Beyond Director Liability for Environmental Remediation

POONAM PURI & ANDREW NICHOL[1]

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1 Poonam Puri is a Professor of Law at Osgoode Hall Law School. Andrew Nichol is an Associate at Shea, Nerland and Calnan LLP. Professor Puri gratefully acknowledges the financial support of the 9th Annual Lloyd Houlden Memorial Fellowship awarded by the Canadian Association of Insolvency Restructuring Professionals (CAIRP) without which this research would not have been possible.

ABSTRACT

The Environmental Review Tribunal's 2013 decision in Baker v. Ministry of the Environment has fundamentally reconfigured the potential personal liability of directors and officers of corporations approaching insolvency in Ontario. In upholding the Ministry of the Environment's decision, the Tribunal held that the directors of Northstar Aerospace (Canada) Inc. were personally liable for the remediation costs associated with environmental contamination at one of Northstar Aerospace's properties. The purpose of this paper is to reconcile the divergent incentives created by Baker in a manner that maintains the integrity and comprehensive nature of the bankruptcy regime while also accounting for the social costs of unremediated environmental contamination that frequently arise when a corporation is liquidated in bankruptcy. Specifically, the paper will explore areas that may provide alternative ways of holding insolvent corporations accountable for environmental remediation costs, as opposed to the ad hoc reactionary system displayed in Baker targeting directors and officers. This paper details the events in Baker and explores why the case demonstrates a need to find a better way to hold corporations responsible for environmental remediation costs after they have become insolvent. The authors go on to discuss the purpose and framework of the bankruptcy regime, before looking closer at the problems created by the Baker case and whether a solution can be found in the bankruptcy and insolvency regime itself. The paper ends with the promising possibility of using the private market, specifically insurance and bonding, to ensure environmental remediation costs are met post-insolvency.

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PART 1: INTRODUCTION

The Environmental Review Tribunal's 2013 decision in *Baker v. Ministry of the Environment*[2] has fundamentally reconfigured the potential personal liability of directors and officers of corporations approaching insolvency in Ontario. In upholding the Ministry of the Environment's decision, the Tribunal held that the directors of Northstar Aerospace (Canada) Inc. were personally liable for the remediation costs associated with environmental contamination at one of Northstar Aerospace's properties. Although the directors eventually settled with the Ministry of the Environment, the case has demonstrated the increased aggressiveness with which regulators are pursuing parties for claims related to environmental remediation.

The case involving Northstar Aerospace introduces two primary problems related to corporate law and bankruptcy and insolvency law. The problem related to Canadian corporate law arises from the fact that one of the key tenets of corporate law is directors and officers owing a fiduciary duty to act in the best interests of the corporation and prioritizing the best interests of the corporation ahead of their own personal incentives.[3] The personal liability of directors and officers of a corporation is typically limited to breaches of their fiduciary duty to the corporation or to owing amounts related to specific liquidated debts of the corporation such as wages or taxes. Directors generally are not personally liable for other debts or unliquidated claims against the corporation. The Ontario Ministry of the Environment's position in *Baker* is therefore incongruent with these fundamental notions of directors' duties and corporate liability because it ignores the separate legal personality of the corporation and disregards the temporary and transitory role of any one group of directors in the life of a corporation. Moreover, the risk of exposing directors and officers to personal liability for the environmental remediation expenses

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2 See generally: *Baker v. Ministry of the Environment*, 2013 ONSC 4142; *Baker v. Director, Ministry of the Environment*, Case Nos. 12-158 to 12-169 [*Baker*].

3 Carol Hansell states that directors are often referred to as "stewards" of a corporation, with three basic functions: 1) keeping the right management team in place; 2) approving the direction in which management proposes to take the corporation; and 3) monitoring the way management operates the corporation's business. There has been an increasing focus on and recognition of corporate governance in the "post-Enron era" as a result of corporate failures that began with Enron (See Carol Hansell, *What Directors Need to Know: Corporate Governance* (Toronto: Thomson Carswell, 2003) at 1-3).

of the corporation creates a regulatory incentive for directors to protect their own personal interests in a manner that is not compatible with their fiduciary duties.[4]

The second problem created by the *Baker* decision is the movement away from the traditional purpose of the Canadian bankruptcy and insolvency regime, which is to serve as a comprehensive framework for corporations entering bankruptcy that clearly delineates the priorities of various groups of creditors. When a corporation nears insolvency, the directors' duty to the corporation do not change and as a whole, directors and officers are not permitted to favour one group of creditors over another. The *Baker* decision has the effect of circumventing this priority structure by creating incentives for directors to favour a subordinate group of creditors over other, possibly superior ranking, parties.[5]

The problems arising out of the *Baker* decision however need to be considered alongside the legitimate issues regulators have in ensuring that the cost of environmental remediation is borne by the corporation responsible for it, especially as it nears insolvency. Environmental claims are not likely to receive full recovery when the assets of a corporation are distributed among creditors, leaving it to the government and by extension, society as a whole to fund these remediation efforts on a going forward basis. This creates indelible tension between the efficient operation of Canada's bankruptcy regime, which does little to address the social costs associated with bankruptcy, and the difficulty of environmental regulators in ensuring that contaminated properties are remediated.

The purpose of this paper is to reconcile the divergent incentives created by *Baker* in a manner that maintains the integrity and comprehensive nature of the bankruptcy regime while also accounting for the social costs of unremediated environmental contamination that frequently arise when a corporation is liquidated in bankruptcy. Specifically, the paper will

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4 For more on the duties directors and officers owe a corporation and corporate governance generally, see Barry Reiter, *Directors Duties in Canada*, 5th ed (Toronto: CCH Canadian Limited, 2012).

5 In addition, Janis Sarra and Ronald Davis point out that because of the greater threat of personal liability for environmental claims or remediation, "directors and officers tend to resign from boards to try to limit their exposure to personal liability. This tendency means that those individuals who often have the skills and information…may be absent at a crucial point in the process." For more see Janis P. Sarra and Ronald B. Davis, *Director and Officer Liability in Corporate Insolvency (A Comprehensive Guide to Rights and Obligations)*, 3rd ed (Markham: LexisNexis Canada, 2015) at 246.

explore areas that may provide alternative ways of holding insolvent corporations accountable for environmental remediation costs, as opposed to the *ad hoc* reactionary system displayed in *Baker* targeting directors and officers.

