COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	2101-0085 AC
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REGISTRY OFFICE	CALGARY
APPLICANT	ALVAREZ & MARSAL CANADA INC. in its capacity as the Court-appointed receiver and manager of MANITOK ENERGY INC.
STATUS ON APPEAL	APPELLANT
RESPONDENTS	PRENTICE CREEK CONTRACTING LTD., RIVERSIDE FUELS LTD. and ALBERTA ENERGY REGULATOR
STATUS ON APPEAL	RESPONDENTS
INTERVENORS	ORPHAN WELL ASSOCIATION, STETTLER COUNTY and WOODLANDS COUNTY
STATUS ON APPEAL	INTERVENORS
DOCUMENT	**FACTUM OF THE INTERVENOR, ORPHAN WELL ASSOCIATION**

APPEAL FROM THE ORDER OF
THE HONOURABLE MADAM JUSTICE B.E.C. ROMAINE
DATED THE 24TH DAY OF MARCH, 2021
FILED THE 10TH DAY OF JUNE, 2021

FACTUM OF THE INTERVENOR, ORPHAN WELL ASSOCIATION

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PART 1 - FACTS

A. Introduction

1. This Factum is submitted on behalf of the Intervenor, the Orphan Well Association ("**OWA**"). The OWA has obtained permission to intervene in this matter on the basis of its ability to offer specialized expertise and institutional knowledge that would assist this Court.[1]

2. The principles set out in *Redwater*[2] provide important clarity respecting the public duty placed on a receivership estate to comply with valid provincial regulatory laws during the course of receivership, regardless of the effect that such compliance may have on the estate's creditors. *Redwater* established a clear and straightforward rule that a receiver must use estate resources to satisfy the end of life obligations associated with a debtor's unsold oil and gas assets, in priority to the payment of provable claims of creditors, secured and unsecured alike. The Supreme Court of Canada recognized that this rule complies with the well-established polluter-pays principle, and is required to give effect to the "complex regulatory apparatus" validly developed by Alberta to "address important policy questions concerning when, by whom and in what manner the inevitable environmental costs associated with oil and gas extraction are to be paid" even "when an oil and gas company is subject to insolvency proceedings."[3]

3. In the present case, the lower Court drew factual and legal distinctions between the *Manitok* receivership proceedings and *Redwater* which are irrelevant, non-existent, or incorrect. In order to do so, the lower Court misinterpreted and misapplied *Redwater* in an excessively narrow manner which is inconsistent not only with the legal principles set out in *Redwater*, but also with its facts and outcome. If left undisturbed, the precedent set by the lower Court in this case obfuscates much of the clarity provided by *Redwater*, and will undermine the effective operation of the complex regulatory apparatus chosen by Alberta to address nuanced and complex policy questions regarding who is responsible for satisfying end of life obligations when oil and gas companies become insolvent.

[1] *Manitok Energy Inc (Re)*, 2021 ABCA 323, at para 19 [**TAB 1**].
[2] *Orphan Well Association v Grant Thornton Ltd*., 2019 SCC 5 [*Redwater*] [**TAB 2**].
[3] *Redwater*, at para 30 [**TAB 2**].

B. Facts Relevant to the Appeal

4. The OWA generally adopts the facts as set out in the Factum of the Receiver, dated September 27, 2021 ("**Receiver's Factum**").

5. The OWA is an independent non-profit organization that operates under the delegated legal authority of the Alberta Energy Regulator ("**AER**"). The mandate of the OWA is to safely decommission orphaned oil and gas wells, pipelines and production facilities where the owners of such wells, pipelines and production facilities are insolvent, and to restore the land on which such assets are located to as close to its original state as possible.[4]

6. Orphaned assets from the Manitok Energy Inc. ("**Manitok**") estate will ultimately be abandoned and reclaimed by the OWA.[5] As such, the AER is holding funds from the sales of Manitok's assets in trust in order to apply such funds against the costs incurred by the OWA related to the abandonment and reclamation of Manitok's unsold assets.[6] The funds held in trust by the AER do not include the holdbacks which are the subject of the within Appeal (the "**Disputed Lien Holdbacks**"), which are being held by the Receiver. Total realizations from the Manitok receivership will be substantially less than the costs incurred by the OWA to satisfy the end of life obligations associated with Manitok's unsold assets.[7]

PART 2 – GROUNDS OF APPEAL

7. The OWA adopts the grounds of appeal as set out in the Receiver's Factum, as follows:

   a. the Chambers Justice erred by ignoring and failing to give effect to the fundamental holding of *Redwater*; specifically, that a receiver must use estate resources to comply with all provincial regulatory laws of general application that are not reduced to provable claims, despite the resulting expense to the estate;

   b. the Chambers Justice erred in distinguishing *Manitok* based on the timing of when the Persist Sale closed relative to when abandonment orders were issued by the

[4] Affidavit of Lars De Pauw, sworn on August 5, 2021 [the "De Pauw Affidavit"] at paras 8-10 [**Extracts of Key Evidence of the Intervenor, Orphan Well Association, p. 7-8]**. See also the *Orphan Fund Delegated Administration Regulation*, Alta Reg 45/2001 [**TAB 3**]; *Oil and Gas* Conservation Act, RSA 2000, c O-6, ss 70(1), 28(b), 41, 102(1), 102(3), 104(1)(b) and (2)(b), 106.1, 105(1)(a), (c), (d) and (e) and (3) [**TAB 4**].
[5] Affidavit of Laura Chant, sworn October 7, 2020, filed October 8, 2020, at paras 8-16 [**Chant Affidavit**] Receiver's Extracts at 035.
[6] Chant Affidavit, at para 17.
[7] *Ibid.*

AER; and

c. the Chambers Justice erred by holding that the Disputed Lien Holdbacks were not part of the Manitok estate and were therefore unavailable to satisfy the estate's abandonment and reclamation obligation ("**ARO**") shortfall.

PART 3 – STANDARD OF REVIEW

8. The OWA adopts the submissions regarding standard of review set out in the Receiver's Factum. The correctness standard of review applies for all issues in this Appeal.

PART 4 – ARGUMENT

A. *Redwater* Does not Impose a "Relatedness" Test in Requiring a Receiver to Expend Estate Assets to Satisfy ARO

9. The OWA adopts and endorses the submissions of the Receiver with respect to the first ground of appeal. Further, the OWA submits that *Redwater* stands for the following propositions:

a. trustees in bankruptcy are bound by and must act in compliance with valid provincial laws, provided the obligations thereunder do not constitute provable claims and no conflict engages the paramountcy doctrine;

b. regulatory laws governing abandonment and reclamation are valid provincial laws of general application. They do not conflict with the *Bankruptcy and Insolvency Act*,[8] or frustrate the purpose of the BIA, even though estate assets may have to be expended to comply with such provincial regulatory laws in priority to creditor claims;

c. AROs are not claims provable in bankruptcy because a regulator is not a creditor when enforcing a public duty; and

d. the receiver of the licensee is deemed to be the "licensee" for the purpose of ARO, and to the extent that assets remain in the receivership estate, the receiver must comply with the ongoing responsibilities and duties of a "licensee" as they arise.[9]

[8] RSC 1985, c B-3, as amended (the "BIA").
[9] *Redwater*, at paras 114, 122, 128, 130, 134-135, and 160 [**TAB 2**]; *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16, at para 94 [*Perpetual*] [**TAB 5**].

10. The lower Court generally recognized the foregoing principles.[10] However, the lower Court also relied heavily on a section of the decision in *Redwater* entitled "Conclusion on the *Abitibi* Test."[11] This section appears after the portion of the *Redwater* decision in which Wagner CJ substantively determines that abandonment and reclamation orders made by the AER are not claims provable in bankruptcy pursuant to the test set out in the leading case of *Newfoundland and Labrador v AbitibiBowater Inc.*[12] The first paragraph of this 'conclusion' section is as follows:

> Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.[13]

11. The lower Court found that it was through the foregoing paragraph "that the distinction between the facts of *Redwater* and the facts in this case becomes apparent. In this case, the AER is seeking to require Manitok to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage represented by the abandonment orders it has issued, assets over which Manitok no longer has ownership or control."[14]

[10] Reasons for Decision of Justice Romaine, filed March 24, 2021, *Manitok Energy Inc Re*, 2021 ABQB 227, 25 Alta LR (7th) 412 [Chambers Decision] [Appeal Record of the Appellant, filed July 26, 2021 (Appeal Record) at 111-118], at para 24 and 37.
[11] *Redwater*, at paras 159-161 [**TAB 2**].
[12] 2012 SCC 67 [*Abitibi*] [**TAB 6**].
[13] *Redwater* at para 159 [**TAB 2**].
[14] Chambers' Decision at para 39.

12. The OWA submits that the lower Court erred by finding that the *Redwater* principles do not apply if the source of funds used to satisfy ARO is the sale of "assets unrelated" to the ARO. When considered in context, the purpose of paragraph 159 of *Redwater* is to explain why, as a matter of substance rather than form, requiring Redwater to pay for all of its end-of-life obligations before distributing value to creditors furthers, rather than interferes with, the policy aims of the *BIA*. Wagner CJ is explaining that the legal conclusion that has already been drawn respecting the correct application of the *Abitibi* test aligns with the policy aims underlying the priority scheme of the *BIA*. Specifically, in other circumstances, not applicable to ARO, priority is given by s.14.06(7) of the *BIA* for the purpose of funding environmental remediation expenses incurred by regulators. The OWA submits that paragraph 159 of *Redwater* does nothing more than establish that recognizing a distinct, but generally analogous priority with respect to ARO is consistent with the established policy aims and intentions of the *BIA*.[15]

13. In this context, it is important to note that when Wagner CJ found that "Redwater's only substantial assets were affected by an environmental condition or damage," the Court did not draw any distinction between assets which had been sold, and unsaleable assets which would ultimately become 'orphans' and the responsibility of the OWA. Instead, the OWA submits that the Court was emphasizing in this passage that Redwater's substantial assets, whether sold, saleable or unsaleable, were subject to "inherent" and "inchoate" ARO, and in this way, were all 'related'.[16] As a result, the Court found that using the sale proceeds from sold or saleable assets to satisfy the 'related' ARO associated with unsaleable assets achieved policy aims analogous to those underlying express provisions of the *BIA*.

14. As end of life obligations are inchoate with an AER licensed asset itself, whenever such asset is sold the obligations will necessarily be assumed by the purchaser. Pursuant to the lower Court's interpretation, these proceeds of sale would therefore be "unrelated" to the property affected by the environmental condition, being the remaining unsold properties.

[15] Although disagreeing with the majority's conclusion, the dissenting opinion in *Redwater* at para 286 similarly interprets this portion of the majority decision as being about policy intentions: "the majority makes the point that the AER's enforcement actions in this case facilitate, rather than frustrate, Parliament's intentions behind the *BIA* priority scheme due to the super priority for environmental remediation costs set out in s. 14.06(7). Respectfully, I completely reject this contention" (emphasis added).

[16] *Redwater,* at para 29 [**TAB 2**]; *Perpetual,* paras 86-87 [**TAB 5**]; *PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181, 81 Alta LR (2d) 45, at paras 32-33 [**TAB 7**].

