Environment Claims Should be Granted Priority in Insolvency

Table of Contents

[Introduction 2](#_Toc95061601)

[Insolvency laws have kept pace with the times 5](#_Toc95061602)

[Insolvency literature on grant of priorities 6](#_Toc95061603)

[Canada – Towards Environmental Nirvana 8](#_Toc95061604)

[United States – A Halfway Home 9](#_Toc95061605)

[United Kingdom – Scottish Courts show the way 11](#_Toc95061606)

[Australia – a few courts are taking up the environmental cause 12](#_Toc95061607)

[Conclusion 13](#_Toc95061608)

[Bibliography 16](#_Toc95061609)

### Introduction

Human influence is the main driver that has warmed the atmosphere, ocean, and land. Global warming of 1.5°C and 2°C[[1]](#footnote-1) will be exceeded during the 21st century unless deep reductions in carbon di-oxide (CO2) and other greenhouse gas emissions (primarily methane) occur in the coming decades. Changes in the climate system have become larger in direct relation to increasing global warming. Global warming has resulted in increase in the frequency and intensity of hot extremes, marine heatwaves, agricultural and ecological droughts, intense tropical cyclones, variability of water cycle, severe wet (heavy precipitation) and dry events, unprecedented sea-level rise, receding glaciers, and reductions in Arctic Sea ice, snow cover and permafrost.[[2]](#footnote-2)

The aforesaid climate emergency calls for an appropriate response from the legislature, the judiciary, and the executive; insolvency and bankruptcy laws[[3]](#footnote-3) being part of the broader legislative framework thus have a moral obligation to adapt accordingly.

Currently, insolvency laws either restructure or liquidate the debtor whereas environment law seek to safeguard the environment. A disagreement arises amidst the two laws, when the debtor enters bankruptcy, has not fulfilled its part of the bargain on the environment regulations and the bankruptcy law intends to treat claims arising out of such negligence, pertaining to period prior to insolvency commencement date[[4]](#footnote-4), as any other unsecured debt. Developing jurisprudence in different jurisdictions on treatment of such environmental claims is discussed later. This paper argues that priority rights should be granted to environmental claims. This would address not only the climate emergency but also in a roundabout way serve the interest of secured creditors; a segment that *prima-facie* will be affected by grant of such a priority.

Some of the enlightened jurisdictions, have already embarked on granting environment obligations/claims their rightful priority, albeit in limited scenarios. The broader ecosystem amidst which insolvency laws operate is amidst change and may have a direct or an indirect effect on functioning of insolvency laws. Though, several adjacencies of insolvency law are undergoing a metamorphosis, two aspects are elaborated below, one from the realm of accounting and another from the domain of lending, to bring to fore, probable consequences of such a transformation.

The first from the accounting arena; IFRS Trustees at the United Nations Climate Change Conference (COP26) decided to establish the International Sustainability Standard Board (ISSB). ISSB’s purpose is to develop, in the public interest, a comprehensive global baseline of sustainability disclosures for the financial markets[[5]](#footnote-5). The intersection of financial standards and sustainable standards may result in a situation of a balance sheet insolvency i.e., liabilities exceeding assets. Most companies do not recognize liabilities that arise due to carbon emissions produced by their operations, products, and services. This is because these emissions are priced at zero today and thus it is assumed that they will be priced at zero in the future too[[6]](#footnote-6). Any change in the assumptions requiring quantification of the aforesaid emissions, may drive companies to balance sheet insolvency and will have a concomitant effect on director’s responsibility and liability.

The second aspect being the gyrations in the debt market. Primarily, there are two sources of debt funds i.e., banks and bond markets. Central Banks across the globe have recognized the climate emergency and heightened the supervision of banks. Network for Greening the Financial System, a conclave of central banks and supervisors, with over 100 members, in their first report, had recommended, engaging with financial firms to ensure that climate-related risks are understood, discussed at board level, and considered in risk management, investment decisions and embedded into firms’ strategy[[7]](#footnote-7). Thirty-eight central banks have committed to climate-related stress tests to review the resilience of large financial firms and 33 central banks have committed to issue guidance on managing climate-related financial risks[[8]](#footnote-8). The Bank of England (BOE) has launched an exercise to assess the resilience of major UK banks, insurers, and the wider financial system to different climate scenarios. Supervised firms of BOE are required to hold capital against material climate risks[[9]](#footnote-9). Needless, to say that these directives and actions will percolate down to lending banks.

Vis-à-vis bonds, US$43tn in assets, or almost half of the asset management sector globally in terms of total funds managed, are committed to a net zero emissions target. A total of 128 investors are part of this initiative[[10]](#footnote-10). A significant part of the asset management sector involves investing in bonds. Additionally, green bonds are slowly creeping in vogue; in-fact European Commission has proposed a European Green Bond Standard[[11]](#footnote-11).

Admittedly, in the initial years “greenwashing[[12]](#footnote-12)” will be rampant but eventually debt markets will move towards financing greener projects. As a corollary, there may be a liquidity crunch for projects that do not meet the green-criterion. This is because secured creditors are assured the first piece of the pie in case a debtor files for insolvency. However, granting priority status to environment claims reverses this equation; in a perverse way, it forces secured creditors to engage with the debtor and adopt means that will make the business sustainable based on the current climate criterion.

Another scenario may be envisaged. Capital committed to net-zero is at over US$130 trillion[[13]](#footnote-13). Such mindboggling dry powder may lead to imprudent lending; reckless lending will eventually lead to bust. Granting environmental claims, a priority in such a scenario too, will not only act as a check on lending practices but also ensure that even in a bust, because of priority status, at least some funds will be utilized for the cause of climate.

The question is whether insolvency laws across the globe have the flexibility to grant such a priority to environment claims? We seek an answer of the same by studying the evolution of insolvency law.

### Insolvency laws have kept pace with the times

“All bankruptcy law, however, no matter when or where devised and enacted, has at least two general objects in view. It aims, first, to secure an equitable division of the insolvent debtor’s property among all his creditors, and, in the second place, to prevent on the part of the insolvent debtor conduct detrimental to the interest of the creditors. In other words, bankruptcy law seeks to protect the creditors, first, from, one another and secondly from their debtor”[[14]](#footnote-14).

However, it wasn’t the same for much of bankruptcy history. Preferences were allowed in English bankruptcies till mid-1500s[[15]](#footnote-15). It was in 1589, in The Case of Bankrupts,[[16]](#footnote-16) that the principle of voiding preferences was upheld conclusively. On the other side of Atlantic, preferential transactions became voidable only in 1898[[17]](#footnote-17).

Thus, insolvency and bankruptcy laws have been malleable and have changed according to circumstances of the day, which buttresses the argument that environmental claims can be granted priority in today’s world.

However, before we embark on our journey of environmental claims in conjunction with jurisdictions, let’s peruse the literature on priorities.

### Insolvency literature on grant of priorities

For the sake of brevity but at the same time completeness two documents were consulted, i.e., UNCITRAL Legislative Guide on Secured Transactions[[18]](#footnote-18) [[19]](#footnote-19) (“ULGST”) and UNCITRAL Legislative Guide on Insolvency Law[[20]](#footnote-20) (“ULGIL”)

Vis-à-vis security rights, ULGST states that in case of ascertainable rights of a grantor and third parties, “defined priority”, clear rules, regard for legitimate interest of all parties, harmonious relationship with international regimes, synchronization between laws i.e., secured transactions law, general law of obligations, property law, civil procedure law and insolvency law, the cost of credit would be reasonable.