Part 2 begins by detailing the events in *Baker* and why the case demonstrates a need to find a better way to hold corporations responsible for environmental remediation costs after they have become insolvent. Part 3 discusses the purpose and framework of the bankruptcy regime, before looking closer at the problems created by the *Baker* case and whether a solution can be found in the bankruptcy and insolvency regime itself. Part 4 explores private market solutions – namely bonding and insurance – as a solution to environmental remediation costs post-insolvency. This part asserts that a private market solution through insurance is the best way forward. Throughout this paper, the undercurrent theme that should be kept in mind is the tension between corporate law, bankruptcy and insolvency and the societal costs of environmental damage.

PART 2: *BAKER V. MINISTRY OF THE ENVIRONMENT*: HOLDING DIRECTORS AND OFFICERS RESPONSIBLE

The ability to hold directors and officers accountable for environmental remediation is nothing new.[6] However, recent litigation has demonstrated increasing readiness on the part of regulators to actually act upon this ability and hold directors and officers liable for environmental remediation. In *Baker v. Ministry of the Environment*, Northstar Aerospace (Canada) Inc. (Northstar Canada), a subsidiary of Northstar Aerospace, owned and operated a manufacturing facility for helicopter and aircraft parts in Cambridge, Ontario from 1981 to 2009. In 2004, Northstar Canada discovered trichloroethylene and hexavalent chromium, both human carcinogens, in the groundwater at the manufacturing facility site. Northstar Canada carried out investigations voluntarily on this matter between 2004 and 2012 in addition to mitigation and remediation efforts.

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[6] Most environmental legislation in Canada states that if a corporation commits an offence, a director that authorizes or permits it has committed the same offence – sanctions range from fines to imprisonment in cases of serious misconduct. Directors can also be found liable for environmental harms when they are no longer directors if an environmental harm took time to manifest itself. The trend in Canada has been to strengthen statutory provisions imposing liability on directors for environmental harms (Ibid at 247-249).

As Northstar Canada began experiencing financial difficulties, the Ontario Ministry of the Environment (MOE) became concerned that Northstar Canada would not be able to continue its remediation efforts. In late spring of 2012, MOE issued an order under Ontario's *Environmental Protection Act*[7] requiring Northstar Canada to continue carrying out monitoring and remediation efforts. MOE also issued a second order requiring Northstar Canada to provide financial assurance of approximately $10 million. Shortly after the orders, Northstar Canada filed for creditor protection under the *Companies Creditor Arrangement Act*[8] (CCCA) and stopped remediating the site. The court in the CCCA proceedings held that the MOE orders were stayed by the CCCA proceedings and that as a result MOE was responsible for ongoing remediation efforts. In July 2012, the Ontario Superior Court of Justice approved the sale of the operating assets of Northstar Canada, other than the contaminated site. MOE stepped in to continue remediating the site in August 2012 since there was no longer anyone to carry out the remediation work.

In October 2012, MOE issued a remediation order under the *Environmental Protection Act* against Northstar Canada's directors and officers, requiring them to personally ensure that the ongoing remediation work was carried out. MOE's rationale was that the directors of Northstar Canada were directors and officers between 2004 and 2012, and had management and control of the former manufacturing site and remediation systems. The directors and officers appealed the order and brought a motion before the Environmental Review Tribunal to stay the order as this would cause irreparable harm – they would incur remediation costs of $1.4 million per year and would not be able to recover any costs from the insurance policy intended to indemnify them (since it excluded environmental remediation).

The Environmental Review Tribunal did not grant the stay, and this decision was upheld by the Ontario Divisional Court on June 19, 2013. The directors and officers remained responsible for the costs of monitoring, reporting and remediation for the duration of the appeal process. Just before the appeal was heard, the directors and officers settled with MOE after

[7] RSO, 1990, c E 19.

[8] RSC, 1985, c C-36.

having spent $800,000 on remediation. The directors and officers agreed to provide $4.75 million as financial assurance to MOE as part of the remediation.

Aside from the case involving Northstar Canada, there are other cases that have signified a shift toward holding directors and officers directly responsible for environmental remediation.[9] For example, after General Chemical Canada – a subsidiary of General Chemical – declared bankruptcy in 2005, MOE issued several environmental orders including some that named specific directors of General Chemical Canada responsible for paying $17 million in financial assurances relating to cleanup of the corporation's former chemical plant. MOE rescinded the order when the parent company agreed to provide the financial assurances. The case of General Chemical Canada demonstrates that the *Baker* case was likely not a "one-off" but the continuation of an increasing trend holding directors and officers personally responsible.

The *Baker* case highlights the need for certainty and predictability when it comes to developing a standard procedure for ensuring that environmental remediation continues to take place when a corporation becomes insolvent – but without resorting to methods that are *ad hoc* and chip away at fundamental tenets of corporate law as it applies to the duties of directors and officers. Imposing personal liability on directors and officers in an unpredictable manner will have a chilling effect on the willingness of qualified individuals to assume these roles, particularly when a corporation is in financial distress.[10]

PART 3: BANKRUPTCY AND INSOLVENCY LEGISLATION IN CANADA

The *Baker* case not only has ramifications for corporate law and the traditional duties of directors, but serves as a caution against the increasing attempt by regulators to circumvent the insolvency process by trying to collect remediation expenses before secured creditors are adequately compensated. This part of the paper describes the bankruptcy and insolvency regime, and then details the dangers of circumventing the established insolvency process. The part will conclude by acknowledging the low-ranking position of environmental

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[9] For some brief examples, see Marsh, "Marsh Insights: The Changing Landscape of Environmental Liability in Canada – Now It's Personal" (3 December, 2013), online: <https://canada.marsh.com/NewsInsights/ThoughtLeadership/Articles/ID/33941/Marsh-Insights-The-Changing-Landscape-of-Environmental-Liability-in-Canada-Now-its-Personal.aspx>.

