had an expanded meaning in section 14.06(2). A similar degree of protection from environmental responsibility is also now afforded for monitors of companies attempting to reorganize under the *Companies' Creditors Arrangement Act*.

As of 1997, the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* also attempt to grapple with the issue of priority of a government's claim in bankruptcies and receiverships, as well as *Bankruptcy and Insolvency Act* proposals and *Companies' Creditors Arrangement Act* reorganizations. In this regard, section 14.06(7) of the *Bankruptcy and Insolvency Act* specifically provides for a "super priority charge" as follows:[17]

> (7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property of the debtor is secured by a charge on the real property and on any other real property of the debtor that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge
>
> (a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and
>
> (b) *ranks above any other claim*, right or charge *against the property*, notwithstanding any other provision of this Act or anything in any other federal or provincial law [emphasis added].

---

[17] (With reference to the decision of the Alberta Court of Appeal in *Panamericana*), section 14.06(8) of the *Bankruptcy and Insolvency Act* also makes clear that governmental authorities have a "provable claim" for costs of remedying environmental problems. A companion provision is found in section 11.8(8) of the *Companies' Creditors Arrangement Act*, *infra* note 18.

Similarly, section 11.8(8) of the *Companies' Creditors Arrangement Act* provides as follows:

> (8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge,
>
> (a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and
>
> (b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.[18]

In closing, I would like to discuss those two provisions briefly, with reference to certain aspects of the insolvency of Royal Oak Mines Inc.

Royal Oak sought protection under the *Companies' Creditors Arrangement Act* in February 1999. The initial stay Order was sought on notice only to certain major creditors and did not include any governmental regulatory authorities. However, Royal Oak had major environmental liabilities - primarily in relation to an arsenic problem at the Giant Mine in the Northwest Territories, which was still in production at the time, as well as a remediation program at a dormant mine in Hope Brook, Newfoundland.[19] Royal Oak also had significant ongoing environmental responsibilities in connection with its other operational mines.

Royal Oak's troubles had many sources and effects. However, they included the fact that the company had expended a tremendous amount of money to develop a state of the art gold mine in Kemess, British Columbia, which had not begun full production when the price of gold sank and the company reached a cash flow crisis.

---

[18] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s.11.8(8).

[19] I represented the Government of Newfoundland and Labrador in that case.

The early weeks of Royal Oak's stay under the *Companies' Creditors Arrangement Act* were stormy. On several occasions one or more creditors moved unsuccessfully before Mr. Justice Farley to have the protective stay lifted and to have the company put into receivership. In the meantime orders were made recognizing the continued jurisdiction of the relevant environmental and mining authorities over certain operating mines.

In this context, the extent to which the governmental authorities derive protection from the "first priority charge" provided for in section 11.8(8) of the *Companies' Creditors Arrangement Act* may be considered. The subject matter of the charge is "the real property [that has given rise to an environmental condition or damage requiring remediation] and on any other real property that is contiguous thereto."[20] In other words, the charge is only over the damaged land in question. It is always a question of fact as to how much the remediation costs are and in turn, how much the land is worth. It may be that the numbers work out such that the charge is indeed valuable and provides adequate coverage for the government, and maybe also mortgagees, when the land is sold or re-financed. Unfortunately, the opposite is also possible. It may also be that the charge will pick up fixtures[21] comprising part of the property, but it clearly does not extend to purely movable personal property though it is located on the property.

---

[20] *Supra* note 18.

[21] With respect to the difficult issue of what does or does not constitute a fixture, see the decision of the Ontario Court of Appeal in *859587 Ontario Ltd.* v. *Starmark Property Management Ltd.*(1998), 40 O.R. (3d) 481 (Ont. C.A.), as well as the voluminous case law in this area, including *Holland* v. *Hodgson* (1872), L.R.7 C.P. 328; *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174; *Stack* v. *T. Eaton Co.* (1902), 4 O.L.R. 335 (Ont. Div. Ct.); *LaSalle Recreations Ltd.* v. *Canadian Camdex Investments Ltd.* (1969), 4 D.L.R. (3d) 549 (B.C. C.A.); *Fess Oil Burners Ltd.* v. *Mutual Investments Ltd.*,[1932] O.R. 203 (Ont. C.A.); *L & R Cda. Enterprises Ltd.* v. *Nuform Industries Ltd.*(1984), 34 R.P.R.1 (B.C.S.C.); *Stott Timber Corp. (Receiver of)* v. *Cape Breton (County)* (1988), 38 M.P.L.R. 68 (N.S.S.C. TD.) varied, on other grounds (1989) 72 C.B.R. (N.S.) 304 (N.S. S.C. A.D.) leave to appeal to SCC denied (1989), 100 N.R. 156n.; *Boxrud* v. *Canada.* (1996), 12 R.P.R. (3d) 163 (F.C. T.D.); *Liscombe Falls Gold Mining Co.* v. *Bishop* (1905), 35 S.C.R. 539; *Royal Bank* v. *Maple Ridge Farmers Market Ltd.* (1995), 34 C.B.R. (3d) 270 (B.C. S.C.); *Pemberton Holmes Ltd.* v. *Ulaszonek,* [1996] B.C.J. No. 1938 (B.C.S.C.), online: QL (BCJ); *Sheferaw* v. *Mutual Trust Co.*,[1999] O.J. No. 464 (Ont. Gen. Div.), online: QL (OJ). Reliable general principles in this area are hard to extract. It seems that articles not attached to land by other than their own weight are not considered part of the land, unless the circumstances are such as to show that they are intended to be part of the land or they are an essential part of the purposes for which the land is used. Also, various cases indicate that articles affixed to the land even slightly are to be considered as part of the land, unless circumstances are such as to show that they are intended to remain as chattels.