Thus, priorities *per-se* are not frowned upon. In-fact, ULGST states the characteristics of priority rules i.e., (a) rest on clearly expressed and well-understood general principles; (b) are comprehensive in scope; (c) cover a broad range of existing and future secured obligations; (d) apply to all types of encumbered asset, including future assets and proceeds; (e) provide ways for resolving priority conflicts among a wide variety of competing claimants; and (f) the enactment be accompanied by a relatively thorough legislative commentary that explains the origins and purposes of the priority law.

It also adds that in several jurisdictions claims for taxes and contributions to social welfare programmes and employee wages, are given a priority solely based on the nature of the claim.

Thus, if the aforesaid recommendations are complied with environmental claims may be granted priority. Furthermore, if few exceptions have already been carved out; there is no reason why these cannot be expanded to encompass environmental claims.

Furthermore, though in a slightly different context of assets, ULGST does state that it does not cover assets covered by national or international agreement; it is highly likely that in future we will have a defined international consensus vis-à-vis environment. Again, in context of efficiency ULGST encourages revisiting traditional policies and accommodating new commercial practices; thus, granting the leeway to reconsider the status of environmental claims.

According to ULGIL most insolvency laws grant a stay/moratorium on any proceedings/enforcements on filing of bankruptcy. The act of stay itself modifies the security rights though only for a brief period. Furthermore, granting administrative expenses the priority too upends the established matrix.

ULGIL states that despite stay laws, action may continue to protect vital and urgent public interests and restraining activities causing environmental damage, with a caveat that to ensure transparency and predictability, it is highly desirable that an insolvency law clearly identify the actions that are to be included within and specifically excepted from the scope of the stay. Additionally, ULGIL allows to relinquish the estate’s interest “provided” relinquishment does not violate public interest, for example, where the asset is environmentally dangerous or hazardous to public health and safety.

Moreover, according to ULGIL, “Some insolvency laws do not afford secured creditors a first priority. Payment of secured creditors may be ranked, for example, after costs of administration and other claims, such as unpaid wage claims, tax claims, environmental claims and personal injury claims, which are afforded the protection of priority under the insolvency law”.

Finally, “some of the factors that may be relevant in determining whether compelling reasons exist to grant privileged status to any particular type of debt may include the need to give effect to international treaty obligations”; likelihood of such a treaty in future is high.

Thus, ULGIL in its current form, raises the issues of environment claims at a number of places in the text, though, relevant importance has not been granted to such claims by the legislature.

Summarising, the aforesaid discussion; there is a climate emergency, ecosystem in which insolvency law operates is taking steps to tackle the climate emergency, historically insolvency law has evolved with the needs of the time, and insolvency literature allows for granting of priority rights. Given these facts let’s focus our attention to how various jurisdictions are treating environmental claims.

### Canada – Towards Environmental Nirvana

Canada has seen enlightened jurisprudence evolve vis-à-vis environmental claims. The question “whether regulator’s use of powers under provincial legislation to enforce bankrupt company’s compliance with end‑of‑life obligations (“environmental obligations”) conflicts with trustee’s powers under federal bankruptcy legislation, or with the order of priorities under such legislation” was answered in 2019, in the landmark Supreme Court case of *Orphan Well Association v. Grant Thornton Ltd*[[21]](#footnote-21) (“Redwater”). A 5:2 majority proclaimed that the trustee cannot renounce assets that are subject to remediation by the environmental regulator, in the process granting priority rights to environmental claims. The majority held that not all environmental obligations enforced by regulator will be provable claims in bankruptcy; regulator fulfilling its public duty obligations is not a creditor[[22]](#footnote-22).

### United States – A Halfway Home

An environmental claim, like most other unsecured claims, is treated as a general unsecured claim unless it is entitled to priority treatment as an administrative expense. However, a narrow exception was created in *Midlantic National Bank v. New Jersey Department of Environmental Protection*[[23]](#footnote-23), wherein the Supreme Court considered trustee's power to abandon property containing toxic waste[[24]](#footnote-24). The Court holds that a trustee may not abandon property in contravention of a state statute or regulation that is designed to protect the public health or safety from identified hazards.

The judgement did not categorically comment on granting priority to clean-up expenses (New York is claiming expenditure as administrative expense; that question is not before us). Furthermore, it does not directly discuss environment claims in bankruptcy (focus on imminent and identifiable harm)

Additionally, there may have been external factors too that may have had an impact on the divided judgement; new bankruptcy law had been adopted in 1978, environmental disasters of three-mile island happened in 1979, and Russel Mahler who operated Quanta was at the centre of several notorious high-profile dumping scandals[[25]](#footnote-25).

Finally, the process that the Justices used to arrive at the judgement[[26]](#footnote-26) resulted in varied interpretations of the judgement[[27]](#footnote-27). Some courts interpreted it narrowly whereas others took a broad interpretation[[28]](#footnote-28). Those ascribing to narrow view said that a trustee may abandon contaminated property if the trustee takes adequate precautions to ensure that there is no imminent danger to the public and the abandonment will not aggravate existing situation. On the other hand, those taking a broad view said that a trustee is barred from abandoning any property if the act of abandonment would violate a state or federal law designed to protect the public health and safety. The condition for abandonment is full compliance with laws. As a trustee cannot abandon property without satisfying certain conditions, in the same vein he can neither maintain nor possess that property without satisfying those same conditions. Thus, the cost incurred in satisfying those conditions is entitled to priority as an administrative expense.

Irrespective of the broad or the narrow interpretation, it seems that the case only addressed one sliver of the environmental issues i.e., abandonment.

In context of abandonment another relevant case to consider would be *United States vs. Apex Oil Company Inc*.[[29]](#footnote-29); a reorganized debtor’s liability to pay for environmental clean-up. The question before the court was whether government’s claim to injunction was discharged in bankruptcy or it can be renewed in subsequent lawsuit[[30]](#footnote-30)?

The court concluded that Resource Conservation Recovery Act (“RCRA”) requires the defendant to clean up the contaminated site and does not allow to sue for money. Thus, the clean-up order was not a claim as it does not give rise to right to payment even though Apex had to spend money for the clean-up. Thus, the claim was not dischargeable in bankruptcy.

Though, abandonment claims for contaminated lands, especially brought under RCRA, will grant primacy to environmental obligations, this isn’t yet true for other environmental violations. One example should suffice to buttress the point.

In *La Paloma Generating Company LLC*[[31]](#footnote-31) (La Paloma) the question before the court was whether debtor can transfer an asset with free and clear title, under section 363 of the Bankruptcy Code, without the purchaser assuming, any obligation under the California Cap-and-Trade Program for emissions generated by the Debtor during the period before the transfer of the assets[[32]](#footnote-32). The court held that the purchaser did not assume successor liability, for the debtor’s obligations under cap-and-trade programme, which arose prior to LNV’s acquisition of debtor’s assets.

Thus, in United States the broader spectrum of environmental claims is not granted priority when such claims are being dealt in bankruptcy.

### United Kingdom – Scottish Courts show the way

The *Celtic Extraction* judgement held primacy for about two decades in which the court said that it is not acceptable that the costs of compliance with a waste management licence imposed by environmental authorities would have priority over provable debts; clearly establishing primacy of the insolvency law over the environmental laws.

However, a shift was seen in the Scottish Courts, In *Doonin Plant Limited* (2018)[[33]](#footnote-33). The company carried waste management business and went into liquidation. The company had not fulfilled its remediation obligations for which a notice had been issued, both pre and post, liquidation filing. The cost of remediation exceeded funds with the company and thus liquidators sought directions from the court. The court held that remediation expenses are liquidations costs to be paid before any other debt[[34]](#footnote-34).