[10] For more on potential environmental statutory liabilities and obligations, see Reiter, *supra* note 4 at 852.

claims in the insolvency process and considering whether a solution can be found in bankruptcy and insolvency legislation that simultaneously balances the integrity of the bankruptcy and insolvency regime and corporate law on the one hand, with the collective good of gathering environmental remediation expenses on the other.

(a) *The Bankruptcy and Insolvency Act* and the *Companies Creditor Arrangement Act*

The policies underlying the federal insolvency regimes[11] are to (1) encourage the financial reorganization of companies with the goal of avoiding the harmful social and economic effects of liquidation; and (2) ensure order and predictability for a corporation's creditors.[12]

To give effect to the policy of order and predictability, federal insolvency laws set out a statutory prioritization scheme for creditor claims that must be followed in distributing the debtor's assets.[13] Two of the primary statutes that govern this process in Canada are the *Bankruptcy and Insolvency Act*[14] (BIA) and the *Companies Creditor Arrangement Act*[15] (CCAA), both of which had their beginnings in the early twentieth century.[16] The two Acts

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[11] "Insolvency" is distinct from the initiation of the "insolvency regime". Insolvency occurs when a debtor is unable to pay its creditors. The insolvency regimes however provide different legal responses to the debtor's insolvency and does not come into operation by the occurrence of insolvency. Rather it must be initiated by an action or proceeding taken by the debtor or creditor (Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015 at 17).

[12] Poonam Puri, "Report on Corporate Governance" prepared for Environmental Review Tribunal, *Neil Baker et al. versus Director, Ministry of the Environment* at 9-10, online: <http://envirolaw.com/wp-content/uploads/Poonam-Puri-report.pdf>. See also, for example, Steven L. Schwarcz, "The Easy Case for the Priority of Secured Claims in Bankruptcy" (1997) 47:3 Duke Law Journal 425 at 432.

[13] This was not always the case, (see Tamara Buckwold and Roderick Wood, "Priorities" in Stephanie Ben-Ishai & Anthony Duggan, eds, *Canadian Bankruptcy & Insolvency Law: Bill C-55, Statute c47 and Beyon*d (Markham, Ont: LexisNexis, 2007) at 103). Insolvency law was supposed to resolve disputes through the priority rules of property law; however "bankruptcy and insolvency law reform has increasingly entered into the realm of priorities. Statutory reforms have created new priority rules superseding the non-insolvency property rules that would otherwise govern priority competitions. Each wave of insolvency law reform has introduced new statutory priority rules that operate in insolvency. These reforms seek to improve the position of certain types of claimants who are regarded as more deserving than other creditors, or restrict the right of certain types of claimants who are thought to receive too much."

[14] RSC, 1985, c B-3.

[15] *Companies Creditor Arrangement Act*, *supra* note 8.

[16] For a brief history of the BIA and CCAA, see Jacob Ziegel, "The BIA and CCAA Interface" in Stephanie Ben-Ishai & Anthony Duggan, eds, *Canadian Bankruptcy & Insolvency Law: Bill C-55, Statute c47 and Beyon*d (Markham: LexisNexis, 2007) at 309-315.

contain provisions that are intended to protect debtors from "a rush of creditors attempting to collect on their claims in a disorganised and potentially injurious fashion, possibly to the detriment of other creditors or the debtor's chance of survival as a viable operation."[17] Where there is a conflict between a federal insolvency provision and a provincial statute, the federal insolvency provision is given overriding power through the constitutional principle of federal paramountcy.

The BIA provides the statutory process for ranking and pro-rating creditor claims against the debtor. It describes an "insolvent person" as someone who cannot pay their obligations and has liabilities amounting to at least one thousand dollars, while a "creditor" is a person who has a provable claim under the BIA. A "secured creditor" is a specific type of creditor – for example, someone who holds a mortgage on the property of a debtor.[18] Pursuant to section 136(1) of the BIA, a secured creditor has priority over all other creditor claims under the Act.

Section 136(1) also contains specific preferred claims that must be paid out – subject to claims made by secured creditors – in priority order before any other creditor claims.[19] For example, one type of preferred claim are those costs associated with the administration of insolvency proceedings such as trustee fees and legal costs. Other preferred claims include municipal taxes assessed against the debtor, arrears for rent, as well as indebtedness under any

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Thomas Telfer has written an interesting piece on the rise of Canadian bankruptcy legislation in the early post-Confederation period and its ultimate repeal in 1880 in order to gain an understanding of the ideas, interests and institutions that were influential in shaping the evolution of Canadian bankruptcy law. See Thomas Telfer, "Ideas, Interests, Institutions and the History of Canadian Bankruptcy Law, 1867-1880" (2010) 60 U. Toronto L.J. 60.

17 Matthew Hawkins, "Rest Assured? A Critical Assessment of Ontario's Mine Closure Financial Assurance Scheme" (2008) 26 J Energy Nat Resources L 499 at 506. Buckwold and Wood, *supra* note 13 at 133 point out that because insolvency law imposes a stay of proceedings, the power to liquidate is taken away from the creditors and given to an insolvency administration, allowing the latter to maximize recovery on behalf of the creditors.

18 See s 2, Interpretation. A secured creditor is specifically described under the BIA as a person "holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable".

19 As Buckwold and Wood point out, *supra* note 13 at 104, these preferred claims must be satisfied in the order in which they are listed. Therefore the preferred claim listed in paragraph (a) must be fully satisfied before payment is made for the claim listed in paragraph (b).

Act with respect to workers compensation, unemployment insurance, or any provision under the *Income Tax Act* creating an obligation to pay. These preferred claims must be completely satisfied before any unsecured creditor claims are paid out from whatever is left of the debtor's assets.[20] Because any debtor's assets will be insufficient to satisfy all outstanding liabilities, the recoverability of claims is "less likely to be complete as the claims become less secured and/or statutorily preferred."[21]

The CCAA is a statutory alternative to the BIA that is only available to debtor companies who have outstanding claims to creditors in excess of $5 million.[22] The definition of a "debtor company" in the CCAA includes a company that is bankrupt or insolvent, while a "secured creditor" holds a similar meaning to "secured creditor" in the BIA.[23] An "unsecured creditor" is specifically defined in the CCAA in contrast to the BIA.[24] The key difference between the CCAA and the BIA is that the CCAA deals only with proposals to creditors rather

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20 According to John Pottow, "the key substantive elements of an insolvency regime can be summarized as rules of priority and distribution, and, to a lesser extent, the related rules of avoidance. These rules are 'prickly' because they are highly normative and driven by domestic policy." See John A.E. Pottow, "Procedural Incrementalism: A Model for International Bankruptcy" (2005) 45 Va. J. Int'L 935 at 941.