There would therefore never be any proceeds of sale from oil and gas properties to go towards satisfying unfunded ARO. This interpretation clearly flies in the face of the principles established by the Supreme Court in *Redwater* and completely defeats the polluter pays policy objectives. Indeed the lower Court's conclusions in this respect are directly contrary to the result in *Redwater*: where the proceeds of sale from Redwater's saleable oil and gas assets were released to the AER as a result of Redwater's unfunded ARO associated with its unsold properties.[17]

15. *Redwater* establishes the simple rule that a receiver must satisfy the ARO associated with unsold oil and gas assets "to the extent that assets remain" in the insolvent estate."[18] This simple rule from *Redwater* does not require or permit a forensic examination of the saleable or sold assets within an insolvent estate in order to determine the extent to which they may be "related" or "unrelated" to the ARO associated with unsaleable assets in the estate.

16. The OWA submits that, regardless of whether a licensee is the subject of insolvency proceedings, it does not matter what type of assets the licensee uses to finance its compliance with valid provincial law. Wagner CJ's general comment respecting the policy aims of the *BIA* does not impose a nebulous 'relatedness' test that would excuse licensees from complying with provincial regulatory orders on the basis that their valuable assets are somehow 'unrelated' to the subject of the regulatory orders. Indeed, as noted in *Redwater*, Alberta's complex oil and gas regulatory apparatus depends in large part on the principle that all of the licensed assets held by a licensee are "treated as a package, without any segregation or parceling of assets," such that a licensee's more valuable assets may be called upon to satisfy ARO associated with assets which have reached the end of their useful life.[19] Pursuant to *Redwater*, it is settled law that Alberta's regulatory apparatus applies to "licensees" with equal force regardless of whether the licensee has entered insolvency proceedings.[20] As such, if no 'relatedness' test applies outside of the insolvency context, there is no basis to impose such a test during insolvency proceedings.

[17] *Redwater*, at para 163 [**TAB 2**].
[18] *Redwater*, at para 114 [**TAB 2**].
[19] *Redwater*, at para 18 [**TAB 2**].
[20] *Redwater*, at para 160 [**TAB 2**].

B. The Timing of Abandonment Orders is Irrelevant

17. The OWA adopts the submissions in the Receiver's Factum with respect to the second ground of appeal, and in particular, emphasizes this Court's prior finding that ARO "exist whether or not abandonment notices have been issued" by the AER.[21] Alberta's regulatory apparatus depends in large part on the proposition that ARO are intrinsic with the granting of an oil and gas licence, which is a common feature of regulatory regimes which are reliant on the polluter-pays principle.[22] ARO therefore arise upon the granting of an AER license itself, and not the issuance of any enforcement orders in relation to said licence.

18. In addition, the OWA submits that, similar to the first ground of appeal above, the lower Court's finding that the relative timing of regulatory orders and asset sales distinguishes the within proceeding from *Redwater* relies on an incorrect and incoherent 'relatedness' test that is not imposed by *Redwater*. Whether inside or outside of the insolvency context, nothing in *Redwater* permits a licensee to excuse non-compliance with regulatory orders on the basis that the funds in its possession are derived from previous asset sales which are 'unrelated' to the regulatory order. Indeed, as noted above, the oil and gas regulatory apparatus in Alberta is premised on the proposition that all of a licensees' licensed assets are inherently related, in that they are "treated as a package."[23] This packaging of assets allows the AER to rely upon the existence of a licensee's valuable assets to compel compliance with ARO associated with assets which have a negative value. Nothing in the Alberta regulatory regime, or in *Redwater*, permits a licensee to avoid its environmental obligations by converting valuable assets into cash prior to regulatory orders being issued in respect of purportedly 'unrelated' assets with a negative value. As noted above, the concept of 'relatedness' as used in *Redwater* is limited to a policy comment to the effect that all of a licensee's licensed assets are 'related' in a policy sense, because they are all subject to ARO.

19. The OWA echoes the concerns raised in the Receiver's Factum with respect to the

[21] *Perpetual*, at paras 86-87 [**TAB 5**].
[22] *Redwater*, at paras 29 and 159 [**TAB 2**]; see also Gary Abrahamson et al, Insolvency and Contamination: Navigating Liabilities, 2020 18th *Annual Review of Insolvency Law* 329, 2020 CanLIIDocs 3607, <https://canlii.ca/t/t1wx>, retrieved on 2021-10-21 [**TAB 8**].
[23] *Redwater*, at para 18 [**TAB 2**].

undesirable and inefficient incentives created by the lower Court's finding that regulatory orders must be imposed prior to asset sales in order for the *Redwater* principles to apply.[24] As a key stakeholder in all proceedings in which the *Redwater* principles may be relevant, the OWA will directly suffer if the realizable value of licensed assets is diminished by the early issuance of regulatory orders during insolvency proceedings.

C. The Disputed Lien Holdbacks are Part of the Manitok Estate

20. The OWA adopts the submissions of the Receiver with respect to the third ground of appeal. In particular, the OWA emphasizes that the only reasonable interpretation of the Persist SAVO[25] is that the Disputed Lien Holdbacks were not removed from the Manitok estate pursuant to that Order, which was intended to preserve the *status quo* pending the resolution of disputed claims, without altering the relative priorities.

21. In this regard, *Ted Leroy Trucking*[26] is clear Supreme Court of Canada authority for the following propositions:

    a. in order to maintain the *status quo* while disputed and uncertain claims are resolved in an insolvency, a Court may validly order that certain sale proceeds be held back in a receiver or monitor's trust account until the outcome of the dispute is known;[27]

    b. an express trust is not created by such a Court order because, given the uncertainty as to which party will ultimately be entitled to the sale proceeds, there is no certainty of object sufficient to support an express trust; [28] and

    c. the "fact that the location chosen to segregate" such sales proceeds is the trust account of the monitor or receiver "has no independent effect such that it would overcome the lack of a clear beneficiary."[29]

22. Where a holdback order is made as part of a sale of assets in receivership proceedings, and "a follow-up order to determine priority is contemplated, the funds in question are necessarily not held in trust for any given creditor, at least until that determination is made.

[24] Receiver's Factum at para 53.
[25] As defined in the Receiver's Factum at para 12.
[26] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60, at paras 4 and 87 [***Ted Leroy Trucking***] [**TAB 9**].
[27] *Ted Leroy Trucking*, at paras 4 and 87 [**TAB 9**].
[28] *Ted Leroy Trucking*, at paras 82 [**TAB 9**]
[29] *Ted Leroy Trucking*, at para 86 [**TAB 9**].

By default, until (at minimum) that happens, the proceeds remain the property of the former owner (now bankrupt)."[30] In other words, "where monies are parked pending a priorities determination, by definition they are not held in trust for any particular claimant."[31] Instead, if the effect of an order is to "substitute the proceeds for the land" in a manner that is "neutral on the priorities question" then the proceeds remain with the receivership estate until there is a "beneficial-interest-crystallizing priority determination."[32]

23. In the present case, the holdback provisions were expressly made "for the purposes of determining the nature and priority of the Claims, and pending any further or other distribution Order of this Court."[33] These provisions clearly fall within the category of holdback provisions which do not create a trust, as discussed in *Ted Leroy Trucking* and *Toronto Dominion Bank*. Without any substantive reasoning or analysis, the lower Court found that the Disputed Lien Holdbacks "are not property of the estate, and would not become part of the estate unless the claims are denied."[34] With respect, the lower Court's finding in this regard is backwards – the effect of the holdback provisions in the Persist SAVO is that the Disputed Lien Holdbacks are property of the estate, unless and until the lien claims are established.

24. Although the holdback provisions do not create a trust, they operate as a Court order which limits the use to which the Disputed Lien Holdbacks may be put, pending a determination of the "nature and priority" of the lien claims or further order of the Court. Notably, the within application by the Receiver sought a further order of the Court which, if granted, would have determined the nature and priority of the disputed lien claims. Specifically, if the lower Court had correctly applied the *Redwater* principles to the within application, as discussed above, the ARO "imposed by valid provincial laws" would have "define[d] the contours of the bankrupt estate available for distribution" in a manner that would have exhausted the sale proceeds in the Manitok estate, and rendered any distribution to lienholders impossible.

[30] *Toronto Dominion Bank v 1287839 Alberta Ltd*, 2021 ABQB 205 at para 15-16, citing *Ted Leroy Trucking* [***Toronto Dominion Bank***] [**TAB 10**].
[31] *Ibid*, at para 17 [**TAB 10**].
[32] *Ibid*, at paras 25 and 27 [**TAB 10**].
[33] Persist SAVO, at paras 11, 12 [**Appeal Record at 032, 033**]
[34] Chambers Decision, at para 43.

25. Finally, the OWA wishes to draw this Court's attention to two Ontario decisions which are relevant to the nature of holdback provisions and trust claims in the builder's lien claim context. In the OWA's submission, *Re: Veltri Metal Products Co.*[35] and *Re: Urbancorp Cumberland 2 GP Inc.*[36] indicate that holdback provisions neither create nor defeat a trust in relation to builder's lien claims – they simply preserve the *status quo*. A trust in relation to a builder's lien claim may arise upon the sale of assets in the insolvency context, provided the requisite statutory and common law requirements are otherwise met.[37] Further, a potential claim for such a trust may be preserved by operation of the holdback provisions in a vesting order. However, the holdback provision itself does not give rise to the creation of a trust in the builder's lien context. In *Veltri*, for example, the Sale Order contained a holdback provision that is analogous to the holdback provision in the Persist SAVO.[38] Notwithstanding this holdback provision, a trust claim was denied in *Veltri* on the basis that a valid statutory trust had not arisen under the relevant provisions of Ontario's builder's lien legislation. In the present case, there is no allegation by the lienholders that a statutory trust under Alberta's *Builder Lien Act* has arisen, and indeed, a statutory trust could not possibly arise on the facts of this case, as the funds in question are not payments made by Manitok, but are instead proceeds derived from the sale of Manitok's property.[39]

PART 5 –RELIEF SOUGHT

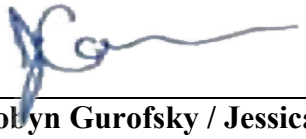
26. The OWA adopts the relief sought by the Receiver, and as such respectfully requests an order: i) allowing this appeal; ii) setting aside the Chambers Decision and the resulting order of the Chambers Justice; and iii) authorizing the Receiver to release the Disputed Lien Holdbacks to the Manitok estate.

[35] [2005] OJ No 3217 [*Veltri*] [**TAB 11**].
[36] 2020 ONCA 197 [*Urbancorp*] [**TAB 12**].
[37] See *Urbancorp* [**TAB 12**].
[38] *Veltri*, at para 14 and 18 [**TAB 11**]. Note the full text of paragraph 12 of the Sale Order stated that: "THIS COURT ORDERS that the Cash Purchase Price, subject to (a) the holdbacks and adjustments, and (b) net of payment of those obligations and expenses required to be made by [Veltri] in each case, made pursuant to the [Sale] Agreement ("Net Proceeds of Sale") shall stand in place and stead of the Acquired Assets without prejudice to any claim being advanced against them as could have been advanced against such assets and any such claim against the Net Proceeds of Sale as may be approved and valued by this Honourable Court in subsequent proceedings shall be subject to the same priorities as could have been claimed against the Acquired Assets."
[39] *Builder's Lien Act*, RSA 200 c B-7, s.22 [**TAB 13**].

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27TH DAY OF OCTOBER, 2021.