In another Scottish case *Dawson International Plc* (2018)[[35]](#footnote-35) the court held that the environment regulators’ ability to serve a notice created a contingent liability. Furthermore, the remediation work for past liabilities that had been going on prior to filing of liquidation cannot be stopped even though it may result in reduced distribution to creditors.

Finally, in *Paperback Collection and Recycling Limited*[[36]](#footnote-36), a company under administration the court did not stay criminal proceedings on the company stating that it did not have the jurisdiction to do so. However, the court added that even if it had the powers serious environmental offenses need not be stayed even at the cost of creditors.

### Australia – a few courts are taking up the environmental cause

A discussion on the primacy of environmental claims has started in the courts but is yet to reach its fruition. In *Linc Energy*[[37]](#footnote-37) liquidators had disclaimed land whereas the Queensland environmental authority wanted them to comply with environmental obligations. The liquidators sought directions of the court requesting permission not to comply with environment directives as well as not be classified as executive directors. The Trial Court[[38]](#footnote-38) disagreed with the liquidators. However, The Court of Appeal[[39]](#footnote-39) held that disclaimer was in accordance with Corporation Act and will override the state act.

However, the High Court’s decision not to grant special leave to Queensland State Government to appeal the decision left the issue inconclusive[[40]](#footnote-40).

A recent case *EPA vs The Australian Sawmilling Company*[[41]](#footnote-41) (TASCO) went a step further. The Supreme Court of Victoria set-aside the notice of liquidators disclaiming the property. The court said that disclaimer would cause prejudice to EPA and the State that is grossly out of proportion to the prejudice that setting aside the disclaimer would have on TASCO’s creditors. Additionally, though the estate *per-se* did not have any property, the indemnity provided by the parent company for TASCO to the liquidator, is a property that liquidators can fall back upon for remediation costs. Also, as a matter of public policy it is inappropriate that liabilities for which liquidators have an indemnity to be passed on to the state.

Finally, liquidators were held to be the occupiers of the site and though not personally liable, they were liable to the extent of indemnity. The costs and remuneration of the liquidators was protected.

### Conclusion

In none of the jurisdictions discussed above the law grants environmental claims or liability a priority over secured creditors. It is the judiciary keeping in mind the larger public interest that has overstretched its reach to grant environmental claims a priority in some of the cases. However, extra-judicial-legislations will result in different yardsticks in different jurisdictions and will create conflicting precedents which will be detrimental to the cause of global cross-border insolvency. Governments across the world need to wake up to climate emergency weigh the competing options between environment and secured creditors and legislate accordingly, if required, with the help of international insolvency organizations like INSOL.

The probable reason environmental claims have not been granted priority is because such a need never arose. ULGIL, gives the example of labour contracts and cites the reasons of their priority status i.e., protection of labour, social concerns, and restricting a debtor to terminate onerous contracts. Today, environment is an equally pressing social concern.

ULGIL also deals with systemic risk and allows netting or closing of financial contracts, else that would be a threat to the stability of financial system. In future a question will arise whether systemic risk is more important than survival risk?

Insurance companies are deeply entrenched in today’s financial system. In case we do not grant priority to environment claims, the world in its as business-as-usual ways, will soon encounter a huge catastrophe in coastal cities, near riverbanks and in the arctic region. The insurance liabilities arising from such devastation will in any case create a systemic risk.

Also, in the times to come it is possible that public interest litigation may hold insolvency practitioners and secured creditors responsible for environmental damage. The Australian case of TASCO described above is just one step away from holding administrators responsible. Similarly, in the United States in the case of *United States v Fleet Factors Corporation*[[42]](#footnote-42) the court held that creditors would subject themselves to CERCLA liability when they participate in the management of a debtor to a degree indicating a "capacity to influence" the debtor's hazardous waste disposal decisions[[43]](#footnote-43). This clearly was a more expansive view than the case of *Maryland Bank* where a lender who forecloses on property was held liable as an owner, or in the case of *Mirabile*, where a lender affiliated with debtor’s management was held liable as an operator[[44]](#footnote-44).

In 1996, Congress passed the Asset Conservation, Lender Liability and Deposit Insurance Protection Act which amended CERCLA’s liability provisions arising out *Fleet Factors* though the amendment falls short of a carte-blanche immunity to lenders. The amended provision states that participation in management requires actual participation in the management and does not include merely having the capacity to influence or the unexercised right to control facility. Thus, presence of clauses in a financing agreement giving a lender the right to take actions for violations of law or discharge of hazardous waste will not expose the lender to liability[[45]](#footnote-45).

Twenty-five years have passed since the aforesaid amendment; priorities for governments may have changed during this period. Thus, it is in secured creditors interest if a priority is granted to environmental claims. This will help to convert the “known-unknowns” to “known-knowns”. Secured creditors can grant the borrowers a time frame of 3 to 5 years wherein the borrowers upgrade to comply with current environmental norms. Simultaneously, the secured creditors can vet the projects through the lens of “The Equator Principles”[[46]](#footnote-46), a financial industry benchmark since 2010 to assess and manage environment risks.

Finally, the global trend in the post-Covid world is to move towards some form of preventative restructuring i.e., filing and solving for insolvency before a company turns insolvent. In most parts of the world, sooner or later this will bring in tow monitoring framework to ensure what is promised is implemented *in-toto*. Such a development will make it very easy for a third party to establish that the lenders and/or the insolvency professionals too are liable for environmental claims as they were in a situation which was broader than mere “capacity to influence”.

Thus, to obviate such allegations which can be foreseen today, it is in interest of all the players in the insolvency ecosystem, to embark on a path which grants some form of priority to environmental claims.

### Bibliography[[47]](#endnote-1)

1. Severe climatic consequences [↑](#footnote-ref-1)
2. Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L.Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.), IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press. [↑](#footnote-ref-2)
3. Throughout the paper the words insolvency laws and bankruptcy laws have been used interchangeably [↑](#footnote-ref-3)
4. All claims arising on account of environmental violations, post the insolvency commencement date, will be treated as insolvency resolution costs / administrative costs, necessary to preserve the assets of the debtor. In some jurisdictions this may not be applicable for renounced assets. [↑](#footnote-ref-4)
5. Meeting Report, IFRS Advisory Council Meeting, November 21. Accessed on January 3, 2021, from <https://www.ifrs.org/news-and-events/calendar/2021/november/ifrs-advisory-council/>

   “Mr. Liikanen updated the Advisory Council members on developments since the Council last met. In particular, Mr. Liikanen reported on the four key announcements that the Trustees made on 3 November at the United Nations Climate Change Conference (COP26):

   • The decision to establish the International Sustainability Standard Board (ISSB). The announcement clarified the ISSB’s purpose is to develop, in the public interest, a comprehensive global baseline of sustainability disclosures for the financial markets, IFRS sustainability disclosure standards. The ISSB will be established under the governance structure of the IFRS Foundation, alongside and working closely with the IASB.

   • The commitment to consolidate two investor-focused international sustainability standard-setters into the ISSB. The Value Reporting Foundation (VRF), which is home to SASB Standards and Integrated Reporting, and the Climate Disclosure Standards Board (CDSB) will become part of the IFRS family.

   • The publication of two prototypes: one on climate-related disclosures and the other on general sustainability disclosure requirements. This is the outcome of the work by the Taskforce for Climate-related Disclosures, the VRF, the CDSB, the World Economic Forum and the IASB, supported by IOSCO. The aim is to consolidate key aspects of this content into an enhanced, unified set of recommendations for consideration by the ISSB”. [↑](#footnote-ref-5)
6. Robert G Eccles and John Mulliken, “Carbon Might Be Your Company’s Biggest Financial Liability”, Harvard Business Review, October 7, 2021.