Eventually, Royal Oak's directors resigned and in April 1999 Mr. Justice Farley appointed PricewaterhouseCoopers Inc. ("PwC") - who had until that time served as monitor under the *Companies' Creditors Arrangement Act* proceedings - as interim receiver with authority to embark on an extensive marketing program for the assets of Royal Oak. Among other things, the draft Order submitted to Mr. Justice Farley contemplated that PwC would have the power to:

- preserve, protect, dispose of, deal with and sell all of the assets of Royal Oak and its affiliated companies;
- employ or retain employees of Royal Oak;
- manage or carry on the business and affairs of Royal Oak;
- purchase or lease such machinery, equipment, inventories, supplies, premises or other assets necessary to continue the businesses of Royal Oak and its affiliated companies;
- institute and prosecute court proceedings;
- receive and collect all rents owing in relation to any assets of Royal Oak and its affiliated companies;
- take any steps as PwC deemed necessary to preserve and protect the assets;
- settle and pay any claims that may be made against the assets;
- "exercise such powers, functions, rights and privileges of the directors and officers of Royal Oak as the court may approve;"
- "take such steps on behalf of Royal Oak as may be necessary or appropriate to cause Royal Oak to comply with environmental regulations and environmental orders relating to the assets."

Under the order PwC would also have borrowing powers.

As discussed at some length in the article on Interim Receivers,[22] the authority

[22] *Supra* note 11.

for Courts to appoint interim receivers as opposed to receivers is found in the *Bankruptcy and Insolvency Act* and not in the *Companies' Creditors Arrangement Act*. Therefore, when PwC was appointed as interim receiver of Royal Oak and the *Companies' Creditors Arrangement Act* stay continued, the Company was under the jurisdiction of both the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*. There was also no assurance as to whether or for how long the proceedings under the *Companies' Creditors Arrangement Act* would continue.

I was concerned in Royal Oak that the appointment of an interim receiver under the *Bankruptcy and Insolvency Act* could be construed as causing the environmental charges in favour of the relevant governmental authorities to slip away based on an argument that:

(a) The charge in section 14.06(7) of the *Bankruptcy and Insolvency Act* applies where the debtor (i.e. Royal Oak) is "in a bankruptcy, proposal or receivership;" however, the subsection does not expressly refer to an "interim receivership." In that regard, indeed, as referred to above, the concept of an interim receiver is incorporated into references to the term "trustee" in certain subsections of section 14.06 but subsection 14.06(7) is *not* such a subsection.

(b) There is even some jurisprudence which suggests that an interim receivership is *not* the same as a receivership for certain purposes under the *Bankruptcy and Insolvency Act*. This jurisprudence has arisen in connection with the elusive "thirty day goods remedy" which (subject to its terms and conditions) arises in favour of unpaid suppliers when a company goes into either bankruptcy or receivership.[23]

Running contrary to that argument, however, was the straightforward definition of a "receiver" in the *Bankruptcy and Insolvency Act*. That definition speaks of "a person who has been appointed to take, or has taken, possession or control, pursuant to... [inter alia]... an order of a court made under [section 47 of the *Bankruptcy and Insolvency Act*] of all or substantially all of... the inventory...accounts receivables,

---

[23] See, for example, *Bruce Agra Foods* v. *Everfresh Beverages Inc.(Interim Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen Div.); *Re T. Eaton Co. (1999)*, [2000]12 C.B.R. (4th) 130 (Ont. Sup. Ct.). These cases are discussed in P. Shea,"Can An Interim Receiver Be a "Receiver" For the Purposes of Section 81.1 of the Bankruptcy and Insolvency Act?" (2000) 17 Nat'l. Insolv. Rev. 22.

or . . . other property of an insolvent person."[24] Clearly, when one looks at the shopping list of powers that the parties were seeking with respect to the appointment of PwC as "interim receiver" of Royal Oak, the resulting Order was to be consistent with that basic definition of a receiver. Thus I requested, and the Court granted, specific language in that Order confirming that the appointment of PwC as interim receiver of Royal Oak did indeed constitute a "receivership" for purposes of the continued application of the governmental priority charge for environmental matters as provided for in section 14.06(7) of the *Bankruptcy and Insolvency Act.*

And so the jurisprudence continues to build. (Indeed, the Royal Oak case itself had a long way to go after the appointment of the interim receiver.[25]) As that process goes on, I hope that this article serves to provide some insight into the law and practice surrounding environmental issues in the context of corporate insolvencies and reorganizations.

[24]*Supra* note 9 at s.243(2).

[25]Eventually, a proposal was approved under the *Bankruptcy and Insolvency Act* whereby, in effect, the company was reorganized with new ownership. Before that step occurred, among other things, a number of Royal Oak's properties were sold and some of the governmental agencies took over some of the properties which required environmental remediation.