Estimated time for Argument:
30 Minutes

BORDEN LADNER GERVAIS LLP



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LIST OF AUTHORITIES

TAB	DOCUMENT DESCRIPTION
1.	*Manitok Energy Inc (Re)*, 2021 ABCA 323
2.	*Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5
3.	*Orphan Fund Delegated Administration Regulation*, Alta Reg 45/2001
4.	*Oil and Gas* Conservation Act, RSA 2000, c O-6
5.	*PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16
6.	*Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67
7.	*PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181, 81 Alta LR (2d) 45
8.	Gary Abrahamson et al, Insolvency and Contamination: Navigating Liabilities, 2020 18th Annual Review of Insolvency Law 329, 2020 CanLIIDocs 3607, <https://canlii.ca/t/t1wx>, retrieved on 2021-10-21
9.	*Ted Leroy Trucking [Century Services] Ltd, Re*, 2010 SCC 60
10.	*Toronto Dominion Bank v 1287839 Alberta Ltd*, 2021 ABQB 205
11.	*Re: Veltri Metal Products Co*, [2005] OJ No 3217
12.	*Re: Urbancorp Cumberland 2 GP Inc.*, 2020 ONCA 197
13.	*Builders' Lien Act*, RSA 2000 c B-7

2020 ANNREVINSOLV 11

Annual Review of Insolvency Law
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11 — Insolvency and Contamination: Navigating Liabilities

Insolvency and Contamination: Navigating Liabilities

Gary Abrahamson, Jonathan Cocker, David Filice, Jan Nato and Michael Nowina *

I. — INTRODUCTION

The significant decision of the divided Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd* ("*Orphan Well*") was released in early 2019. [1] In *Orphan Well*, the Supreme Court ruled 5-2 that Alberta's environmental regulations relating to the abandonment of oil and gas wells were not in conflict with the federal *Bankruptcy and Insolvency Act* (*BIA*). [2] The Supreme Court in *Orphan Well* overturned lower court decisions that had upheld the trustee's disclaimer of certain of the bankrupt company's oil and gas wells to avoid the environmental obligations associated with them. In the words of the Supreme Court, "[b]ankruptcy is not a licence to ignore rules". [3] The effect of the decision is that the bankrupt estate must use available funds to comply with the debtor's regulatory obligations to the public before paying creditors.

Since *Orphan Well*, environmental liabilities have loomed larger in insolvency proceedings because the breadth of potential environmental liabilities is wide and the case law on the intersection between insolvency and environmental laws remains sparse. [4] Environmental laws have developed to regulate air pollution, land and subsurface contamination, the handling of toxic substances, recycling and waste management and—most recently—carbon emissions and lifecycle impact assessments. Depending on the circumstances, a monitor (particularly if they are acting with receiver-like "super monitor" powers), receiver or trustee (collectively, "insolvency professionals") may fall within the scope of persons who, in addition to the debtor, are responsible for environmental conditions and damage.

This article will review the potential scope of liabilities arising from spills or release of pollutants and contaminants, including the ensuing environmental damage, and will offer practical solutions to minimize the exposure of an insolvency professional to these risks. First, this article reviews the intersection of insolvency and environmental regimes in Canada including the *Orphan Well* decision, subsequent case law and their implications for the statutory and tort liability of debtors and insolvency professionals. Second, it describes statutory and tort liabilities for environmental damage and conditions, with particular attention to how these liabilities may impact the insolvency process. Finally, this article offers strategies to minimize exposure to tort and statutory liability within the insolvency process.

This article focuses primarily on the Ontario *Environmental Protection Act* (*EPA*) and the Alberta *Environmental Protection and Enhancement Act* (*EPEA*) regimes.

II. — THE INTERSECTION OF INSOLVENCY AND ENVIRONMENTAL LAW

1. — Protections Under the *BIA* and *CCAA*

To address the significant challenges regarding control of environmentally contaminated property, Parliament enacted section 14.06 of the *BIA* in 1992, and later extended the protection to include interim receivers in 1997. These amendments provide that an interim receiver or trustee is not personally liable for environmental damage that occurred before their appointment. [5]

For damage arising after their appointment, the provisions provide that the trustee or receiver is only liable if the damage was the result of gross negligence or wilful misconduct. [6] Additionally, where an environmental protection or remediation order is made, a receiver or trustee is not personally liable for a failure to comply with that order if the trustee or receiver abandons the property. [7] Equivalent protections have been enacted in the *Companies' Creditors Arrangement Act* (*CCAA*). [8]

Can insolvency professionals be sued personally in connection with a spill of toxic contaminants? The short answer is, of course, they can. The longer explanation is: (1) Can a plaintiff meet the threshold to obtain leave to sue the insolvency professionals? (2) Does the conduct of the insolvency professionals rise to the level of gross negligence or wilful misconduct such that the protections set out in section 14.06 of the *BIA* and the equivalent section 11.8(3) of the *CCAA* do not apply? (3) In light of *Orphan Well*, regardless of the insolvency professionals' liability, is the estate still on the hook?

The leave requirement under the *BIA* provides that: "[e]xcept 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." [9] The Supreme Court set out the test to be applied in *GMAC Commercial Credit Corp - Canada v TCT Logistics Inc* [10] by adopting the principles set out by the Ontario Court of Appeal in *Mancini (Trustee of) v Falconi*. [11] The test requires a motions judge to assess whether there is a *prima facie* case to support a cause of action and provides some leeway to weigh the probative value of the evidence on the motion. The *prima facie* case must be one of gross negligence or wilful misconduct.

There is no stand-alone tort of gross negligence at common law. The standard for gross negligence, akin to abject recklessness, lies somewhere between ordinary negligence and criminal negligence.

The Supreme Court of Canada has described it as "great or very great negligence;" [12] a very marked departure from the required standard of care; [13] and a high or serious degree of negligence. [14] Establishing gross negligence is a question of fact decided by the trier of fact. [15]

While gross negligence does not require proof of intent, a trial judge may consider evidence of conscious wrongdoing or indifference, as well as the likelihood of harm and the magnitude of damage, in determining whether an act or omission constitutes gross negligence. Individual factors which alone may not amount to gross negligence can nevertheless reach that threshold when considered cumulatively. [16]

Wilful misconduct is more egregious than gross negligence, and involves voluntary or intentional misconduct. Similar to gross negligence, assessing whether an act or omission amounts to wilful misconduct is a question of fact. The Supreme Court has described wilful misconduct as "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not," while recklessness was defined as "an awareness of the duty to act or a subjective recklessness as to the existence of the duty". [17]

The threshold of gross negligence or wilful misconduct requires the plaintiff to demonstrate that the insolvency professional showed "a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct." [18] Courts will generally defer to actions taken by insolvency professionals on the assumption that they are acting properly, "unless the contrary is clearly shown." [19]

In *Re National Carpet Mills Ltd*, [20] leave was granted to continue an action based on alleged gross negligence against a trustee for environmental damage caused by a spill. In granting leave, the Court considered that the trustee appreciated the risk of environmental damage to a degree that could give rise to a duty of care to take steps to avoid the risk of the toxic spill that later occurred. [21] Section 93(1) of the Ontario *EPA* supports the proposition that if an insolvency professional has some reason, even short of confirmed evidence, to believe that there is a risk of a spill, it has the positive duty to do everything practicable to mitigate the risk. There is little case law under this provision to help define the scope of the duty. Nonetheless, the statute

itself states that the duty is to "forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment." [22] The Alberta *EPEA* imposes a similar duty upon responsible persons to "take all reasonable measures to [...] restore the environment to a condition satisfactory to the Director." [23]

2. — Orphan Well and Subsequent Case Law

The central issue in *Orphan Well* was whether the *BIA* prevailed over the provincial environmental regime under the constitutional doctrine of federal paramountcy. [24] Ontario, British Columbia and Saskatchewan intervened in the case to support the Alberta Energy Regulator's position that the provincial regulations remained in effect such that the polluter must pay for cleanup of its oil and gas wells notwithstanding the bankruptcy.

The Supreme Court held that there was no operational or functional conflict between the *BIA* and the provincial legislation [25] and determined that the protections against environmental liability in section 14.06 of the *BIA* protected the trustee from personal liability only. The Court held: "There is no conflict between the Alberta legislation and s. 14.06 of the *BIA* that makes the definition of "licensee" in the former inapplicable insofar as it includes [the trustee]. [The trustee] continues to have the responsibilities and duties of a "licensee" to the extent that assets remain in the [debtor's] estate." [26]

In other words, where insolvency professionals fall within the scope of persons responsible for obligations under environmental legislation because of their management of an insolvent estate, those obligations will survive any disclaimer of those assets. The debtor's estate is bound even if the insolvency professional is protected.

The Supreme Court also considered whether the environmental claims were a provable claim that would be subject to the stay of proceedings under the *BIA*. The Court applied the three-part test in *Newfoundland and Labrador v AbitibiBowater Inc* ("*Abitibi*") that determines whether an obligation is a provable claim: [27]

1. There must be a debt, a liability or an obligation to a *creditor*;
2. The debt, liability or obligation must be incurred *before the debtor becomes bankrupt*; and
3. It must be possible to attach a *monetary value* to the debt, liability or obligation.

The Court found that the Alberta regulator's claims were not a claim provable in bankruptcy because it was neither a creditor nor was it possible to be certain that the regulator's contingent claim would materialize. [28] Unlike in *Abitibi*, the regulator had not made itself a creditor by seeking to enforce a monetary claim but was instead asserting regulatory obligations owed to the public. [29]

A recent case that draws heavily on *Orphan Well* is *British Columbia (Attorney General) v Quinsam Coal Corporation*, [30] where the issue before the Court was the entitlement to the proceeds from the sale of coal inventory. Shortly before the bankruptcy, the debtor had executed a promissory note in favour of the secured creditor and granted a security interest in its coal inventories and the proceeds of sale from such inventories. The secured creditor claimed the proceeds as a secured creditor. The Province wanted the proceeds to fund the unfulfilled closure, reclamation and remediation obligations imposed under the *Mines Act*. British Columbia requested an order that the proceeds must "be used to address the costs of [the debtor's] compliance with its current regulatory obligations, including, without limitation, its reclamation obligations, before any payment is made to [the secured creditor]". [31]

Giaschi J agreed with the secured creditor; the Alberta regime that regulates the reclamation of oil and gas wells differed significantly from the regime imposed under the *Mines Act*. For instance, Alberta's regime expressly makes trustees responsible for regulatory obligations by including them within the statutory definitions of "operator" and "licensee", whereas the *Mines Act* makes no express references to trustees. [32] In addition, the Alberta regime makes the estate liable for end-of-life obligations

by providing that trustees are personally liable for failure to carry out a protection order, whereas the *Mines Act* does not contain a similar provision. [33]

In spite of these differences, Giaschi J found that certain aspects of *Orphan Well* were applicable, in particular the determination that a disclaimer by the trustee under section 14.06(4) of the *BIA* affects the trustee's personal liability and does not affect ongoing liabilities imposed on the bankrupt by provincial law. In the reasons, Giaschi J highlighted what he considered the more "difficult aspect" of the *Orphan Well* decision: to what extent does *Orphan Well* create a super-priority for environmental obligations over all other creditors? [34]

Ultimately, Giaschi J decided that he did not need to resolve this issue because he concluded that the debtor had given up all rights to receive the proceeds and it was not an asset of the estate. Therefore, the trustee could not use the proceeds from the sale of coal inventory to satisfy the obligations imposed under the *Mines Act.* No case law was cited for this aspect of the decision, and the province has appealed. It remains to be seen how appellate courts will deal with the issue.