   “Through some combination of government intervention and the development of carbon trading markets, it seems inevitable that a price will eventually be put on carbon around the world. Underscoring this, a carbon price has been proposed as part of several bills before Congress, but other mechanisms like a cap on emissions in a sector or geography would achieve the same effect. Economic models and the experience of the EU Emissions Trading System suggests that a price could likely be between $50 and $100 per ton of CO2 in the near term and rise from there. At $100 per ton that would represent five percent of the global economy. Five percent of the global economy is a huge number. But where does this liability sit? With the world’s corporations.

   A sad joke for corporate climate activists is that acting on climate plans is always “the next CEO’s job.” But every company has an uncovered “Carbon Short” position based on their emissions, and it needs to recognize this hidden liability today. This short position arises from the carbon emissions produced by their own operations (Scope 1 and 2, in the argot of climate accounting), and their products and services (Scope 3). Most companies don’t recognize this liability because these emissions are priced at zero today, were priced at zero last year, and so it seems natural to assume that they will be priced at zero in the future. One could say that companies are engaging in the carbon futures market, assuming that this fundamental “input cost” will never change. Anyone who works in commodity markets knows that uncovered positions can turn from profit to significant loss in the blink of an eye”. [↑](#footnote-ref-6)
7. A Call for Action - Climate Change as a Source of Financial Risk, Network for Greening the Financial System, First Comprehensive Report, April 2019 [↑](#footnote-ref-7)
8. Amount of finance committed to achieving 1.5C now at scale needed to deliver the transition, Glasgow Financial Alliance for Net Zero, November 3, 2021. Accessed on January 4, 2021 from <https://www.gfanzero.com/press/amount-of-finance-committed-to-achieving-1-5c-now-at-scale-needed-to-deliver-the-transition/> [↑](#footnote-ref-8)
9. Bank of England, Our response to climate change. Accessed on January 4, 2021, from https://www.bankofengland.co.uk/climate-change [↑](#footnote-ref-9)
10. Investment industry at ‘tipping point’ as $43tn funds commit to net zero. Financial Times, July 6, 2021. [↑](#footnote-ref-10)
11. Proposal for a Regulation of the European Parliament and of the Council on European green bonds, Strasbourg, July 6, 2021

    [↑](#footnote-ref-11)
12. Greenwashing is the process of conveying a false impression or providing misleading information about how a company's products are more environmentally sound. Greenwashing is considered an unsubstantiated claim to deceive consumers into believing that a company's products are environmentally friendly – Investopedia [↑](#footnote-ref-12)
13. Glasgow Financial Alliance for Net Zero. <https://www.gfanzero.com/press/amount-of-finance-committed-to-achieving-1-5c-now-at-scale-needed-to-deliver-the-transition/> Accessed on January 7, 2021. [↑](#footnote-ref-13)
14. Louis Edward Levinthal, “The Early History of Bankruptcy Law”, Scholars Select, Franklin Classics, Page 3

    [↑](#footnote-ref-14)
15. Louis Edward Levinthal, “The Early History of English Bankruptcy”, University of Pennsylvania Law School, Volume 67, Number 1, January 1919

    Many of the Lombards, who nearly monopolized the trade of Britain in 1300’s were found to have left- the kingdom, leaving their creditors without a possibility of redress. By a Statute in 1351 it was ordained that if any merchant of the company of Lombard-merchants acknowledged himself bound in a debt, the company should answer for it. This apparently was due to the fact that the Lombard merchants made a practice of escaping from the country without satisfying their creditors. The regulation is based upon a principle quite familiar to our law-the principle that where many are interested to prevent an offense, that offense will probably be less frequently committed.

    Evasions by debtors who for one reason or another had gained the favor of the King constituted a peril that had to be fought by Parliament constantly. Royal aid was given to the evading debtors by means of a letter of safe conduct issued by virtue of the Royal prerogative. This corrupt practice was frequently restrained by action of Parliament, but since the fifteenth century the kings do not appear to have abused their authority in this way.

    Asylums constituted the most dangerous means of evasion by debtor. Officials who followed the debtor into the asylums were excommunicated by the Church and otherwise punished. As the number of asylums increased through the influence of the Abbots, the abuse became more and more intolerable.

    In the reign of Richard II, the King decreed that Westminster Abbey should be an asylum for only such debtors as were impoverished through adversity and not for those who became insolvent through their own fault and who simply sought to protect themselves from imprisonment. Fraudulent debtors, on the other hand, could be compelled to appear before Court even if they had fled to asylums.

    The Statute of 2 Richard II, St. 2, c. 3 (1379), which provided that "in case of debt where the debtors make feigned gifts and feoffments of their goods and lands to their friends and others, and often withdraw themselves and flee into places of Holy Church privileged, and there hold them a long time, and take the profit of their said lands and goods so given by fraud and collusion, whereby their creditors have been long and yet be delayed of their-debts and recovery, wrongfully and against good faith and reason: It is ordained "and established, that after that the said creditors have thereof brought -their writs of debt, and thereupon a capias awarded, and the Sheriff shall make his return that he hath not taken the said persons, because of such place.

    By the Statute of 3 Henry VII, c. 4 (1487), all gifts were made void, where a debtor made a fraudulent transfer to friends and lived in an asylum on the rents and income. There -had been no remedy for this abuse prior to the reign of Henry VII. The Statute of 1487 gave a fairly adequate remedy where the fraudulent transfer was intended for the benefit of the debtor himself.

    These statutes, it is to be noted, avoided fraudulent alienations of property for the use of the debtor himself, but not such alienations for the benefit of others, particularly favored creditors

    The fundamental principle of the Act of 34 and 35 Henry VIII was an effort to remedy this situation. It aimed to establish a summary proceeding, by which the property of the fraudulent debtor should be at once seized and secured for the benefit of all the creditors, and by which all unfair alienations, even to favored creditors, should be avoided. In the case of fraudulent debtors, there should be a compulsory administration and distribution, on the basis of a statutable equity or equality among all the creditors. This, of course, involved a compulsory and summary collection of the assets. Hence the two great features of all bankruptcy law, as we know it today, have their origin in the Act of **1542**: a summary collection or realization of the assets, and then an administration or distribution for the benefit of all creditors. A number of penal provisions are also' included in the statute to prevent fraud on the part of the debtor's friends or false claimants. [↑](#footnote-ref-15)
16. Steve Sheppard, “The selected writings and speeches of Sir Edward Coke”, Volume One, The Case of Bankrupts (Smith vs. Mills) (1589) Trinity Term, 31 Elizabeth I, In the Court of the King’s Bench First Published in the Reports, volume 2, page 25a.

    “John Cook, a merchant, went bankrupt, owing Robert Tibnam £64 and another group of creditors £273, 12d. The second group of creditors got a commission in bankruptcy against Cook. Cook gave part of his goods to Tibnam in partial payment of his debt, and Tibnam sold them. But the bankruptcy commissioners sold the same goods to the group of creditors in partial satisfaction of their debts. In an important case construing the then-two-decade-old bankruptcy statute, Chief Justice Wray of the King’s Bench held that the sale by the commissioners was good, that the purpose of the statute was to protect all of the creditors of a bankrupt, and that a bankrupt debtor cannot give preferential settlements to one creditor, but both debtor and creditors must accept an equal settlement for all of the creditors”.