21 Hawkins, *supra* note 17 at 506.

22 CCCA, *supra* note 8 at 3(1).

23 The CCAA definition of a secured creditor is "a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds" at s 2.

24 An unsecured creditor is defined in the CCAA as "any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds" at s 2.

than proposals to creditors and mandatory distribution schemes like the BIA does.[25] The BIA can be used if proceedings under the CCAA ultimately prove to be unsuccessful.[26]

Both the BIA and the CCAA contain provisions that reference environmental liability and claims by the government. Section 14.06(7) of the BIA and section 11.8(8) of the CCAA create a "super-priority" for any claim by the federal or provincial government against a debtor for the costs of environmental remediation of a specific property belonging to the debtor – but the security is only on the property affected and any other debtor property contiguous to the affected property and not the debtor's other assets.[27] The security is enforceable against the debtor the same way as a mortgage or other security on real property, and ranks above any other claim against the property. This priority does not extend to a debtor's other assets and is strictly limited to the specific property that has incurred environmental damage. In the words of the Supreme Court of Canada, through these provisions "Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably."[28]

(b) Maintaining the Integrity of the Bankruptcy and Insolvency Process after *Baker*

There are strong economic and public policy reasons for the priority of secured credit. For example, although a corporation may not be economically motivated to give security over its assets, it may end up giving security so that it can receive necessary funds on more favourable terms (such as a lower interest rate), or because the necessary funds are not available on an unsecured basis. Creditors negotiate security because it reduces their risk when they are providing these funds and provides certain protections. Business law and federal insolvency

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25 See Ziegel, *supra* note 16 for an analysis of arguments in favour and against the harmonization of commercial proposals under the BIA and business restructurings under the CCAA. According to Ziegel in "Bill C-55 and Canada's Insolvency Law Reform Process" (2006) 43 Can. Bus. L.J. 76 at 86, the way the CCAA is presently used is a complete "transformation of the Act [CCCA] in ways that would have startled the original drafters."

26 For more on the CCAA see David Baird, "Baird's Practical Guide to the Companies' Creditors' Arrangement Act" (Toronto: Carswell, 2009).

27 Buckwold and Wood, *supra* note 13 at 124.

28 *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67.

laws recognize the value of secured credit and give priority to secured creditors over the assets of the borrowing company.[29]

Bankruptcy is often portrayed as a mechanism for "balancing" the interests of various groups of creditors and stakeholders.[30] However, the bankruptcy process is not designed to weigh the equitable merits of various stakeholder groups or respond to social externalities that often emerge from the bankruptcy process. At its core, commercial and bankruptcy law work together to provide a predictable rank-order that can be relied upon by creditors when making lending decisions. By obtaining the status of a secured creditor, a lender has a first-order claim against the assets of the debtor and is assured that other, unsecured or junior ranking secured claims do not compromise their ability to recover on the debt. This framework promotes the predictability and stability necessary for the efficient operation of debt markets in Canada.

Rules governing fraudulent preferences and conveyances in the pre-insolvency context fortify this framework by ensuring that the pressures and incentives faced by corporations in financial distress and their directors and officers do not result in the corporation improperly favouring one group of creditors over another, compromising the integrity of the insolvency regime.[31] To this end, directors and officers are not permitted, under corporate and bankruptcy law, to favour junior ranking creditors, such as environmental claimants, over more senior ranked secured creditors once the corporation has entered the vicinity of insolvency.[32] By

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[29] For an interesting discussion regarding "contract bankruptcy" see Susan Bloc-Lieb, "The Logics and Limits of Contract Bankruptcy" (2001) U. Ill. L. Rev. 503.

[30] Thomas H. Jackson, *The Logic and Limits of Bankruptcy* (Washington: Beard Books, 2001) at 1.

[31] Ibid at 123.

[32] Section 95 of the BIA states the following: (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person: (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against - or, in Quebec, may not be set up against - the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against - or, in Quebec, may not be set up against - the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy. (2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been

ensuring the predictable ranking of liquidated claims, the structure and formality of the bankruptcy process enables parties to efficiently allocate in a manner that effectively promotes economic development.

The *Baker* decision has the potential to turn over the predictable features of the bankruptcy process by creating incentives for directors to favour the interests of unsecured environmental creditors ahead of secured creditors – in direct derogation of their fiduciary duties – because of fear of being held personally liable for the costs of any remaining environmental remediation. This is not only disruptive to the orderly operation of the insolvency framework, but it creates greater risk for creditors and increases the cost of capital for all market participants. Altering the priority structure in this way to give environmental claimants a secured or preferred claim for all assets of the insolvent corporation may have negative repercussions for the availability of financing in certain industries and impair economic growth.

(c) Does the Bankruptcy Regime Reinforce the Low Prioritization of Environmental Remediation and is the Solution an Amendment to the *Bankruptcy and Insolvency Act*?

The importance of certainty and predictability in the rank-ordering system of the insolvency regime are clear. In this context it makes sense for claims of environmental regulators to rank alongside other unsecured creditors. However, this comes at a clear cost: environmental claims are not close to full recovery when the assets of a corporation are distributed among creditors. When an insolvent corporation can no longer carry on its environmental remediation commitments, the inability to use the assets of an insolvent corporation to fund ongoing remediation will ultimately be borne by the government and society at large.

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made, incurred, taken or suffered with a view to giving the creditor the preference - even if it was made, incurred, taken or suffered, as the case may be, under pressure - and evidence of pressure is not admissible to support the transaction. These provisions have been largely unchanged for the past 100 years (Anthony Duggan and Thomas G.W. Telfer, "Voidable Preferences" in Stephanie Ben-Ishai & Anthony Duggan, eds, *Canadian Bankruptcy & Insolvency Law: Bill C-55, Statute c47 and Beyon*d (Markham, Ont: LexisNexis, 2007) at 157).