Another case decided this year that considers *Orphan Well* involved a mine where environmental remediation work had already commenced and Yukon sought a declaration that it had a provable claim in bankruptcy of over $35 million to remediate environmental damage caused by the failed mining project. [35] Yukon's environmental licensing regime required the debtor to post security in an amount determined by the regulator based on the mine's stage of development, production and condition. [36] Because of the progressively deteriorating condition of the mine, Yukon eventually revised the required security to about $35.5 million to reflect the anticipated remediation costs. [37] The debtor had paid about $10.6 million before beginning insolvency proceedings. [38] At the time of trial, Yukon had only incurred costs of about $5.6 million and was using the paid portion of the security to fund the costs it was incurring. [39]

The Court found that the obligation to post security as a condition to licensing was not, in itself, a provable claim. [40] This is because, under Yukon's regime, the obligation to pay the security is not recoverable by legal process. [41]

The Court held that, even if it were, Yukon's claim of over $35 million was contingent and too remote or speculative to be considered a provable claim. [42] While Yukon was continuing to spend money on care and maintenance and environmental remediation at the mine, there was no guarantee that Yukon would spend the full amount that it claimed. [43] The Court therefore found that the costs beyond the $10.6 million security Yukon already had could be recouped only once the government actually incurred the cost. [44] The government would then enjoy a first priority charge on the real property under section 14.06(7) of the *BIA*. The Court found that it was clearly Parliament's intent to provide a super-priority over the real property to the environmental regulators once they incur costs of remediating the environmental damage or condition affecting that real property or contiguous property. [45]

Environmental legislation presumes generally, with important caveats, that a "polluter pays". To this end, legislation provides regulators with increasingly powerful tools to ensure compliance that are designed to be deployed at different points in a "timeline" of environmental compliance. The first part of the timeline consists of the core obligations of environmental protection laws. Generally, this involves reporting and remediation obligations. *Orphan Well* addresses the intermediate stage in the timeline of environmental enforcement: orders to remediate environmental damage.

When regulators suspect that a polluter or other responsible person will not voluntarily fulfill their remediation obligations, they may issue orders to responsible persons to take steps to restore the environment. [46] The Supreme Court's decision in *Orphan Well* recognizes that such orders are made in the public interest and precludes insolvency professionals from treating such orders like any other debt that is subject to insolvency proceedings.

Orphan Well requires insolvency professionals to engage with environmental regulators to honour the debtors' obligations under statute. This preserves the tenet of "polluter pays" in Canadian environmental law.

In contrast, *Yukon Zinc* applies to the final stage of environmental enforcement: seeking compensation from parties defaulting on remediation obligations. Where responsible parties fail to fulfil environmental duties or to abide by orders, governments may remediate environmental damage themselves and thereafter seek compensation from responsible parties. Here, government's super-priority for such costs recognizes the financial loss governments may incur and ensures, to the extent possible, that the taxpayer does not fund remediation of private pollution.

III. — OBLIGATIONS ARISING FROM ENVIRONMENTAL CONTAMINATION

1. — Introduction: Environmental Protection Laws and Tort Liability

Historically, tort liability was a primary instrument for establishing liability for environmental conditions and damage. Much has changed since the late 19th and 20th centuries. All Canadian jurisdictions have adopted statutes that define the concept of an environmental spill or contamination.

Generally, a spill or contamination is a release into the natural environment of a substance that has or may have a negative impact on the environment, human life or animal life.[47] For example, spills can occur where oil spills from a storage tank,[48] where trains derail,[49] where dry cleaning chemicals are discharged[50] or where furnace oil spills into the environment.[51]

While the definition of a spill is generally similar across Canada, the nature and extent of obligations to remediate the spill vary markedly. Generally, environmental protection legislation imposes obligations on private parties to report and remediate spills. This can occur in relation to fresh spills, or for legacy contamination that occurred long in the past. In light of governments' statutory powers to order almost any person to take steps to mitigate and/or remediate, insolvency professionals should be aware of the environmental regulatory framework.

In particular, three factors are pertinent to insolvency professionals: (1) the specific obligations relating to the spill, (2) the identity of persons bound by such obligations and (3) the timing of such obligations. These factors will be discussed in greater detail below.

2. — Ontario's *Environmental Protection Act*

The core *EPA* obligations in relation to spills and contamination are contingency planning, reporting and remediation.[52] Beyond these obligations, an important concern for insolvency practitioners is the broad power of governments to issue compliance or compensation orders. In particular, regulators may issue orders to any person whose assistance is necessary to repair the environment.

Above all, time plays an important role in the Ontario *EPA*'s design. On the one hand, responsibility for environmental spills lies on those who own or control a pollutant at the time of its first spill, and their designated successors. On the other hand, the *EPA* can apply to spills of substances which, at the time, were not known to be toxic.[53] As a result, liability for legacy contaminations can unexpectedly encroach into insolvency proceedings.

i. — Core obligations: Contingency planning, reporting and remediation

The *EPA* requires prescribed persons to develop, implement and periodically review plans to prevent or reduce the risk of spills and to prevent, eliminate or ameliorate their adverse effects.[54] Prescribed persons are those who "own or operate" a plant listed in the regulations.[55] Generally, a debtor operating a facility that presents an increased risk of a spill is required to do contingency planning.[56]

Insolvency professionals are also required to meet this obligation if they are in possession of and operating such a facility. Non-compliance with this requirement is a provincial offence.[57]

Reporting and remediation obligations frequently present immediate concerns for insolvency professionals. First, it is very likely that an insolvency professional will begin an engagement without knowing that some assets are subject to environmental problems or, at the very least, the scope of those problems. Second, the financial and operational burden of compliance can be significant. Third, to be certain about environmental liabilities, parties must be sure about the timeline of the environmental contamination. This determination will require expert environmental assessments and, in many cases, is not entirely ascertainable.

Above all, insolvency professionals must be prepared to navigate a regulatory system where the government is empowered to issue orders to "any person [...] whose assistance is necessary", [58] or to seek compensation for carrying out the work required under the *EPA*.

When a spill occurs, the *EPA* imposes reporting requirements on every "person having control of a pollutant" and "every person who spills or causes or permits a spill of a pollutant". [59] The reporting obligation is engaged once a responsible person knows or ought to know that a pollutant has spilled. [60]

Responsible persons must notify the Ministry of Environment, Conservation and Parks ("Ministry") and the municipality affected by the spill "forthwith". [61] Further, a regulation under the *EPA* also imposes special reporting requirements expressly upon receivers and trustees where they become "aware that as a result of the presence or discharge of a contaminant on, in or under the property, there is a danger to the health or safety of any person." [62] This effectively imposes a greater disclosure obligation than exists for private parties.

Active spill matters that pose an immediate and serious threat to the natural environment and/or health and safety are generally reported to an emergency response unit (currently the Spills Action Centre) for which a Ministry response can be anticipated. The common practice, at least among environmental consultants, is to treat legacy contamination as a reportable matter only where there is evidence to support a threat to human health or safety. Even where there is evidence of migration of contamination and it is reported to the Ministry (though not necessarily the Spills Action Centre), the Ministry may be unresponsive where no imminent threat is perceived despite the *EPA* reporting provisions.

Finally, the "owner of a pollutant" and the "person having control of a pollutant" must remediate damage and "restore the natural environment". [63] Some detail about remediation plans, including steps already taken, must also be included with the report to the Ministry and municipality. [64]

The remediation obligation is engaged once a responsible person knows or ought to know that a spill has occurred that is causing or is likely to cause an adverse effect. [65] However, there is considerable uncertainty and debate regarding when these obligations have crystalized and when a positive reporting obligation is, in practice, required by the Ministry.

ii. — Government powers to order compliance and compensation

A principal concern for insolvency professionals is the broad power of government to issue compliance and compensation orders. Under the *EPA*, the Ministry may issue compliance orders to owners and controllers of pollutants responsible for spills. [66] However, the Ministry may also issue orders to, *inter alia*, "[a]ny person ... whose assistance is necessary, in the opinion of the Minister". [67]

The Ministry may require that subjects of orders do "everything practicable" for the restoration of the natural environment. [68] The Supreme Court of Canada has confirmed that environmental regulators enjoy broad discretion to craft orders in the public interest. [69] As a result, a person not responsible for the spill may also be the subject of compliance orders. [70]

On the other hand, compensation orders, which are meant to cover reasonable costs and expenses incurred by governments to remediate spills, may be issued without prior recourse to the courts and can easily amount to large sums. [71] The *EPA* empowers both provincial and municipal governments to issue orders to the owner or person having control of a pollutant to recover "reasonable costs or expenses" for work done to prevent and/or remediate the adverse effects of an environmental spill. [72] Furthermore, the provincial government, via the Director of the Ministry, is also empowered to issue orders to "any person required by [a previous] order or decision" for the costs of doing that which was ordered. [73] In other words, where compliance orders go unfulfilled, the provincial government may complete the required work and seek to collect from the defaulting party. As a result, almost any person may be subject to a compensation order for the remediation of a spill.

The potential financial significance of these orders should not be underestimated. Ontario's "Compliance Policy Applying Abatement and Enforcement Tools" states: "[i]n regard to issuance of orders, financial hardship on the part of the responsible person should not be accepted as a reason for not issuing an order to respond to an incident", [74] although it may be taken into consideration with respect to the timeline for compliance. Compensation orders are effective without court approval. However, persons subject to orders may appeal to the Environmental Review Tribunal on limited grounds. [75]

Under the *EPA*, if such orders are issued to a receiver or trustee, they will not be personally liable for those costs unless the spill arose from their or their representative's gross negligence or wilful misconduct. [76] This mirrors the protections of the *BIA*. Notably, the *EPA* builds in further express protections for secured creditors, receivers and trustees in respect of compensation and other orders.

Part XV.2 of the *EPA* provides that orders shall not be issued to trustees, receivers and secured creditors who become owners upon foreclosure unless the order arises from the gross negligence or wilful misconduct of these parties, or in circumstances allowed by regulation. [77] Nonetheless, orders are permitted under exceptional circumstances where there is a danger to the health of any person, a serious risk of impairment of the environment or danger to animal or plant life. [78]

There is currently uncertainty as to the scope of this *EPA* order-making power against receivers and trustees. Section 168.20(7) provides for a process whereby potentially liable trustees and receivers can still avoid complying with "exceptional circumstances" orders where they have not caused the environmental harm through gross negligence or wilful misconduct and:

> (a) not later than 10 days after being served with the order, or within such longer period as may be specified by the Director in the order, the receiver or trustee in bankruptcy notifies the Director that they have abandoned, disposed of, or otherwise released their interest in the property to which the order relates; or,
>
> (b) the order was stayed under Part I of the *BIA* and the receiver or trustee in bankruptcy notified the Director, before the stay expired, that they abandoned, disposed of, or otherwise released their interest in the property. [79]

As a result of *Orphan Well*, it is prudent to assume that insolvency professionals have an obligation to comply with an order related to environmental protection in the normal course and not as a competing creditor claim.

iii. — Time and liability: Successor liability and "retrospective" application of the EPA

An "owner of a pollutant" and "person having control of a pollutant" are defined terms that impose liability for reporting and remediation obligations to the ownership, charge, management or control of the pollutant at the time "immediately before the first discharge of the pollutant". [80] Therefore, a debtor is not responsible for a spill merely because they occupy a contaminated property. For example, a spill may have occurred at a time when a previous owner of a facility was doing business. [81] In this case, the debtor would not be the party responsible, and if it is possible to identify the truly responsible party, then seeking compensation through court action is an option. [82]

The *EPA* provides that the successors, assignees, executors or administrators of "owners of the pollutant" or "person having control of the pollutant" are bound by the same obligations in relation to the spill, with the exception of reporting requirements. [83] Recent jurisprudence from Ontario's Environmental Review Tribunal suggests that adjudicators interpret the *EPA*'s successor provisions broadly to achieve the goal of environmental protection. [84]

In the insolvency process, a trustee may be considered a successor to an owner or person having control of a pollutant as an "assignee" (although a trustee would benefit from protections contained in both the *EPA* and the *BIA*). On the other hand, insolvency practitioners may invoke successor liability to pursue third parties responsible for spills, thereby relieving the debtor's estate from the financial burden of remediation. However, the practical realities facing insolvency professionals, including funding constraints, may make this an unrealistic option in most cases.