    “In our case, there ought to be an equal distribution secundum quantitatem debitorum suorum; (according to amount of debts) but if, after the debtor becomes a bankrupt, he may prefer one (who peradventure hath least need), and defeat and defraud many other poor men of their true debts, it would be unequal and unconscionable, and a great defect in the law, if, after that he hath utterly discredited himself by becoming a bankrupt, the law should credit him to make distribution of his goods to whom he pleased, being a bankrupt man, and of no credit; but the law, as hath been said before, hath appointed certain commissioners, of indifferency and credit, to make the distribution of his goods to every one of his creditors, rate and rate alike, a portion, according to the quantity of their debts, as the statute speaketh. Also, the case is stronger, because this gift is an assignment of the bankrupt after the commission awarded under the Great Seal, which commission is matter of record, whereof every one may take conusance”. [↑](#footnote-ref-16)
17. David A. Skeel Jr., "The Empty Idea of “Equality of Creditors”" (2018). Faculty Scholarship at Penn Law. 1724. <https://scholarship.law.upenn.edu/faculty_scholarship/1724>

    “Bankruptcy advocates, many of whom lived in the commercial states of the Northeast, viewed bankruptcy as essential to the development of commerce in America, and equality of creditors as a key feature of a properly functioning bankruptcy law.

    Thomas Jefferson and other bankruptcy critics in the South and West, by contrast, questioned the need for a federal bankruptcy law; many critics insisted that it was perfectly appropriate for debtors to pay some of their general creditors rather than others. Critics refused to concede that preferential payments are inherently problematic.

    Congressman Bailey of Texas, who had proposed an alternative to the bill that became the 1898 Act, criticized the assumption that “all debts shall stand upon exactly the same footing.” “As for my part,” he countered, “I do not believe that it is true in morals, and I do not believe that it ought be made true in law, that all debts are of equal obligation.” Congressman Bailey then gave two illustrations: “If I owed $5000 to a man who possessed nothing else and I owed $25,000 to a man who was many times a millionaire,” he said, but he could not pay both, he would not hesitate to pay the $5000 debt but not the $25,000. As finally enacted, the 1898 Act included a preference provision that took roughly the same form as the provisions in the 1841 and 1867 Acts. The trustee could retrieve any payments or other transfers made within four months of the bankruptcy, so long as the debtor was insolvent at the time of the transfer and the creditor “had reasonable cause to believe that [the transfer] was intended thereby to give a preference.” The provision was important both because it was a victory for advocates of creditor equality, and because the 1898 Act would prove to be the nation’s first permanent bankruptcy law, escaping the early demise of its three predecessors. Within a few years, defenders of intentionally preferential payments would wane, and the equality norm would be embraced by nearly everyone”. [↑](#footnote-ref-17)
18. Applies to movable assets [↑](#footnote-ref-18)
19. United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Secured Transactions, pp \_\_\_\_\_ [↑](#footnote-ref-19)
20. United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Insolvency Law, pp \_\_\_\_\_ [↑](#footnote-ref-20)
21. Supreme Court of Canada, Supreme Court Judgments, Orphan Well Association vs Grant Thornton Limited, 2019 SCC 5, Case Number 37627, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17474/index.do> and <https://www.scc-csc.ca/case-dossier/cb/2019/37627-eng.aspx> accessed on January 8, 2021. [↑](#footnote-ref-21)
22. In brief, the facts of case: Redwater, a publicly traded oil and gas company, was first granted licences by the Regulator in 2009. Its principal assets are 127 oil and gas assets: wells, pipelines and facilities and their corresponding licences. A few of its licensed wells are still producing and profitable, but the majority are spent and burdened with abandonment and reclamation liabilities that exceed their value. In 2013, ATB Financial, which had full knowledge of the end‑of‑life obligations associated with Redwater’s assets, advanced funds to Redwater and, in return, was granted a security interest in Redwater’s present and after‑acquired property. In mid‑2014, Redwater began to experience financial difficulties. Grant Thornton Limited (“GTL”) was appointed as its receiver in 2015. At that time, Redwater owed ATB approximately $5.1 million and of 127 gas and oil assets, 72 were inactive or spent i.e., only 55 working assets.

    On Redwater’s receivership, the Regulator notified GTL that it was legally obligated to fulfil abandonment obligations for all licensed assets prior to distributing any funds or finalizing any proposal to creditors. The Regulator warned that it would not approve the transfer of any licenses.

    GTL surmised that it could not meet the Regulator’s requirements because the cost of the end‑of‑life obligations for the spent wells would exceed the sale proceeds for the productive wells. Therefore, GTL informed the Regulator that it was taking possession and control only of productive wells and renouncing others. GTL’s position was that it had no obligation to fulfil any regulatory requirements associated with the renounced assets.

    The Regulator filed an application for declaration of renounced assets as void and required GTL to comply with orders to fulfil the end‑of‑life obligations. GTL brought a cross‑application seeking approval to pursue a sales process excluding the renounced assets and an order directing that the Regulator could not prevent the transfer of the licenses associated with the retained assets. Meanwhile, a bankruptcy order was issued for Redwater, and GTL was appointed as trustee. GTL invoked Bankruptcy and Insolvency Act (BIA) in relation to renounced assets.

    The Chambers Judge and Court of Appeal agreed with GTL and held that the Regulator’s proposed use of its statutory powers to enforce Redwater’s compliance with abandonment and reclamation obligations during bankruptcy conflicted with the BIA: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to BIA; and (2) it upended the priority scheme for the distribution of a bankrupt’s assets established by the BIA by requiring that an unsecured creditor be paid ahead of the claims secured creditors.

    Majority in Supreme Court opined, “Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non‑monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the BIA notwithstanding the consequences this may have for the bankrupt’s secured creditors”.

    Therefore, the trustee couldn’t walk away from the disowned sites. The BIA was meant to protect trustees from having to pay for a bankrupt estate’s environmental claims with their own money. It didn’t mean estate could avoid its environmental obligations. Also, the abandonment costs were not provable claims or debts requiring payments—they were **duties** (to the public and nearby landowners). Therefore, these costs were outside the BIA’s payment order scheme. [↑](#footnote-ref-22)
23. United States Supreme Court, Midlantic Nat. Bank v. N. J. Dept. OF E. P.(1986), No. 84-801, Argued: October 16, 1985, Decided: January 27, 1986, Together with No. 84-805, O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor v. City of New York et al., and O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor v. New Jersey Department of Environmental Protection, also on certiorari to the same court. <https://caselaw.findlaw.com/us-supreme-court/474/494.html> accessed on January 10, 2021.

    4th Draft, Supreme Court of the United States, Midlantic National Bank, Petitioner vs, New Jersey Department of Environmental Protection, Thomas J. O’Neill, trustee in bankruptcy of Quanta Resources Corporation, Debtor, Petitioner vs. City of New York et al., on writs of certiorari to the United States Court of Appeals for the Third Circuit [↑](#footnote-ref-23)
24. In brief the facts of the case: Quanta Resources Corp. (Quanta) processed waste oil at facilities located in New York and New Jersey. The New Jersey Department of Environmental Protection (NJDEP) discovered that Quanta had violated a provision by accepting oil contaminated with a toxic carcinogen. Amidst negotiations for the cleanup, Quanta filed a petition under Chapter 11 and after NJDEP had issued an order, converted the action to a liquidation under Chapter 7. An investigation of the New York facility too revealed similarly contaminated oil at that site. The trustee notified the creditors and the Bankruptcy Court that he intended to abandon the property, which authorizes a trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." The city and the State of New York objected, contending that abandonment would threaten the public's health and safety, and would violate state and federal environmental law.

    The Bankruptcy Court approved the abandonment, and, after the District Court affirmed, an appeal was taken to the Court of Appeals. Meanwhile, the Bankruptcy Court also approved the trustee's proposed abandonment of the New Jersey facility, and NJDEP took a direct appeal to the Court of Appeals.