The bankruptcy regime reinforces the low priority of environmental remediation.[33] The current structure of according full priority to secured claims encourages corporations to shift value away from the claims of environmental creditors and other "involuntary creditors"– those creditors that have not voluntarily granted credit to the debtor and who have no control over the amount of credit the debtor has incurred.[34] Because involuntary creditors are treated as unsecured creditors, their ability to recover the value of their claims is superseded by secured creditors, creating an unfair preference for the claims of voluntary creditors relative to involuntary creditors.[35]

Involuntary creditors cannot usually predict the nature and occurrence of their claims, and are thus less capable than voluntary creditors of taking steps to minimize their potential future claims. For example, when providing financing, secured and unsecured contractual creditors evaluate credit risk by appraising the realizable value of a debtor's assets and evaluating operational risks that can impact a borrowers' ability to repay their debts. Creditors mitigate these risks by imposing covenants that restrict the ability of the debtor to dispose of certain assets, or limit the amount of additional liabilities the borrower may incur. Creditors may also charge higher interest rates to account for operational and default risks. These risk minimization techniques effectively shift the perceived risk costs onto the borrower. However, in the case of environmental damage, there is currently no way to mitigate risk through the bankruptcy regime because environmental creditors became creditors involuntarily in the first place.

In addition, there is little incentive on the part of other creditors when they first enter into an agreement with a corporation to require the corporation to take the necessary required steps to ensure that remediation for past damage be made a priority as a condition for

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33 With the exception of the "super-priority" created for environmental claims over contaminated land in sections 14.06(7) of the BIA and section 11.8(8) of the CCAA.

34 Lucian Bebchuk & Jesse M Fried, "The Uneasy Case for the Priority of Secured Claims in Bankruptcy" (1996) 105:4 Yale LJ 857 at 882.

35 Stephanie Ben-Ishai and Stephen J. Lubben, "Involuntary Creditors and Corporate Bankruptcy" (2012) 45 UBC L. Rev. 253. Ben-Ishai and Lubben discuss how "quick asset sales" can harm involuntary creditors – in particular, the sale can result in the realization of less value by junior claimants than a traditional reorganization or liquidation.

the loan.[36] In fact, if a creditor is aware that a borrower has pre-existing environmental liabilities associated with some of their assets, a creditor may conversely obtain a general security interest in the assets to ensure the creditor receives priority upon repayment. After a corporation becomes insolvent and if a regulator imposes remediation costs, the creditor will likely realize on its secured collateral in order to ensure that the borrower's environmental remediation costs are not paid at the expense of the secured creditor. Rather than incentivizing creditors to make sure corporations prioritize environmental remediation, the insolvency regime creates an incentive on the part of creditors for environmental remediation costs to be deferred and remediated to the minimum extent necessary.[37]

The Ontario Ministry of the Environment's decision in *Baker* attempted to ensure that Northstar Canada's environmental remediation costs were not borne by the public. By unconventionally holding the former directors of Northstar Canada personally liable for environmental remediation costs, the Ministry of the Environment tried to sidestep the disadvantages created by the bankruptcy and insolvency regime. Despite these disadvantages prudence must be exercised: targeting directors and officers in an *ad hoc* manner is not the solution.

One possible way around the unfairness created by the bankruptcy regime is to make changes to the BIA that balance the integrity of the bankruptcy and insolvency regime and corporate law with the importance of collecting environmental remediation expenses. One such option is to expressly codify in the BIA director and officer liability for remediation expenses,

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36 Secured creditors may need to be concerned about the environmental risks of a debtor corporation once it becomes insolvent – for example, where a secured creditor realizes on its security and has taken control and charge of the debtor's property, the directors and officers of the corporation could possibly become liable for environmental harms (Sarra and Davis, *supra* note 5 at 283).

37 This is not to say that creditors are not capable of playing a role in environmental risk management. The "Equator Principles", first introduced in 2003 and revised in 2006 is a voluntary global agreement between private banks that sets industry wide standards for assessing and managing environmental and social risk in project finance lending. This has resulted in these banks playing a "quasi-regulatory role by introducing developed-country social and environmental sensibilities, procedures, and standards across the entire range of the world's industries and development activities" (John M. Conley and Cynthia A. Williams, "Global Banks as Global Sustainability Regulators?: The Equator Principles" (2011) 33 Law & Pol'y 542 at 543). Currently 83 Equator Principles Financial Institutions in 36 countries have officially adopted the Equator Principles – over 70 percent of the international Project Finance debt in emerging markets (see *About the Equator Principles*, Equator Principles: <http://www.equator-principles.com/index.php/about-ep/about-ep>).

capped at a prescribed, liquidated amount. Directors and officers satisfying their duty of care and acting in good faith would not be subject to any personal liability. This option has the advantage of explicitly providing for when a director or officer will be held accountable for environmental remediation and for how much. However, this option may not be the optimal solution because it does not go far enough to ensure that costs for environmental remediation are not borne by the public at large. To go further than this in the BIA however might make environmental claimants secured creditors, which would compromise the stability of the bankruptcy and insolvency regime for all of the reasons discussed above. As a result, bankruptcy and insolvency legislation may not be the best way to achieve balance between these two competing interests.[38]

PART 4: PRIVATE MARKET-BASED SOLUTIONS: BONDING AND INSURANCE

This part discusses potential "market-based" solutions to the problem of collecting environmental remediation costs once a corporation has become insolvent.[39] The first of these market solutions are "assurance bonds" – where a corporation provides funds upfront that are returned once the environmental remediation work has been properly completed. The second solution is a mandatory environmental insurance scheme that provides third-parties with a role to play in evaluating risk, and ensures that appropriate funds have been collected to mitigate these risks. This part will begin with a discussion of the benefits and drawbacks of an assurance bond scheme, followed by an overview of the insurance option and how it may provide the much needed solution to ensuring that environmental remediation costs are covered after a corporation becomes insolvent.