For insolvency professionals, the more important consideration may be legacy contamination. Indeed, these considerations arise frequently in insolvency proceedings. The *Huang* case illustrates how the challenge may present itself. [85]

In 2018, the Ontario Court of Appeal affirmed the decision of the trial judge in *Huang* to establish an *EPA* liability for a defendant who spilled a dry-cleaning solvent into the environment in the 1960s and 1970s. At the time, the solvent was not considered dangerous and the recommended method of disposal was to pour the solvent into the ground. Nonetheless, the Court ruled that the 40-year-old spill of dry-cleaning solvents established section 99 liability under the *EPA*.

The *Huang* case highlights the potential for liability to arise for long-forgotten business activities. It also highlights the importance of reviewing a debtor's history to determine the scope of potential exposure.

3. — Alberta's Environmental Protection and Enhancement Act

Alberta's *Environmental Protection and Enhancement Act* (*EPEA*) provides for two separate regimes for the regulation of spills. [86] The first regime, under Part 5, Division 1 of the *EPEA*, regulates the "release of substances" and imposes reporting and remediation obligations. The second regime, under Part 5, Division 2 of the *EPEA*, ties remediation obligations to responsibility over "contaminated sites". Notably, this second regime provides "tools of last resort" to regulators and has been described as essentially obsolete. [87] Nonetheless, these provisions remain in effect and should be considered.

For both regimes, the provincial government is empowered to issue enforcement orders. Where responsible parties fail to comply with enforcement orders, the government may seek to recover costs.

i. — Reporting obligations for "release of substances"

The *EPEA* imposes different reporting obligations on different parties for the "release of substances" that may cause, is causing or has caused an adverse effect on the environment. The most immediate obligations fall upon the persons who cause or permit the release of a substance. Such persons are required to report the release to the Alberta Environment Director, their employer (if applicable), the owner of the substance, the "person having control of the substance" and any other person who the reporting person knows or ought to know will be directly affected by the release. [88] This obligation is notionally engaged as soon as the person knows or ought to know of the release. [89]

Different reporting obligations are imposed upon the "person having control of the substance", which is defined as a person having charge, management or control of the substance. [90] Such persons are not required to report the release if they have reasonable grounds to believe that the persons to whom reports must be made are already aware of the release. [91] This obligation may be viewed as triggered upon becoming aware of the release. However, in practice, releases, other than active spills, are rarely reported, and even more rarely acted upon by the regulator.

Notwithstanding the difference in reporting requirements, the *EPEA*'s vicarious responsibility provisions effectively negate the distinction in reporting requirements in most commercial arrangements. Section 253 of the *EPEA* deems that the acts or

omissions of a "director, officer, official, employee or agent" of a corporation are the acts of the corporation. [92] As a result, prompt reporting by a "person having control of the substance", no matter their role in the release, will avoid running afoul of the *EPEA*'s reporting obligations.

ii. — Remediation obligations for "release of substances"

The *EPEA* requires that the "person responsible for the substance" take remedial actions with the ultimate purpose of restoring the environment to a condition that is satisfactory to the Alberta Environment Director. [93] Notably for insolvency professionals, a "person responsible for the substance" is defined very broadly. [94] It includes the current and former owners of a substance. [95] It includes "every person who has or has had charge, management or control of the substance", including those who manufactured, treated, sold, handled, used, stored, disposed, transported, displayed, or applied the substance. [96] It also expressly includes a "successor, assignee, executor, administrator, receiver, receiver-manager or trustee". [97]

Responsible persons must "take all reasonable measures" to satisfy the obligation. This obligation is engaged as soon as the responsible person becomes aware or ought to have become aware of the release. [98]

The *EPEA* empowers the Alberta Environment Director to issue environmental protection orders to the "person responsible for the substance". [99] Notably, the Director may issue such orders preventatively when a substance may be released and cause an adverse effect. [100] In practice, Alberta Environment commonly engages informally with parties deemed responsible for a release to ensure that they take the necessary remedial actions without the need for a formal order.

A separate enforcement regime exists for the purposes of ensuring that the government can recuperate costs against responsible persons. Where remediation is completed to the Director's satisfaction, the Director may issue a remediation certificate, which prevents further environmental protection orders being made with respect to the same release. [101]

Insolvency professionals should note that because of the broad definition of a "person responsible for the substance", insolvency professionals are directly bound by the remediation obligations under the *EPEA*. Furthermore, as in Ontario, the scope of the duty to remediate engages questions of liability for legacy contaminations.

iii. — Orders regarding "contaminated sites"

The "contaminated sites" regime under Part 5, Division 2 of the *EPEA* is seldom used. It has been argued that it is "for all intents and purposes been completely removed from Alberta Environment's toolkit". [102] Nonetheless, since it remains in effect, insolvency professionals should consider its potential impact.

Under the "contaminated sites" regime, the Alberta Environment Director is empowered to issue environmental protection orders to a "person responsible for the contaminated site". [103] Such orders may require the person "to take any measures that the Director considers are necessary to restore or secure the contaminated site". [104] This is a very broad power as it includes the present owner of the contaminated site (regardless of their responsibility for the contamination), former owners during the period when the site was contaminated and "any other person" the Director considers has contributed to the release causing the contamination. [105] The successors, assignees, executors, administrators, receivers, receivers-manager and trustees of any of the foregoing are also included in the scope of responsible persons. [106]

The *EPEA* imposes certain procedural requirements before this category of environmental protection order may be made. First, the Director must designate a site as contaminated. [107] This designation may be made where the Director is "of the opinion that a substance that may cause, is causing or has caused a significant adverse effect is present in an area of the environment". [108] Second, the Director must give notice of the designation to the site's owner, any other persons the Director considers responsible for the site and the municipality where the site is located. [109] Any person directly affected by the

designation may submit a statement of concern to the Director, which may include recommendations on what remedial actions are required. [110] Finally, persons responsible for the contaminated sites may submit to the Director a remedial action plan with respect to the contaminated site, and enter into an agreement with the Director and any other responsible parties regarding remedial action and the apportionment of costs. [111]

Where the agreement is fulfilled, the Director may not issue an environmental protection order to any parties to the agreement. [112]

iv. — Recovery of costs

Alberta's regime for recovery of costs by government differs from that under Ontario's *EPA*. Notably, it provides for more procedural safeguards, including court involvement. If the Alberta Environment Director wishes to recover costs against a person responsible for a spill, they must first issue an enforcement order, which is distinct from an environmental protection order. [113] Such order must contain reasons for its issuance and must be served. [114] If the Director has not issued an enforcement order, the *EPEA* only allows the government to pursue costs against responsible persons if they are convicted of an offence under the Act. [115]

The *EPEA* provides the government two types of recourse to recover these costs. [116] The first permits the Director to pursue an action in debt in court against the subject of the order. [117] The second enables the Alberta Ministry of Environment and Parks to issue an order to the purchaser of the land covered by an enforcement order. The *EPEA* expressly includes purchasers of land in a sale to realize on a security interest in the scope of these orders. [118] The Minister's order would direct the purchasers to pay to the Minister, instead of to the vendor, an amount not exceeding the costs incurred in fulfilling the enforcement order. [119] As a result, the *EPEA*, like the *BIA*, gives a super-priority to the government for the costs of remediation. If these situations arise, the impact on creditor realization on debts may be significant.

4. — Other Provincial Environmental Protection Laws

Other provincial environmental protection laws impose similar obligations to Ontario's *EPA* and Alberta's *EPEA*. However, important differences exist as to (1) the specific obligations relating to a spill, (2) the identity of persons bound by such obligations and (3) the timing of such obligations. For example, under British Columbia's *Environmental Management Act*, there is a rebuttable presumption that the current owner of a contaminated property is responsible for remediation. [120]

While the various provincial regimes can arrive at the same conclusions as to responsibility and liability for spills, the difference in legislative design impacts the way insolvency professionals should engage with regulatory decision-makers and manage the debtor's estate. Whatever the jurisdiction, insolvency professionals should be mindful of the regulators' powers to issue compliance and compensation orders. These measures can quickly and radically alter the landscape of a debtor's estate.

5. — Federal *Canadian Environmental Protection Act*

Legislative jurisdiction for the regulation of the environment is *de facto* shared between federal and provincial orders of government. [121] Therefore, the federal *Canadian Environmental Protection Act* (*CEPA*) also applies to spills, unless an equivalency agreement has been entered into between federal and provincial governments. [122]

With respect to spills of toxic substances, only Alberta has signed such an agreement. [123] Therefore, the *CEPA*'s provisions on spills will apply concurrently with provincial legislation in all other jurisdictions.

Generally, *CEPA*'s regime governing spills is similar to that of Ontario's *EPA* described above. The *CEPA* imposes obligations to report and remediate environmental spills of scheduled toxic substances. [124] This obligation applies to those persons who

own or have charge, management or control of a substance before its release or likely release into the environment. [125] This provision mirrors the Ontario *EPA*'s focus on ownership and control at the time of the spill.

Unlike the Ontario *EPA*, the federal *CEPA* provides for more restrained powers to enforce compliance and seek compensation. The Ministers of the Environment and of Health may together issue interim orders where "the Ministers believe that immediate action is required to deal with a significant danger to the environment or to human life or health". [126] However, unlike the Ontario regime, federal interim orders are subject to certain procedural safeguards, such as expiry after 14 days unless the interim order is approved by the Governor in Council. [127] With respect to compensation for remedial measures, the federal government may only recover costs and expenses by proceedings brought in a court of competent jurisdiction. [128]

6. — Civil liability

In addition to the statutory framework of environmental legislation, certain tort liabilities may impact strategies for dealing with contamination caused by spills. [129] These "toxic torts" include trespass, private and public nuisance, strict liability under the doctrine of *Rylands v Fletcher* and negligence. [130] Moreover, polluters may also be subject to class action lawsuits. [131]

However, as described above, insolvency professionals generally will not be subject to many of these tort liabilities because of the gross negligence or wilful misconduct threshold. Nonetheless, insolvency practitioners should be aware of the elements of "toxic tort" liability. [132]

Two recent decisions from the Court of Appeal for Ontario illustrate the gamut of potential "toxic tort" liabilities, which will be described in detail in the following sections.