    A divided Court of Appeals for the Third Circuit reversed the bankruptcy court's decisions. The Supreme Court in a 5-4 verdict, affirmed the court of appeals' decisions and refused to allow the trustee to abandon the contaminated properties. Although a trustee can abandon property which is burdensome or of inconsequential value, the Supreme Court created a narrow exception and refused to allow abandonment.

    The Supreme Court concluded, “without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, the Court holds that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards. Accordingly, we affirm the judgements of Court of Appeals for the Third Circuit”

    The Court further stated: “This exception to the abandonment power vested in the trustee is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.” [↑](#footnote-ref-24)
25. Ronald Mann, “Balancing Bankruptcy and Environment Law: Midlantic National Bank vs. New Jersey Department of Environmental Protection, Journal of Supreme Court History, Page 102-103 [↑](#footnote-ref-25)
26. Ronald Mann, “Balancing Bankruptcy and Environment Law: Midlantic National Bank vs. New Jersey Department of Environmental Protection, Journal of Supreme Court History, Page 101 to 117. [↑](#footnote-ref-26)
27. Deborah E Parker, “Environmental Claims in Bankruptcy: It’s a question of priorities”, San Diego Law Review, Vol 32:221, 1995, Page 221 to 284 [↑](#footnote-ref-27)
28. Ibid Page 258 [↑](#footnote-ref-28)
29. <https://caselaw.findlaw.com/us-7th-circuit/1492982.html> accessed on January 12, 2021. [↑](#footnote-ref-29)
30. In brief facts of the case: Apex Oil’s Corporate predecessor operated Hartford refinery from 1967 to 1988. The leaks and spills from refinery had contaminated the ground water and the fumes created odour problems for the residents. In 1987 Apex’s predecessor entered Chapter 11 and in 1990 the bankruptcy court entered confirmation discharging corporate debtor from liens and suits. Apex had discontinued refining facility and did not have contamination cleaning capability. In 2005 The Administrator of the EPA filed a suit for injunctive relief claiming that this was not discharged by the 1990 order. The district court agreed; “section 6973(a) does not allow the government to seek pecuniary relief here, the injunction the government seeks could not have been discharged in earlier bankruptcy proceedings.”

    The court of appeals affirmed. The court held that the government’s entitlement to a RCRA injunction is not a “claim” within the meaning of the Bankruptcy Code; the Code defines the term “claim” to include a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. The court concluded that the RCRA provision “entitles the government only to require the defendant to clean up the contaminated site at defendant’s expense,” but “does not authorize any form of monetary relief.” The court rejected petitioner’s contention that, because compliance with any clean-up order would require the expenditure of money, such an injunction would entail a “right to payment”. Supreme Court denied a writ of certiorari. [↑](#footnote-ref-30)
31. In the United States Bankruptcy Court for the District of Delaware, In re La Paloma Generating Company et. al Debtors, Case No 16012700 (Jointly Administered)

    In the United States Bankruptcy Court for the District of Delaware, California Air Resources Board vs La Paloma Generating Company, No 1:17-CV-1698

    <http://climatecasechart.com/climate-change-litigation/case/re-la-paloma-generating-co/> accessed on January 13, 2021 [↑](#footnote-ref-31)
32. Brief facts of the case: La Paloma owned a natural gas fired facility in California which had GHG emissions. Under the California Air Resources Boards’ (CARB), cap-and-trade programme, La Paloma was supposed to submit GHG equivalent compliance instruments to CARB. The cost of compliance instruments to fulfil GHG obligations in open market would be US$ 63 million. LNV Corporation (“LNV”), La Paloma’s secured creditor who was owed US$300M agreed to purchase all its assets by a credit bid for US$150M. La Paloma submitted a plan to bankruptcy court for transferring all La Paloma’s assets free and clear of all claims and interests to LNV.

    The court held that under section 363(f), “the trustee may sell property ... free and clear of any interest in such property of an entity other than the estate, only if (1) applicable non bankruptcy law permits sale of such property free and clear of such interest”. In the instant case neither did the court find that the Regulation provides for successor liability nor is environmental liability excepted by Section 363(f) of bankruptcy code. [↑](#footnote-ref-32)
33. Outer House, Court of Session, [2018] CSOH 89, p599/17, Opinion of Lord Doherty, in the note by Blair Carnegie Nimmo C.A. and Gerard Anthony Friar C.A., as the joint Liquidators of Doonin Plant Limited [↑](#footnote-ref-33)
34. Brief facts of the case: The company carried waste management business and is registered in Scotland. In July 2015 the Court ordered that the company be wound up and appointed liquidators. Scottish Environment Protection Agency (SEPA) maintains that between 2010 and the liquidation date the company deposited waste at the site which it was not licensed to deposit. In December 2012 SEPA issued a notice requiring the company to remove waste which was not acted on. In December 2015, SEPA issued a further notice to remove controlled waste. Liquidators had realised all the company’s assets other than the site. They estimate that the cost of remediation work exceeded the funds with the company. Therefore, the Liquidators sought directions from the court as the need for removal and remediation is attributable to the activities of the company prior to the liquidation date. The questions were:

    1. Whether remediation costs be expenses of liquidation or contingent debt i.e., unsecured debt? Whether Liquidators are obliged to apply companies’ funds to the extent available for remediation?
    2. Whether liquidators’ remediation will be paid in priority to remediation costs?

    The court opined that remediation costs are indeed liquidation expense and thus must be paid before secured creditors. “Viewing the nature of the liability imposed by a section 59(1) notice through the prism of the directive which Part II of the EPA was intended to implement, I conclude that it must reasonably have been intended by the legislature that expenditure by a liquidator complying with a section 59(1) notice should be a liquidation expense”.

    The court can order for liquidator’s remuneration be paid in priority to section 59(1) expenditure if that is necessary. [↑](#footnote-ref-34)
35. Outer House, Court of Session, [2018] CSOH 52, P1007/17 & P1008/18, Opinion of Lord Clark in the cause Blair Carnegie Nimmo, CA, administrator of Dawson International Public Limited Company, a limited liability company incorporated under the Companies Acts and having its registered office at Saltire Court, 20, Castle Terrace, Edinburgh [↑](#footnote-ref-35)
36. Sally Williamson, “High Court Cannot stay liquidated company’s Magistrates’ court case”, Out-Law, November 25, 2019. [↑](#footnote-ref-36)
37. Brief facts of the case: Linc Energy operated a pilot underground coal gasification project at Chinchilla in Queensland. The company owned land, a Mineral Development Licence granted under Mineral Resources Act 1989, Petroleum Facility Licence granted under Petroleum and Gas (Production and Safety) Act 2004, and Environmental Authority (“EA”) issued under Environmental Protection Act 1994 (“EPA”). In Queensland, one needs to apply for an environmental authority (EA) to undertake an environmentally relevant activity (ERA). ERAs are industrial, resource or intensive agricultural activities with the potential to release contaminants into the environment.

    In May 2016, the Department of Environment & Heritage Protection, issued an Environmental Protection Order (“EPO”) pursuant to EPA to Linc Energy. The EPO was made whilst the company was under administration. Subsequently Linc Energy went into liquidation. The EPO required liquidators to comply with their general environment duty which included sampling gas and water, maintain infrastructure to comply with EPO and site rehabilitation.

    In June 2016, the liquidators issued a notice disclaiming the land, licenses, and site infrastructure. The liquidators sought directions from the court. The court had to decide on following three questions a) whether the liquidators were justified in not complying with EPO? b) whether liquidators were justified in complying with any future EPO’s and c) whether liquidators were executive directors of the company and thus would be personally liable?