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38 Ben-Ishai and Lubben state that "while a specific creditor's decision to block the debtor's plan might seem inefficient within the internal context of insolvency law, from a broader societal perspective it might be that reorganization in the face of unpaid and unaddressed environmental claims is actually inefficient overall. At the same time…it might be that these larger issues are better served in some way other than by a power to block the debtor's reorganization". Ben-Ishai and Lubben's suggest expanding the "super-priority" that environmental claimants have in the BIA and CCAA to all of a debtor's assets, not just contaminated property. Another option is to have debtor corporations obtain contractual capital commitments from their parent companies (Ben-Ishai and Lubben, *supra* note 35 at 277-279).

39 See Michael P. Vandenbergh, "Private Environmental Governance" (2014) 99 Cornell L. Rev. 129, for an analysis of how private environmental governance mechanisms are increasing through collective and bi-lateral standard setting.

(a) Laying out a Bonding Scheme

Assurance bonds appear to be an attractive way of ensuring that environmental remediation costs are met when a corporation becomes insolvent. The rationale behind an assurance bond is that it gives a regulator or other entity certainty that there are appropriate funds to cover the cost of environmental remediation in all circumstances. The bonds "do not by themselves require performance, but rather simply set a price on noncompliance – the cost of the defaulted bond."[40]

There are already examples of assurance bond schemes in Ontario. For example, under the Ontario *Environmental Protection Act*, the Director has discretion to require that a company provide financial assurance to the government as a condition of approval for projects that may discharge contaminants into the natural environment. Financial assurance can take the form of a personal bond accompanied by collateral, a cash deposit, or a letter of credit from a Schedule I or II bank, among other measures.[41] Similarly, Ontario's *Mining Act*[42] requires mining companies to prepare and comply with "closure plans", which detail how the mine will be rehabilitated once it is exhausted.[43] Within the closure plan, mining companies are required to provide an estimate of the costs of complying with closure obligations prepared by a qualified professional and certify that sufficient assurance is provided to cover the costs.[44] Like the *Environmental Protection Act*, financial assurance can be in the form of a bond, cash deposit or letter of credit from a bank, among other measures.[45]

Bonding for environmental remediation could work in a number of ways. One method is for a government regulator to set the price of a bond once it is clear that environmental remediation needs to take place on a particular site. The amount set should be effective at

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40 David A. Dana & Hannah J. Wiseman, "A Market Approach to Regulating the Energy Revolution: Assurance bonds, Insurance and the Certain and Uncertain Risks of Hydraulic Fracturing" (2014) 99.4 Iowa Law Review 1523 at 1562.

41 *Environmental Protection Act*, *supra* note 7 at ss 131 and 132(1).

42 RSO, 1990, c M14.

43 Ibid at ss 140-142.

44 *Mining Act*, O Reg 240/00, s 12(2).

45 *Mining Act*, *supra* note 42, s 145.

inducing performance and also be adjusted over time - a bond price that is set at a low amount or that is rarely adjusted over time may encourage non-performance or bond forfeiture.[46] Another way bonding could work is for the corporation itself – as stated in provisions of the *Mining Act* discussed above – to be required to provide an estimate prepared by a qualified professional for the complete costs of environmental remediation. Once this estimate has been provided, the corporation would be expected to deliver on its assurance obligations. The regulator would have to ensure that all necessary remediation has taken place through a trustworthy verification process before the bond is returned.[47]

Whatever method of bonding is chosen, it must be expressly required through legislation or regulation. Without this express requirement, there are potential issues that could arise related to corporate governance and bankruptcy and insolvency law. For example, good corporate governance requires a board of directors to consider all relevant stakeholders and their interests, including secured creditors, suppliers, customers, employees as well as payroll, benefit and pension obligations. These secured creditors and other stakeholders could very well have valid complaints against the corporation, and the directors personally, if funds were set aside without any explicit requirement to do so because they would in effect be favouring one set of stakeholders over another.

This point leads to a problem with bonding in the insolvency context: bonding transactions potentially violate secured credit agreements as a corporation approaches insolvency because it gives an unjust preference to one creditor over another. In particular, as a corporation nears insolvency, the fiduciary duty of directors does not change – directors and officers must not take steps that unreasonably reduce the pool of assets available for creditors upon liquidation.

Another problem with bonding is that specific requirements will likely be more onerous for junior companies in a capital-raising, infrastructure building or extraction stage of development. Unlike larger companies with greater capital and revenue, they will be forced to bear the cost of bonding either by financing the debt or by diluting the value of their equity by

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46 Dana and Wiseman, *supra* note 40 at 1562.

47 Ibid.

issuing shares to cover an essentially unproductive investment. Similarly, the costs associated with bonding for future environmental expense will have an effect on corporations of all sizes by impairing that corporation's balance sheet and return on investment.

The potential solution to one problem – for example, requiring a corporation to provide as much financial assurance up front as possible once the environmental damage is detected – exacerbates another problem – a lack of return on investments for instance or onerous requirements for smaller corporations. While bonding is a good option to consider for covering future environmental remediation costs, the complexities regarding how it will actually work in practice makes it a less attractive option than an option like environmental insurance, discussed below.

(b) Laying out an Insurance Scheme

Issues associated with the environmental remediation of properties owned by insolvent corporations can be addressed proactively through an insurance based model. Requiring companies to obtain adequate insurance for potential environmental remediation expenses would lead to a different set of market players – the insurance industry – having a vested interest in how a corporation mitigates risk. Imposing an insurance requirement can be structured in ways that do not trammel on or undermine the integrity of the federal bankruptcy process, corporate law or a corporation's profit margins, and that are also consistent with a corporation's environmental obligations.

(i) *The Basics of Insurance Coverage*

Before looking at various environmental insurance models that already exist, it is important to lay out the basics of insurance.[48] Insurance at its core is a way to protect against potential financial loss or hardship in the event of an unexpected event. Without insurance, there would be many unaffordable risks since individuals or corporations would have to pay for unexpected mishaps. For corporations and businesses specifically, insurance is essential for a number of reasons, including the fact that it protects a corporation and its directors, officers and

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[48] See Barbara Billingsley, *General Principles of Canadian Insurance Law*, 2nd ed (Markham: LexisNexis, 2014) for the legal foundations of Canadian insurance.

employees from financial risk. Insurance is therefore an integral part of any corporate risk management plan.