In *Smith v Inco* ("*Smith*"), [133] the class claimants alleged that the long-time release of nickel particles into the air by a factory caused property damage when the particles settled into the earth. The claimants argued that this lowered property values as a result, in part, because of public perception about the dangers of nickel pollution. The Court of Appeal overturned the trial court's decision and dismissed the claimants' allegations of trespass, nuisance and strict liability.

In the more recent *Huang* case, discussed above, the Court of Appeal upheld the trial court's decision with respect to a dry cleaner's liability for the 40-year-old release of toxic substances into the soil. [134] The Court held that the dry cleaner was liable in nuisance and under section 99 of the *EPA*, but not liable under trespass, strict liability or negligence.

The *Smith* and *Huang* cases serve to illustrate the potential scope of "toxic torts".

i. — Trespass

Trespass requires both a direct and voluntary physical intrusion onto the plaintiff's land by the defendant without a licence to do so. [135] Liability is established where the defendant enters the plaintiff's property, or where the defendant places or propels an object or substance onto the plaintiff's land. [136]

Where a trespass is ongoing, as in the case of a continuing spill of pollutants, it is possible to "move into" liability for trespass. Because of the requirements of directness and voluntariness, many scenarios where a spill occurs do not establish liability. In particular, most environmental spills are indirect, because it is rare that a person will intentionally spill waste onto another's property. [137]

In *Huang*, the dry cleaner defendant spilled solvents onto the soil of their own property. [138] The solvents then travelled through the soil into the plaintiff's property, causing contamination. The Court held that this was not a direct intrusion of the plaintiff's property and dismissed the allegations of trespass. [139] The trial decision in *Smith* similarly found that the escape of nickel particles in the air that thereafter settled onto the ground was not a direct intrusion for the purposes of trespass. [140]

ii. — Public and private nuisance

Nuisance is a substantial and unreasonable interference in the plaintiff's rights in relation to land. [141] In particular, nuisance can result both from actual property damage or the interference with a right to use, enjoy or dispose of land.

A "substantial" interference with a plaintiff's rights is one that is "non-trivial or that is more than a slight annoyance or trifling interference." [142] An "unreasonable" interference is assessed in light of all relevant circumstances. [143]

The focus of the reasonability analysis is on "the character and the extent" of interference with the plaintiff's land or rights. [144] Nonetheless, the defendant's conduct is also relevant. [145] The Court of Appeal in *Smith* described the consideration of unreasonableness as a balancing act. [146]

The courts in *Huang* and *Smith* arrived at different conclusions upon broadly similar facts. In *Huang*, at issue was the spill of dry-cleaning solvents into the ground, which contaminated the soil and groundwater of adjoining properties. The Court found an actionable nuisance. On the other hand, in *Smith*, the release of nickel particles into the air that then settled into the soil did not.

Upon review, it appears that the distinction may be the result of a difference in the pleadings. In *Smith*, the plaintiff did not claim that the defendant had interfered with the use or enjoyment of the property, only that the defendant's activities damaged the property. [147] While either claim could ground an actionable nuisance, the Court of Appeal held that a claim of property damage requires more than what was proven at trial:

> In our view, a mere chemical alteration in the content of soil, without more, does not amount to physical harm or damage to the property. For instance, many farmers add fertilizer to their soil each year for the purpose of changing, and enhancing, the chemical composition of the soil. To constitute physical harm or damage, a change in the chemical composition must be shown to have had some detrimental effect on the land itself or rights associated with the use of the land. [148]

By contrast, the plaintiff in *Huang* pleaded that his rights to use and enjoy his property were unreasonably and substantially interfered with. Specifically, because of the environmental contamination on his land, he was unable to secure permits to redevelop his land. In addition, he claimed that the dry-cleaning solvent contamination posed a danger to human health. [149] The Court agreed. [150] It listed several factors that supported the plaintiff's claim of nuisance against the dry cleaner including the plaintiff's inability to redevelop his land until the property was remediated, the high cost of remediation and the presence of the solvent in excess of what is permissible by environmental regulation. These factors demonstrated that the plaintiff's right to use and enjoy his property was unreasonably and substantially interfered with.

The decision in *Huang* also provides some guidance as to when a party may be found liable for a nuisance it did not cause. In this case, the owner of another neighbouring property (who was also the owner of the dry-cleaning business) was a second defendant. The plaintiff demonstrated that a "source zone" of the solvent developed on the second defendant's property, which contributed to the contamination of his own property. [151]

The Court in *Huang* did not find the second defendant liable, stating that there must be "some causal link" between the inaction of a defendant and a nuisance they are alleged to permit. [152] Upon the evidence, no causal link was established. First, by the time the second defendant knew that a "source zone" for the solvent was located under his property, the plaintiff's property was already contaminated. Second, from the time when Ministry monitoring began at the plaintiff's property, the level of contamination had not significantly changed. In sum, the second defendant's inaction did not significantly interfere with the plaintiff's use or enjoyment of his property. [153]

v. — Strict liability under Rylands v Fletcher

Although the rule in *Rylands v Fletcher* ("*Rylands*") encompasses a narrow set of scenarios, the circumstances in which spills occur may fall within its scope. [154] Recently, the Ontario Court of Appeal in *Smith* restated the four requirements to establish strict liability under *Rylands*:

1. the defendant made a "non-natural" use of their land;
2. the defendant brought onto their land something that was likely to do mischief if it escaped;
3. the substance escaped; and,
4. damage was caused to the plaintiff's property because of the escaped substance. [155]

The Courts in *Smith* and *Huang* take a similar approach to applying the *Rylands* test. First, in both cases, the Courts rejected that the defendant's actions constituted a "non-natural" use of the land. Here, the Courts looked to all relevant circumstances to determine "non-natural" use. In *Smith*, the Court determined that operating an aluminium refinery in an industrial part of the city was not a non-natural use of the land. [156] In *Huang*, the Court found that operating a dry cleaner in a predominantly commercial part of the city was not a non-natural use of the land. [157]

Notably, compliance with environmental legislation is not a defence. However, it is a factor to consider in the assessment of whether the defendant's use is "non-natural". [158]

Finding that use was not "non-natural" suffices to dismiss claims of strict liability. However, the Court in *Huang* provided further *dicta*. The Court emphasized the element of foreseeability in the second part of the *Rylands* test, [159] and held that little was known about the dangers of the dry-cleaning solvents before 1974, when the defendant last used and disposed of the impugned solvents on their land. As a result, the plaintiff's claim also failed on the second part of the *Rylands* test. This finding may help defend claims of liability for legacy contamination where the dangers of a pollutant were not known at the time of the spill or release.

vi. — Negligence

Negligence occurs when a defendant owes a plaintiff a duty of care, the defendant breaches the corresponding standard of care and thereby causes a class or classes of damage that were reasonably foreseeable. [160] Negligence can occur by act or omission, and requires a highly contextual analysis of the circumstances.

The Court in *Huang* addressed claims of negligence. The Court held that the defendant's standard of care must be considered differently as between the time when the spills occurred and after the spills occurred, based in part on knowledge about the solvents' toxicity. [161] The Court held that during the time of the spills, the defendant did not breach the standard of care. Little was known about the danger of the solvents, and the recommended disposal method was to pour the substance on the ground. [162]

As for the time after the spill, the Court held that the appropriate standard of care is that of a "reasonable property owner". [163] The Court found that both defendants breached this standard of care when they stopped communicating with Ministry officials and failed to take any step to prevent or limit further harm to neighbours. [164] However, the Court dismissed the negligence claim because the defendants' inaction after 2013 could not be shown to have caused any additional harm or loss suffered; the bulk of the damage was done before 1974, when the defendants were found to have behaved reasonably based on the knowledge and practices of the time. [165]

The Court's findings on negligence provide some insight about how an insolvency professional may avoid claims of gross negligence and wilful misconduct. First, statutory obligations will most likely provide a minimum floor for the standard of care. Abiding by disclosure requirements and cooperating with regulatory officials in finding solutions for remediation form the core

of the Court's findings. Second, the applicable standard of care may require defendants to go beyond statutory minimums to prevent further harm to neighbours by taking other "reasonable step[s]". [166]

Notably, the Court did not expressly include the actual remediation of the environmental damage in the scope of the standard of care, and focused on disclosure and cooperation with Ministry officials. This suggests that, in a negligence claim, parties may be able to successfully defend claims where they could not reasonably remediate environmental damage.

This scenario may arise when defendants have insufficient resources to remediate contamination. However, the Court was clear that the failure to take any step was a breach of the standard of care. Potential defendants might consider disclosing the circumstances of a spill to other parties not listed in statute or regulation, but who may suffer adverse effects. This may include tenants of the contaminated property or occupants of neighbouring properties. Therefore, these parties, who may suffer adverse effects, may immediately take precautions while the Ministry regulatory process plays out.

Nonetheless, several questions remain open. For example, what is the standard of care applicable to an insolvency professional trying to determine whether a property is the subject of legacy contamination? How might the standard of care apply differently to an insolvency professional compared to, or contrasted with, an environmental assessment specialist engaged by the insolvency professional? How does an insolvency professional's responsibility to work for the benefit of creditors weigh against the standard of care for spills? These types of concerns must guide insolvency professionals in their management of insolvency proceedings.

vii. — Statutory causes of action under environmental legislation

Apart from causes of action under common law or the Civil Code of Québec, environmental legislation may also provide for private causes of action. [167] For example, section 99 of the Ontario *EPA* establishes that any person may pursue the owner and/or the person having control of a pollutant for compensation of reasonable costs and expenses connected to complying with an environmental order, or for loss or damage. [168] Compensable loss or damage is that which arises directly from (1) the spill, (2) the exercise of municipal authority under section 100 of the *EPA* and (3) the defendant's neglect or default in carrying out a duty imposed by the *EPA* or by an environmental order. [169] The dry cleaner defendant in *Huang* was found liable to the plaintiffs under section 99 of the *EPA*. [170]

7. — Summary: Environmental Liabilities and the Insolvency Process

Federal and provincial environmental statutes provide a comprehensive regulatory framework to prevent, minimize and repair the adverse effects of the spills of pollutants. The core obligations of these statutes include reporting and remediating spills. When responsible parties fail to discharge their obligations, governments are empowered to seek compliance and, where the government is forced to carry out the work themselves, compensation for costs and expenses. In addition to statutory mechanisms, tort law presents other sources of potential exposure for both debtors and insolvency professionals.

Both tort and statutory liability give rise to concerns about legacy contaminations where the debtor's long-past activities have contaminated the environment. As described above, liability for legacy contaminations may arise even where there was little knowledge about the dangers of certain substances at the time of their use and spill.

In a way, legacy contaminations present more difficult situations for insolvency proceedings than active spills because the scope of liability may be difficult or impossible to ascertain. Nonetheless, there are certain strategies that insolvency professionals may deploy to identify and minimize environmental liabilities.

IV. — PRACTICAL OPTIONS TO MANAGE ENVIRONMENTAL LIABILITIES IN THE INSOLVENCY CONTEXT

1. — For Monitors/Receivers/Trustees

i. — Assess environmental damage before taking possession; seek appointment of "investigative receiver"

Possession of properties may result in statutory or common law liabilities for the insolvency professional personally, particularly if spills or their effects are ongoing. The first line of defence is not to take possession of real property where environmental liabilities are suspected. In these circumstances, insolvency professionals can engage environmental consultants to assess whether, and to what extent, properties may carry environmental liabilities before taking possession of those properties.