    The court concluded that the liquidators are not justified in causing the company not to comply with the EPO but did not decide whether the EAs are disclaimer property. Furthermore, the court said that it would be unwarranted to limit the definition of “executive officer” to exclude a liquidator.

    On an appeal the Court of Appeals turned down the trial court’s judgement. The court held that obligations imposed by EPO were in respect of disclaimed property; disclaimer of the land and MDL is effectively an acceptance that the disclaimer terminated the liabilities under the EPO and an inconsistency in the law of the state should be resolved in favour of insolvency provisions under the Corporation Act. [↑](#footnote-ref-37)
38. Linc Energy Ltd (in Liq): Longley & Ors v Chief Executive Dept of Environment & Heritage Protection [2017] QSC 5, In the matter of, Parties: Linc Energy (In Liquidation) ACN 076 157 045, Stephen Graham Longley, Grant Dene Sparks and Martin Francis Ford as Liquidators of Linc Energy Limited (In Liquidation) CAN 076 157 045 (applicants) v Chief Executive, Department of Environment & Heritage Protections (respondent) [↑](#footnote-ref-38)
39. Longley & Ors v. Chief Executive, Department of Environment & Heritage Protection & Anor; Longley & Ors V Chief Executive, Department of Environment & Heritage Protection [2018] QVA 32, In appeal no 4657 of 2017. [↑](#footnote-ref-39)
40. Douglas Ross (Partner), David Proudman (Consultant), “Linc Energy – High Court refuses special leave to Qld State Government”, Sep 2018, <https://jws.com.au/en/insights/articles/2018-articles/linc-energy-%E2%80%93-high-court-refuses-special-leave-to> accessed on January 16, 2022. [↑](#footnote-ref-40)
41. EPA & Anor v Australian Sawmilling Company Pty Ltd (in liq) & Ors [2020] VSC, 550, Judge – Garde J, September 2, 2020 [↑](#footnote-ref-41)
42. Brief facts of the case: Fleet Factors Corporation (Fleet) loaned Swainsboro Print Works (SPW), a textile manufacturer, working capital from 1976 to 1981. Fleet took a security interest in SPW’s accounts receivable, equipment, and the land on which SPW's manufacturing facility was located. SPW filed for bankruptcy and was adjudged bankrupt, and a trustee assumed title and control over assets. Fleet foreclosed on everything except plant.

    Later, the EPA discovered hazardous waste on the property and in some of the plant buildings. The EPA disposed of the waste at a cost of $400,000. The EPA sued Fleet under CERCLA for the cost of its clean-up and argued that Fleet was liable as both the current owner and operator of the SPW plant and as the owner and operator at the time of the illegal disposal of the hazardous substances. The district court held that Fleet was not the current owner and operator of the plant. The court, however, denied Fleet's motion to dismiss the action on the second basis of Fleet's liability as the "owner and operator" at the time the hazardous substances were illegally disposed. Both Fleet and the EPA appealed.

    Eleventh Circuit held that secured creditor may incur liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. [↑](#footnote-ref-42)
43. Geoffrey Kres Beach, “Secured Creditor CERCLA Liability after United States v. Fleet Secured Creditor CERCLA Liability after United States v. Fleet Factors Corp. – Vindication of CERCLA's Private Enforcement Mechanism”, Catholic University Law Review, Volume 41, Issue 1, Fall 1991. [↑](#footnote-ref-43)
44. David C. Read, “The Comprehensive and Liability Act After United States v. Fleet Factors: New Guidelines Concerning Lender Liability”, 26 Val. U. L. Rev. 871 (1992) [↑](#footnote-ref-44)
45. Larry Schnapf, “Congress amends CERCLA to expand lender liability protection”, Natural Resources and Environment, Vol 11, No.4. [↑](#footnote-ref-45)
46. The Equator Principles (EPs) is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence and monitoring to support responsible risk decision-making.

    The EPs apply globally to all industry sectors and to five financial products: 1) Project Finance Advisory Services, 2) Project Finance, 3) Project-Related Corporate Loans, and 4) Bridge Loans and 5) Project-Related Refinance, and Project-Related Acquisition Finance.

    Financial Institutions commit to implementing the EPs in their internal environmental and social policies, procedures and standards for financing projects and will not provide Project Finance or Project-Related Corporate Loans to projects where the client will not, or is unable to, comply with the EPs.

    EPs are not intended to be applied retroactively. However, EPs apply to the expansion or upgrade of an existing project where changes in scale or scope may create significant environmental and social risks and impacts. [↑](#footnote-ref-46)
47. 1. Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L.Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.), IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press.
    2. Meeting Report, IFRS Advisory Council Meeting, November 21. <https://www.ifrs.org/news-and-events/calendar/2021/november/ifrs-advisory-council/> accessed on January 3, 2022
    3. Robert G Eccles and John Mulliken, “Carbon Might Be Your Company’s Biggest Financial Liability”, Harvard Business Review, October 7, 2021.
    4. A Call for Action - Climate Change as a Source of Financial Risk, Network for Greening the Financial System, First Comprehensive Report, April 2019
    5. Amount of finance committed to achieving 1.5C now at scale needed to deliver the transition, Glasgow Financial Alliance for Net Zero, November 3, 2021. <https://www.gfanzero.com/press/amount-of-finance-committed-to-achieving-1-5c-now-at-scale-needed-to-deliver-the-transition/> accessed on January 4, 2022
    6. Bank of England, Our response to climate change. <https://www.bankofengland.co.uk/climate-change> accessed on January 4, 2022.
    7. Investment industry at ‘tipping point’ as $43tn funds commit to net zero. Financial Times, July 6, 2021.
    8. Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on European green bonds, Strasbourg, July 6, 2021
    9. Louis Edward Levinthal, “The Early History of Bankruptcy Law”, Scholars Select, Franklin Classics, Page 3
    10. Louis Edward Levinthal, “The Early History of English Bankruptcy”, University of Pennsylvania Law School, Volume 67, Number 1, January 1919
    11. Steve Sheppard, “The selected writings and speeches of Sir Edward Coke”, Volume One, The Case of Bankrupts (Smith vs. Mills) (1589) Trinity Term, 31 Elizabeth I, In the Court of the King’s Bench First Published in the Reports, volume 2, page 25a.
    12. David A. Skeel Jr., "The Empty Idea of “Equality of Creditors”" (2018). Faculty Scholarship at Penn Law. 1724. <https://scholarship.law.upenn.edu/faculty_scholarship/1724>

    United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Secured Transactions, pp \_\_\_\_\_

    United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Insolvency Law, pp \_\_\_\_\_

    Supreme Court of Canada website <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17474/index.do> accessed on January 8, 2022.