At the most basic level, an insurance plan operates so that the insured pays a premium in exchange for an insurer paying out money – known as a claim – if an event the insured is protecting against occurs during the policy's term. The insurance policy is the legal contract between the insured and the insurer and contains details of the insurance coverage, such as exactly what events are covered and for how much. In any insurance plan, there are items to be aware of.[49]

One item is the concept of a "deductible". If an insured decides to make a claim for a specific event, the insured usually has to pay a portion of the claim before the insurance company pays the rest. The higher the deductible amount in a policy, the lower the premium because the insured has agreed to pay for a higher proportion of the loss. The rationale behind the deductible is that the insurer should only pay for substantial losses, not minor ones. As a result, the insured will have more of stake in the potential claim and can decide whether or not bringing a claim to an insurance company is financially worth it, especially since claims can often result in higher premiums going forward.

Another item to be aware of in an insurance policy are exclusions – those things that are not included in the policy. For example, in the case of insurance policies covering environmental damages (which will be discussed more below), some policies may exclude damage to property and environmental remediation for that damage. However, an insured may be able to circumvent this problem by buying extra insurance known as an endorsement or rider to pay for risks not covered in the policy.

There are various forms policies can take. For example, an umbrella policy can be distinguished from an underlying policy in that it provides excess coverage and additional primary coverage for matters not covered in an underlying policy. An "occurrence policy" refers

49 For more detailed basics, see Financial Consumer Agency of Canada, "Understanding Insurance Basics" (November 2012), online: <http://www.fcac-acfc.gc.ca/Eng/resources/publications/insurance/Documents/InsuranceBasics-eng.pdf> and Insurance Bureau of Canada, "Insurance Basics", online: http://www.ibc.ca/on/insurance-101/insurance-basics.

to policies that are triggered when some sort of damage occurs, as opposed to a "claims made" policy, which is triggered when the claim was first made. "Standard policies" are those written on a standard form that leave very little room for an insured to negotiate, while "manuscript policies" are written by an insurance broker and then brought to insurers to see who wants to cover the risk on the terms set by the manuscript policy. Some insurance policies also contain a "duty to defend" provision, referring to the insurer's responsibility to retain, instruct and pay for defence counsel, as opposed to a "duty to indemnify", requiring an insurer to pay for covered settlements and judgments against the insured. Many insurance policies also contain "aggregate limits" that limit the amount the insurer has to pay regardless of the number of claims, in contrast to "per occurrence limits" that apply to an unlimited amount of occurrences or claims.[50]

Factors a corporation should generally consider when getting insurance include what kind of deductible makes sense for the corporation, potential liability exposures and past losses, as well as what kind of coverage is adequate versus over-insuring and paying too much. The key to acquiring insurance is to look at the needs of the corporation from a risk management and protection standpoint as well as the areas the corporation is most vulnerable.

(ii) *Existing Insurance for Environmental Damage*

There are three primary insurance policies through which a corporation can acquire insurance coverage for environmental liability: 1) general liability insurance; 2) environmental liability insurance; and 3) directors and officer's liability insurance. Although these policies will likely not provide full coverage for environmental damages, they nonetheless lay the foundation for new methods of using insurance in the post-*Baker* world to recover the costs of environmental remediation.[51]

General liability insurance is typically used by businesses for general business risks, such as third-party bodily injury and property damage that may occur in the course of a business' commercial activities. Most general liability insurance policies include pollution

[50] Thomas Donnelly and Catherine Keyes, "The 6 Minute Environmental Lawyer: Insurance Primer for Lawyers" (prepared for the Law Society of Upper Canada's Continuing Professional Development series, October 2012).

[51] See Marsh, *supra* note 9 for more details.

exclusions[52] – whether for existing or future conditions – although many insurers are now offering exceptions to this inclusion through a policy modifying endorsement.[53] In addition, it is possible to "match up historical pollution losses with historical general liability policies"[54] to get remediation claims paid in those cases where a general liability policy was issued before the mid-1980s, since these policies typically did not contain pollution exclusions.[55] General liability policies tend to respond only to third-party claims[56] and do not include coverage of environmental remediation or damage to the property of an insured.

Environmental liability insurance on the other hand, is available for new and historical pollution claims.[57] Since these policies pertain specifically to environmental liability, they usually will include coverage of remediation costs, third-party property damage and bodily injury claims. Former and current directors and officers are usually covered under the policy in addition to the corporation. Although these policies do not cover known pollution conditions, some insurers are providing liability coverage for known pollution conditions on a case-by-case basis. Environmental insurers will also allow policies to be modified by endorsement with respect to when claims can be brought, since standard agreements provide that claims can only be brought during the policy period or any available extended reporting period.

Directors and officers liability insurance is the third way a corporation can acquire environmental insurance.[58] The purpose of directors and officers liability insurance is to protect individual directors and officers from claims brought by third-parties arising out of alleged

52 See Donnelly and Keyes, *supra* note 50 at 9-13 for more on the genesis of the pollution exclusion over the last 40 years.

53 Marsh, *supra* note 9.

54 Ibid.

55 See Donnelly and Keyes, *supra* note 50 for more information on proving the existence and terms of lost insurance policies.

56 A third-party claim as opposed to "first-party" insurance, is money paid to a third party who is a complete stranger to the insurance agreement. In first-party insurance, benefits are directly paid to insureds and beneficiaries named in the policy in order to cover certain personal losses. For more, see Denis Boivin, *Insurance Law* (Toronto: Irwin Law Inc., 2004) at 42.