When insolvency proceedings are adversarial, it may be difficult to gain the debtor's cooperation to access the premises and have environmental consultants perform assessments. It may be possible to appoint an "investigative receiver" to facilitate environmental assessments. This will then allow stakeholders to decide what actions to take once environmental liabilities are known and what remediation steps may be necessary.

ii. — Engage independent counsel

Retaining counsel that is independent from creditors is important given the potential for conflict between the estate's environmental obligations and the creditors' interests in maximizing recovery. There will often be a tension between the creditors' desire to maximize the value of the property and the need to engage in other activities, such as environmental assessments, reporting or remediation, which arguably can diminish the value of that property, at least in the short term.

In addition, insolvency professionals should consider retaining specialized environmental counsel early in the insolvency proceeding. The reality of environmental contamination is that it occurs over time. Contamination of soil can quickly turn into contamination of water. Water may cause contamination to spread further than anticipated. Engaging specialized environmental counsel alongside consultants can help stem the tide of growing exposure to liability.

iii. — Remediating the impacts of contamination

A particularly thorny issue occurs where the contamination is migrating and/or otherwise potentially causing harm to human health and safety or the environment and there are limited funds available to an insolvency professional to remediate the property. This arguably places the insolvency professional in an untenable position of being unable to act when evidence suggests that action is needed to prevent harm.

At a minimum, a strategy of broad disclosures to the regulator and all persons potentially under threat of harm, as well as a formal request to creditors for funds to address such potential for harm, should be considered. Less clear is whether the passage of time with knowledge of such potential harm itself creates liability for insolvency professionals as gross negligence by failing to take further, positive steps.

However, in some circumstances, immediate remediation may be unavoidable. Insolvency professionals may have knowledge of the extent of environmental contamination based on information from hiring environmental consultants. With this knowledge in hand, a sales process is usually undertaken by the receiver to sell the asset and attempt to maximize realizations, with full disclosure being provided to potential purchasers through the due diligence period of the sale process. However, if the environmental contamination is ongoing and migrating to adjacent properties or affecting the health of people who may be working or living in the premises, there is a possibility that the insolvency professional may need to incur costs to remediate the property prior to it being sold.

The passage of time during the sales process may incur further environmental or human health harm, and could be seen as gross negligence on the part of the insolvency professional in failing to take further positive steps. All of these actions increase the realization costs of the insolvency proceeding before even knowing if the sales process will be successful.

iv. — Report environmental dangers and engage with regulators

Section 14.06(3) of the *BIA* is clear that the protections provided by insolvency statutes for environmental liability do not exempt the insolvency professional from duties to report or make disclosure. [171] Environmental protection statutes establish a flexible regime where regulators are given discretion to engage with polluters and the public to achieve the purposes of preserving and

restoring the environment. As a result, it is important to engage with individual environmental protection officers who may determine the course of compliance in each particular case.

In many instances, the regulator will be satisfied with early and forthright disclosures and communications from insolvency professionals. Generally, the regulator will not mandate further actions unless it is clear that human health or safety is threatened.

v. — Health issues: Tenants and eviction, potential claims

Toxic spills often lead to air-quality problems, which can have adverse health consequences. In addressing properties that have on-site impacts due to contamination, insolvency professionals may be placed in the position of having to remove tenants, temporarily or permanently, due to a combination of health and safety protective measures and remediation work requirements. Doing this in a prompt manner, once the danger of an environmental condition is known, minimizes exposure to claims related to endangering human health.

The process of removing a residential tenant is difficult and may be lengthy, potentially lasting months. Not only must the insolvency professional meet the eviction threshold, but the property value will arguably be diminishing at the same time, as the act of tenant removal also serves as an admission that environmental harm must be abated.

In addition to exposure for health-related claims from tenants, environmental contamination also can give rise to such claims from third parties. As described above, the reality of environmental contamination means that a once-localized condition may migrate and spread via soil, water and air. The potential exposure to liability related to such migration is a strong incentive to engage specialized environmental counsel and consultants quickly and to take steps to stop migration where possible.

vi. — Pursuing polluters

In addition to common law torts, environmental legislation provides private causes of action against persons responsible for spills. [172] Insolvency professionals should consider pursuing claims against the truly responsible parties, as determined by statute. Needless to say, the time and cost of pursuing these claims must be weighed against the potential benefits.

vii. — Consider disclaiming assets

As a corollary to delaying the taking of possession, which is described above, insolvency professionals should consider disclaiming an asset after taking possession if that asset would expose them to personal liability either under tort or statute. Under the *EPA*, the Director may make emergency orders if there are reasonable grounds to the believe that there is (1) a danger to the health or safety of any person, (2) impairment or serious risk of impairment of the quality of the natural environment or (3) injury or damage or serious risk thereof to any property or to plant or animal life. [173] Unless there has been gross negligence or wilful misconduct, an insolvency professional does not have to comply with emergency orders if the property is abandoned within 10 days of receiving the emergency order. [174] In theory, a disclaimer at any time would also end potential tort liabilities that rely on the insolvency professional's control of property.

The major disadvantage of a disclaimer is that the insolvency professional will no longer play a role with respect to the disclaimed asset, while ultimate liability may nonetheless attach to the debtor's estate. *Orphan Well* has made clear that the sole utility of a disclaimer is to limit the personal liability of insolvency professionals, not the estate.

In light of the limited utility of a disclaimer and the improbability of personal claims against insolvency professionals, perhaps the best course of action is to retain possession of assets and engage candidly with environmental regulators. This will allow insolvency professionals to engage their own experts and potentially circumscribe the scope of required remediation, thereby preserving value in contaminated assets for creditors.

There is, of course, the possibility that in all possible remediation scenarios, the entirety of the asset's value will be consumed by costs, whether directly or indirectly. This is an unavoidable endgame in the interface of insolvency and environmental law. Therefore, even in these circumstances, instead of disclaiming assets solely to avoid the limited potential of personal liability,

insolvency professionals should consider whether it is better to retain possession of assets and play some role in the regulatory process.

If an insolvency professional retains possession of assets and plays a role in the regulatory process, that may build important and useful rapports of confidence with environmental regulators. At the same time, other instruments, such as court orders providing more explicit protection from specific liabilities, may serve the same purpose of a disclaimer with respect to contaminated assets.

viii. — Summary: Timing is key

Timing is central to effectively managing environmental liabilities in insolvency. On one level, many environmental obligations are subject to tight timelines for compliance. On another level, the realities of environmental spills and the liabilities attaching thereto play out over long periods of time.

The ability to manage the information concerning a contaminated land site is pivotal. Care must be taken in setting a clear and probative path forward to discern what information gaps currently exist, the prudent measures needed to address those gaps and the possible remedial actions ultimately required.

Unsolicited findings and recommendations from third parties, such as non-retained environmental consultants, can sometimes create more issues than they resolve.

2. — For Lenders

In light of the above, lenders should seek full and/or continual disclosure about their debtors' potential environmental liabilities. Lenders stand to lose the most if environmental obligations deplete a debtor's asset base in insolvency. Financing agreements and lenders' behaviour should also change to minimize potential loss.

V. — CONCLUSION

Whether the *Orphan Well* decision will translate into a super-priority for environmental obligations is debatable, but the decision certainly raised the stakes. The outcome of the appeal in *British Columbia (Attorney General) v Quinsam Coal Corporation* will be an important guidepost concerning whether the courts applying *Orphan Well* will find that it is an overarching principle that environmental obligations prevail or if *Orphan Well* is to be applied more narrowly to specific regulatory regimes. In the meantime, insolvency professionals should take care to balance the obligations under environmental regimes with the goal of maximizing value for creditors.

Footnotes

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1 See *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (SCC) [*Orphan Well*].

2 *Ibid*, at paras 102--13.

3 *Ibid*, at para 160.

4 See Alastair Lucas & Roger Cotton, eds, *Canadian Environmental Law*, 2nd ed (Toronto: LexisNexis, 2020) at § 1.20--1.32.1.

5 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 14.06(2)(a) [*BIA*].

6 *Ibid,* s 14.06(2)(b).

7 *Ibid*, s 14.06(4); these provisions are discussed by the Court in *Strathcona County v PriceWaterhouseCoopers Inc*, 2005 ABQB 559 (Alta QB) at paras 35--36 [*Strathcona*]; *British Columbia (Attorney General) v Quinsam Coal Corporation*, 2020 BCSC 640 (BC SC) [*Quinsam*].

8 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ss 11.8(3), 11.8(5) [*CCAA*].

9 See *BIA*, *supra* note 5, s 215.

10 *GMAC Commercial Credit Corporation - Canada v TCT Logistics Inc*, 2006 SCC 35 (SCC).

11 *Mancini (Trustee of) v Falconi*, 1993 CarswellOnt 1861, [1993] OJ No 146 (Ont CA).

12 See *Studer v Cowper*, [1951] SCR 450, [1951] 2 DLR 81 (SCC).

13 See *McCulloch v Murray*, 1942 CarswellNS 15, [1942] SCR 141 (SCC).

14 *Holland v Toronto (City)*, 1926 CarswellOnt 77, [1927] SCR 242 (SCC).

15 See *Gordon et al v Nutbean, Moehl et al v Nutbean*, [1969] 2 OR 420, [1969] OJ No 1338 (Ont. H.C.) at para 3.

16 *Ibid*.

17 *R v Boulanger*, 2006 SCC 32 (SCC) at para 27; *Peracomo Inc v TELUS Communications Co*, 2014 SCC 29 (SCC) at para 57.

18 *Alberta Treasury Branches v Elaborate Homes Ltd*, 2014 ABQB 350 (Alta QB) at para 39 [*Alberta Treasury Branches*]; *Canadian National Railway Company v Holmes*, 2015 ONSC 3038 (Ont SCJ) at para 25, affirmed *Holmes v Schonfeld Inc*, 2016 CarswellOnt 2573 (Ont CA).

19 *Alberta Treasury Branches*, *supra* note 18, at para 59.

20 See *Re National Carpet Mills Ltd*, 2015 ONSC 4890 (Ont SCJ) [*National Carpet Mills*].

21 *Ibid*, at para 54.

22 See *Environmental Protection Act*, RSO 1990, c E.19, s 93(1) [*EPA*].

23 See *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 112(1) [*EPEA*].

24 *Orphan Well*, *supra* note 1, at paras 63--66.

25 *Ibid*, at para 114.

26 *Ibid* [emphasis added]; see also *BIA*, *supra* note 5, ss 14.06(1.1), 14.06(2), 14.06(4); *CCAA*, *supra* note 8, ss 11.8(3), 11.8(5).

27 *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67 (SCC) at para 26 [*Abitibi*].

28 *Orphan Well*, *supra* note 1, at paras 159--61.

29 *Ibid*, at paras 122--37.

30 *Quinsam*, *supra* note 7.

31 *Ibid*, at para 3.

32 *Ibid*, at para 103.

33 *Ibid*, at para 104.

34 *Ibid*, at para 109.

35 *Yukon (Government of) v Yukon Zinc Corporation*, 2020 YKSC 15 (YT SC), reversed in part 2021 CarswellYukon 18 (Y.T. C.A.).