    1. Tom Cumming, Caireen E. Hanert, “Environmental liabilities now enjoy super priority in Canada”, <https://www.americanbar.org/groups/business_law/publications/committee_newsletters/bcl/2019/201902/fa_10/>accessed on January 8, 2022
    2. Josef Kruger, Jack Maslen, Jessica Cameron, “Super-Priority for Environmental Liabilities in Insolvencies – A Comment on the Supreme Court of Canada’s Decision in Redwater”, <https://www.blg.com/en/insights/2019/02/super-priority-for-environmental-liabilities-in-insolvencies-a-comment-on-the-supreme-court-of-canad> accessed on January 8, 2022.
    3. Maurice V Fleming, Harriette E Codrington, Bonnie Fish, “The Tides Have Turned With Redwater, Provincial Environmental Obligations Have Priority Over Secured Creditors In A Bankruptcy”, <https://www.mondaq.com/canada/insolvencybankruptcy/779966/the-tides-have-turned-with-redwater-provincial-environmental-obligations-have-priority-over-secured-creditors-in-a-bankruptcy> accessed on January 8, 2022
    4. Ronald Mann, “Balancing Bankruptcy and Environment Law: Midlantic National Bank vs. New Jersey Department of Environmental Protection, Journal of Supreme Court History, Page 101 to 117.
    5. Deborah E Parker, “Environmental Claims in Bankruptcy: It’s a question of priorities”, San Diego Law Review, Vol 32:221, 1995, Page 221 to 284
    6. United States Supreme Court, MIDLANTIC NAT. BANK v. N. J. DEPT. OF E. P.(1986), No. 84-801, Argued: October 16, 1985, Decided: January 27, 1986, Together with No. 84-805, O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor v. City of New York et al., and O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor v. New Jersey Department of Environmental Protection, also on certiorari to the same court. <https://caselaw.findlaw.com/us-supreme-court/474/494.html> accessed on January 10, 2022.
    7. 4th Draft, Supreme Court of the United States, Midlantic National Bank, Petitioner vs, New Jersey Department of Environmental Protection, Thomas J. O’Neill, trustee in bankruptcy of Quanta Resources Corporation, Debtor, Petitioner vs. City of New York et al., on writs of certiorari to the United States Court of Appeals for the Third Circuit
    8. <https://caselaw.findlaw.com/us-7th-circuit/1492982.html> accessed on January 12, 2022.
    9. David B Hird, <https://restructuring.weil.com/environmental/supreme-courts-denial-of-certiorari-in-apex-oil-leaves-standing-seventh-circuit-ruling-that-environmental-cleanup-injunctions-are-not-dischargeable-in-bankruptcy/> , Weil Restructuring, accessed on January 12, 2022
    10. In the United States Bankruptcy Court for the District of Delaware, In re La Paloma Generating Company et. al Debtors, Case No 16012700 (Jointly Administered)
    11. In the United States Bankruptcy Court for the District of Delaware, California Air Resources Board vs La Paloma Generating Company, No 1:17-CV-1698
    12. <http://climatecasechart.com/climate-change-litigation/case/re-la-paloma-generating-co/> accessed on January 13, 2022
    13. Ken W Irvin, David E Kronenberg, Sidley Austin LLP, Acquiring Bankruptcy Energy Assets Clear of Compliance Obligations, February 22, 2018, <https://www.powermag.com/white-papers/acquiring-bankrupt-energy-assets-clear-of-compliance-obligations/> accessed on January 13, 2022
    14. Michael Barlow, “Who is protected on insolvency: the environment or the creditors”, Burges Salmon, 13th November 2018, <https://www.burges-salmon.com/news-and-insight/legal-updates/who-is-protected-on-insolvency-the-environment-or-the-creditors> accessed on January 13, 2022.
    15. Ainslie Benzie, “Scottish Courts gives clean up costs priority over creditors”, Out-Law legal update, January 14, 2019, [https://www.pinsentmasons.com/out-law/legal-updates/scottish-court-gives-clean-up-costs-priority-over-creditor-repayment](https://www.pinsentmasons.com/out-law/legal-updates/scottish-court-gives-clean-up-costs-priority-over-creditor-repayment%20) accessed on January 13, 2022
    16. Outer House, Court of Session, [2018] CSOH 52, P1007/17 & P1008/18, Opinion of Lord Clark in the cause Blair Carnegie Nimmo, CA, administrator of Dawson International Public Limited Company, a limited liability company incorporated under the Companies Acts and having its registered office at Saltire Court, 20, Castle Terrace, Edinburgh
    17. Sally Williamson, “High Court Cannot stay liquidated company’s Magistrates’ court case”, Out-Law, November 25, 2019.
    18. Linc Energy Ltd (in Liq): Longley & Ors v Chief Executive Dept of Environment & Heritage Protection [2017] QSC 5, In the matter of, Parties: Linc Energy (In Liquidation) ACN 076 157 045, Stephen Graham Longley, Grant Dene Sparks and Martin francis Ford as Liquidators of Linc Energy Limited (In Liquidation) CAN 076 157 045 (applicants) v Chief Executive, Department of Environment & Heritage Protections (respondent)
    19. Longley & Ors v. Chief Executive, Department of Environment & Heritage Protection & Anor; Longley & Ors V Chief Executive, Department of Environment & Heritage Protection [2018] QVA 32, In appeal no 4657 of 2017
    20. Dougal Ross, David Proudman, “Linc Energy (in Liq): Liquidators obliged to prioritise State environmental laws despite disclaimer, April 2017, <https://jws.com.au/en/insights/articles/2017-articles/linc-energy-ltd-(in-liquidation)-liquidators-oblig> accessed on January 16, 2022
    21. Joseph Abberton, “Environmental obligations given priority over liquidators remuneration”, May 23, 2017, [https://www.lavan.com.au/advice/recovery\_reconstruction\_insolvency/environmental-obligations-given-priority-over-liquidators-remuneration](https://www.lavan.com.au/advice/recovery_reconstruction_insolvency/environmental-obligations-given-priority-over-liquidators-remuneration%20accessed%20on%20January%2016)  accessed on January 16, 2022.
    22. Ian Innies, “Australia: Missing Linc – Queensland Court of Appeals rules environmental protection order ineffective after liquidator’s disclaimer”, Global Restructuring & Insolvency, March 13, 2018.
    23. EPA & Anor v Australian Sawmilling Company Pty Ltd (in liq) & Ors [2020] VSC, 550, Judge – Garde J, September 2, 2020
    24. Ian Innes, Peter Lucarelli, Ilona Millar, Maria O’Brien, Lauren Kirkwood, Guy Dwyer, “Australia: Stuck in the middle – Court finds liquidators personally liable for environmental remediation costs, September 23, 2020, <https://www.lexology.com/library/detail.aspx?g=4ca7e07b-abc5-4e5e-a0ac-a63a4c2400f6> accessed on January 16, 2022.
    25. Linc Energy Ltd (in Liq): Longley & Ors v Chief Executive Dept of Environment & Heritage Protection [2017] QSC 5, In the matter of, Parties: Linc Energy (In Liquidation) ACN 076 157 045, Stephen Graham Longley, Grant Dene Sparks and Martin Francis Ford as Liquidators of Linc Energy Limited (In Liquidation) CAN 076 157 045 (applicants) v Chief Executive, Department of Environment & Heritage Protections (respondent)
    26. Longley & Ors v. Chief Executive, Department of Environment & Heritage Protection & Anor; Longley & Ors V Chief Executive, Department of Environment & Heritage Protection [2018] QVA 32, In appeal no 4657 of 2017.
    27. Douglas Ross (Partner), David Proudman (Consultant), “Linc Energy – High Court refuses special leave to Qld State Government”, Sep 2018, <https://jws.com.au/en/insights/articles/2018-articles/linc-energy-%E2%80%93-high-court-refuses-special-leave-to> accessed on January 16, 2022.
    28. EPA & Anor v Australian Sawmilling Company Pty Ltd (in liq) & Ors [2020] VSC, 550, Judge – Garde J, September 2, 2020
    29. Geoffrey Kres Beach, “Secured Creditor CERCLA Liability after United States v. Fleet Secured Creditor CERCLA Liability after United States v. Fleet Factors Corp. – Vindication of CERCLA's Private Enforcement Mechanism”, Catholic University Law Review, Volume 41, Issue 1, Fall 1991.

    David C. Read, “The Comprehensive and Liability Act After United States v. Fleet Factors: New Guidelines Concerning Lender Liability”, 26 Val. U. L. Rev. 871 (1992)

    1. Larry Schnapf, “Congress amends CERCLA to expand lender liability protection”, Natural Resources and Environment, Vol 11, No.4.

    [↑](#endnote-ref-1)