57 Marsh, *supra* note 9.

58 See Reiter, *supra* note 4 at 978-989 for key director and officer insurance terms, types of insurance coverage and the insurance procurement process.

director or officer breach of duties or for failing to act in the best interests of the corporation.[59] Policies are typically renewed annually, although an insurer may not renew the policy when the corporation is in financial difficulty. If formal restructuring proceedings are underway however, a court may order the insurer to continue coverage if premiums continue to be paid.[60] Many of these policies no longer have the specific pollution exclusions that they historically used to contain – however, a fair number of pollution scenarios may not be covered under these policies because of other provisions within the wording of the policies that have the effect of excluding a particular type of event.[61] A way around this may be through "Side a Difference in Condition" policies that provide broader definitions with less exclusionary language, whether this is related to pollution, property damage or clean-up costs. A Side a Difference in Condition policy may in theory allow for coverage on these claims.[62]

(iii) *Insurance as a Private Market Solution for Environmental Remediation?*

The option of using an insurance scheme to make sure environmental remediation costs are secured after a corporation becomes insolvent is perhaps the most appealing of the three options presented in this paper. Mandatory insurance would be an effective private market solution to the problem environmental creditors have in collecting on environmental remediation costs, especially in cases of insolvency and other longer-term risks. In such a scheme, insurance requirements can be imposed directly as a pre-condition for obtaining operating licenses in particular areas or sectors, or alternatively as a pre-condition for the registration of a security interest by a secured creditor. One of the most obvious reasons that mandatory insurance would work best is because it will establish a reserve of funds to be used for environmental remediation expenses that otherwise would not be exist.

Another reason mandatory insurance can work well is because an insurance company will act as a "regulator", monitoring the actions of the corporations it insures. Insurers

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59 The decision to purchase or maintain directors or officers liability insurance must be made in a manner that is consistent with relevant fiduciary duties and duties of care (Hansell, *supra* note 3 at 167).

60 Ibid at 168.

61 Marsh, *supra* note 9.

62 Ibid.

have a vested interest in how the corporations they insure conduct business, because they are better off economically if they can take action to reduce liabilities they are responsible for covering in the event of a claim. Insurers will also be interested in monitoring and gathering information related to the insured company's safety standards and protocols since this will feed into setting future premiums. Meanwhile, insured corporations will have a strong incentive to cooperate with an insurance company – especially if it can only operate in a particular industry with required environmental insurance. An insured corporation will also be motivated to develop safety and protection procedures in order to minimize future costs related to insurance premiums in the next policy period.[63]

Environmental insurers may also engage in strategic planning with insured companies in the interest of managing risk, and use their vast resources to identify best practices based on information gathered from multiple jurisdictions. As litigation risk increases due to mandatory insurance, insurers will likely respond by increasing risk management strategies. As mandatory insurance will incentivize insurers to gather information about risks from the industry in order to transform this into effective risk standards and will encourage risk prevention. The insurance industry is likely to produce strict environmental standards that insured corporations will follow in order to prove that they are following best practices and meriting insurance discounts. Insurers will "place a new set of eyes" on corporations that are insured, and will also likely lead them to lobby for better regulation in order to control risks.[64]

The argument for a mandatory insurance regime is not perfect – like bonding, an argument can be made that an environmental insurance requirement will be particularly onerous on junior companies in a capital-raising stage of development. However, perhaps it is in the best interests of a corporation and society at large that the barriers to entry for industries that have a risk of producing environmental damage are a little higher. Furthermore, as mandatory insurance becomes more widespread and insurance companies become more adept at ensuring that corporations appropriately mitigate risk, insurers will likely become more competitive with one another, pushing down costs for environmental insurance. Corporations themselves will be

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63 Dana and Wiseman, *supra* note 40 at 1565.

64 Ibid at 1592.

in a more secure position by being forced to add environmental insurance to their risk management strategies, while regulators and the public at large will no longer have to take on the burden of environmental remediation costs due to an insolvent corporation.

PART 5: CONCLUSION

The Supreme Court of Canada's decision in *Newfoundland and Labrador v. AbitibiBowater Inc*.[65] in 2012 discussed the interplay between federal insolvency proceedings and environmental remediation. In this case, the Province of Newfoundland and Labrador argued that remediation orders under its *Environmental Protection Act* against AbitibiBowater were not claims under the CCAA and therefore should not be stayed and subject to any claims procedure. The Court disagreed by finding that the situation between the province and AbitibiBowater met three requirements: 1) it was a debt, liability or obligation to a creditor; 2) the debt, liability or obligation was incurred before the debtor became bankrupt; and 3) it was possible to attach monetary value to the debt, liability or obligation. The Court ruled that the province was subject to the claims process under the CCAA, and also made it a point to state: "a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings."[66] The Court emphasized the importance of maintaining the integrity of the insolvency regime and having regulators work within the confines of the insolvency process even if it did not appear at the outset that they were subject to insolvency proceedings.

Going forward, it is critical that environmental regulators recognize the need for certainty and predictability in corporate and insolvency law. Imposing liability on an *ad hoc* basis on officers and directors of insolvent corporations appears reactionary and short sighted since it fails to fully contemplate how this liability interacts with the fiduciary duties of directors owed under corporate law. Irrespective of where the ultimate burden for remediating the environmentally contaminated properties of an insolvent corporations rests, the order and

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[65] *Newfoundland and Labrador v. AbitibiBowater Inc.*, *supra* note 29.

[66] Ibid at para 48.

predictability derived from the priority structure created under Canada's commercial and insolvency legislation is critical for the efficient operation of Canadian debt markets.

The solution to covering the costs of environmental remediation after a corporation has become insolvent cannot be derived by bending corporate law. Changes to bankruptcy and insolvency law is also not an optimal solution. The private market is not a complete solution either – rather the solution lies halfway between changing the law and relying on the private market. If an insurance model is going to work, it must be backed up by a requirement in law that corporations undertaking environmental remediation, or those operating in particular sectors get insurance coverage. The marriage between the public and the private is the optimal way forward since it relies on the structure provided by a legal requirement as well as the flexibility and adaptability provided by the private markets, specifically the insurance market.

The *Baker* case has demonstrated that the problems for corporations and their directors and officers, along with the genuine interests of regulators relating to environmental remediation and insolvency, are not going to go away any time soon. A viable solution – specifically the insurance solution – must be explored. However, before any regulatory changes are made or policy positions adopted by the Ministry of the Environment and/or other regulatory bodies, a full discussion must take place with all stakeholders affected by these changes and all parties involved must be fully aware of their potential liability in various circumstances.