36 *Ibid*, at paras 35--36.

37 *Ibid*, at para 28.

38 *Ibid*, at para 26.

39 *Ibid*, at para 30.

40 *Ibid*, at para 92.

41 *Ibid*, at paras 92--111.

42 *Ibid*, at paras 123--27.

43 *Ibid*, at paras 132--36.

44 *Ibid*, at para 136.

45 *Ibid*.

46 See "Compliance Policy Applying Abatement and Enforcement Tools" (updated 30 April 2019) at § 8.3, online: *Government of Ontario* <ontario.ca/page/compliance-policy-applying-abatement-and-enforcement-tools>.

47 See *EPA*, *supra* note 22, ss 1(1), 91(1) definitions for "spill", "pollutant", "contaminant", and "adverse effect".

48 *Nipissing-Parry Sound Catholic District School Board v East Ferris (Municipality)*, 2020 CarswellOnt 4263 (Ont Environmental Review Trib) [*East Ferris*].

49 *Canadian National Railway Company v Ontario (Environment and Climate Change)*, 2017 CarswellOnt 15472 (Ont Environmental Review Trib) [*Canadian National Railway*].

50 *Huang v Fraser Hillary's Limited*, 2017 ONSC 1500 (Ont SCJ), additional reasons 2017 CarswellOnt 4124 (Ont SCJ), additional reasons 2017 CarswellOnt 14034 (Ont SCJ), affirmed 2018 ONCA 527 (Ont CA), leave to appeal refused 2019 CarswellOnt 5599 (SCC) [*Huang*].

51 *Technical Standards and Safety Authority v Kawartha Lakes (City)*, 2016 CarswellOnt 10718 (Ont Environmental Review Trib) [*Kawartha Lakes*].

52 See *EPA*, *supra* note 22, Part X; see also Lucas & Cotton, *supra* note 4 (in addition, the Ontario *Water Resources Act*, RSO 1990, c O.40 is also a relevant concern for insolvency professionals, as are permits and other approvals under municipal by-laws).

53 See *Huang*, *supra* note 50.

54 *EPA*, *supra* note 22, s 91.1; see also "Spills Prevention and Contingency Plans", O Reg 224/07, s 10 ["SPCP Reg"].

55 See *ibid*, s 1; see also "Environmental Penalties", O Reg 222/07, s 3(1) ["Env Pen"].

56 See "SPCP Reg", *supra* note 54, s 1; see also "Env Pen", *supra* note 55, s 3(1)(c)(viii).

57 Contravention of the *EPA* constitutes a provincial offence: *EPA*, *supra* note 22, s 186(1).

58 *EPA, supra* note 22, s 97(1).

59 *Ibid*, s 92(1).

60 *Ibid*, s 92(2).

61 *Ibid*, s 92(1).

62 ”Municipalities, Secured Creditors, Receivers, Trustees in Bankruptcy and Fiduciaries -- Part XV.2 of the Act”, O Reg 298/02, s 9(1).

63 *EPA*, *supra* note 22, s 93(1).

64 *Ibid*, s 92(1).

65 *Ibid*, ss 93(2), 1(1) “adverse effect”.

66 *Ibid*, ss 97(1)(1)--(2).

67 *Ibid*, s 97(1)(8).

68 *Ibid*, s 97(2).

69 See *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 (SCC).

70 *EPA*, *supra* note 22, s 97(1).

71 *Ibid*, ss 99.1, 100.1, 150; see also *East Ferris*, *supra* note 48.

72 *EPA*, *supra* note 22, ss 99.1, 100.1.

73 *Ibid*, s 150.

74 See “Compliance Policy Applying Abatement and Enforcement Tools”, *supra* note 46.

75 *EPA*, *supra* note 22, ss 140(1), 145.3(1)--(3), 100.1(7)--(16) (subjects of orders by municipal governments may further appeal a Tribunal decision to the Minister of the Environment: *ibid*, s 100.1(18)); see also *Canadian National Railway*, *supra* note 49.

76 *EPA*, *supra* note 22, ss 99.1(2), 100.1(2), 150(2.2).

77 *Ibid*, ss 168.18(1), 168.19(1).

78 *Ibid*, ss 168.20(1)--(2).

79 *Ibid*, s 168.20(7).

80 *Ibid*, s 91(1), definitions “owner of the pollutant” and “person having control of a pollutant”.

81 See *Huang*, *supra* note 50.

82 *EPA*, *supra* note 22, s 99; see also *Huang*, *supra* note 50.

83 *EPA*, *supra* note 22, s 91(5).

84 *East Ferris*, *supra* note 48, at para 34.

85 See *Huang*, *supra* note 50.

86 *EPEA*, *supra* note 23, Part 5.

87 See Lucas & Cotton, *supra* note 4, § 8.39.

88 *EPEA*, *supra* note 23, s 110(1).

89 For releases that occurred before 1 September 1993, the obligation is engaged once the person is aware that an adverse effect has occurred or is occurring.

90 *EPEA*, *supra* note 23, ss 107(1)(b), 110(2).

91 *Ibid*, s 110(2).

92 *Ibid*, s 253.

93 *Ibid*, s 112(1).

94 *Ibid*, s 1(tt).

95 *Ibid*, s 1(tt)(i).

96 *Ibid*, s 1(tt)(ii); see also Lucas & Cotton, *supra* note 4, § 8.33 (discussion on whether the polluter-pays principle will require a nexus between the "person responsible for the substance" and the release).

97 *EPEA*, *supra* note 23, s 1(tt)(iii) (note: the exceptions to the defined term are unlikely to apply in the insolvency context; see *ibid*, s 1(tt)(vi)--(vii)).

98 *Ibid*, s 112(1).

99 *Ibid*, ss 113--14.

100 *Ibid*, ss 113(1)(a)--(b).

101 *Ibid*, ss 117--18.

102 See Lucas & Cotton, *supra* note 4, § 8.33.

103 *EPEA*, *supra* note 23, s 129(1).

104 *Ibid*, s 129(4)(a).

105 *Ibid*, ss 107(1)(c)(ii)--(iv).

106 *Ibid*, s 107(1)(c)(v).

107 *Ibid*, s 125.

108 *Ibid*.

109 *Ibid*, s 126.

110 *Ibid*, s 127.

111 *Ibid*, s 128.

112 *Ibid*.

113 *Ibid*, s 210(1); see also Lucas & Cotton, *supra* note 4, § 8.126.

114 *Ibid*, s 210(3).

115 *Ibid*, s 223.

116 *Ibid*, s 214(2).

117 *Ibid*, s 214(2)(a).

118 *Ibid*, s 214(2)(b).

119 *Ibid*, ss 214(2)(b), 214(4).

120 *Environmental Management Act*, SBC 2003, c 53, s 46.

121 See Lucas & Cotton*, supra* note 4, § 3.5.

122 *Canadian Environmental Protection Act*, SC 1999, c 33, s 10 [*CEPA*].

123 See Lucas & Cotton*, supra* note 4, § 4.27; see also "Canadian Environmental Protection Act: equivalency agreements" (modified 3 April 2020), online: *Government of Canada* <canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/agreements/equivalency.html>.

124 *CEPA*, *supra* note 122, s 95(1); see also Lucas & Cotton, *supra* note 4, § 4.23.

125 *CEPA*, *supra* note 122, s 95(2).

126 *Ibid*, s 94(1).

127 *Ibid*, s 94(3); see also Lucas & Cotton, *supra* note 4, § 4.25.

128 *CEPA*, *supra* note 122, ss 98(1)--(2), 98(5).

129 See also Lynda M Collins & Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Toronto: Carswell, 2014).

130 See Lucas & Cotton, *supra* note 4, ch 18.

131 See *Pearson v Inco Ltd*, 2005 CarswellOnt 6598, [2005] OJ No 4918 (Ont CA), additional reasons 2006 CarswellOnt 1527 (Ont CA), leave to appeal refused 2006 CarswellOnt 4020, 2006 CarswellOnt 4021 (SCC); see also André Durocher, *Environmental Class Actions in Canada* (Toronto: Carswell, 2018).

132 The Civil Code of Québec provides for no-fault and fault-based regimes for establishing extra-contractual liability for the province's civil law system of private law. This article will not address these regimes in detail. However, the no-fault regime is comparable to the common law of nuisance, and the fault-based regime is comparable to the common law of negligence.

133 See *Smith v Inco*, 2010 ONSC 3790 (Ont SCJ), reversed 2011 CarswellOnt 10141 (Ont CA), leave to appeal refused 2012 CarswellOnt 4932, 2012 CarswellOnt 4933 (SCC), reconsideration / rehearing refused 2014 CarswellOnt 12113, 2014 CarswellOnt 12114 (SCC) [*Smith* SC].

134 See *Huang*, *supra* note 50.

135 See *Smith* SC, *supra* note 133, at paras 37--42; see Lucas & Cotton, *supra* note 4, § 18.49.

136 See *Huang*, *supra* note 50, at para 49.

137 See Lucas & Cotton, *supra* note 4, § 18.52.

138 See *Huang*, *supra* note 50.

139 *Ibid*, at paras 52--56.

140 See *Smith* SC, *supra* note 133, at para 42. This holding was undisturbed by the Court of Appeal.

141 See *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 (SCC) at paras 18--21.

142 See *Huang*, *supra* note 50, at para 119.

143 *Ibid*, at para 120.

144 *Ibid*.

145 *Ibid*.

146 See *Smith v Inco*, 2011 ONCA 628 (Ont CA) at para 39, leave to appeal refused [2012] 1 SCR xii (note) (SCC), reconsideration / rehearing refused 2014 CarswellOnt 12113, 2014 CarswellOnt 12114 (SCC) [*Smith* CA].

147 *Ibid*, at para 44.

148 *Ibid*, at para 55 [emphasis added].

149 See *Huang*, *supra* note 50, at para 110.

150 *Ibid*, at paras 110--43.

151 A "source zone" is distinguished from the "source". A source zone is an area where the solvent had collected in an amount that can migrate to other properties. The source remains the spill of solvents onto the ground at the dry cleaner's property.

152 See *Huang*, *supra* note 50, at para 148.

153 *Ibid*, at paras 144--53.

154 See *Rylands v Fletcher*, [1868] UKHL 1.

155 See *Smith* CA, *supra* note 146, at para 71.

156 *Ibid*, at para 103.

157 See *Huang*, *supra* note 50, at para 61.

158 See *Smith* CA, *supra* note 146, at para 100.

159 See *Huang*, *supra* note 50, at para 62.

160 *Ibid*, at paras 156--69; see also Lucas & Cotton, *supra* note 4, § 18.41--18.42.

161 See *Huang*, *supra* note 50, at para 162.

162 *Ibid*, at paras 163--43.

163 *Ibid*, at para 165.

164 *Ibid*, at paras 165--66.

165 *Ibid*, at paras 167--69.

166 *Ibid*, at para 165.

167 See *EPA*, *supra* note 22, s 99(2).

168 *Ibid*.

169 *Ibid*, ss 99(2)(a)(i)--(iii).

170 See *Huang*, *supra* note 50, at paras 65--109.

171 See *BIA*, *supra* note 5, s 14.06(3).

172 *EPA*, *supra* note 22, s 99(2).

173 *Ibid*, s 168.20(1).

174 *Ibid*, s 168.20(7); *BIA*, *supra* note 5, s 14.06(4).

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