Court of Appeal File No. M52471

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BOOK OF AUTHORITIES OF THE RESPONDING PARTY, LAURENTIAN UNIVERSITY OF SUDBURY
(Motion for Leave to Appeal Order Regarding Disclaimer)

June 4, 2021

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TAB 1

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***New Skeena Forest Products Inc., Re,***
2005 BCCA 192

Date: 20050401
Docket: CA032484

Between:

In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36
and
In the Matter of the *Canada Business Corporations Act*,
R.S.C. 1985, c. C-44
and
In the Matter of the *Company Act*, R.S.B.C. 1996, c. 62, as amended
and
In the Matter of New Skeena Forest Products Inc.,
Orenda Forest Products Ltd., Orenda Logging Ltd. and
9753 Acquisition Corp.

Respondents
(Petitioners)

And

Kitwanga Lumber Co. Ltd.

Respondent
(Respondent)

Before: The Honourable Mr. Justice Esson
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Smith

R.J.M. Janes and M.D.B. Paine — Counsel for the Appellant City of Prince Rupert

R.A. Millar — Counsel for the Interim Receiver and Trustee in Bankruptcy Ernst & Young Inc.

P.J. Reardon — Counsel for 646325 B.C. Ltd.

R.D. Leong — Counsel for the Attorney General of Canada

D.J. Hatter	Counsel for Her Majesty the Queen in Right of the Province of British Columbia
Place and Date of Hearing:	Vancouver, British Columbia February 28, 2005
Written Submissions Received:	March 22, 24, 29 and 30, 2005
Place and Date of Judgment:	Vancouver, British Columbia April 1, 2005

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Esson
The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] On August 30, 2004 New Skeena Forest Products Inc. ("New Skeena"), formerly known as Skeena Cellulose Inc., brought to an end its most recent attempt at financial restructuring under the ***Companies' Creditors Arrangement Act*** ("CCAA") by filing an assignment in bankruptcy. The last CCAA proceeding had been initiated in November 2003 when the Supreme Court made an order in the usual terms, staying proceedings against the company, authorizing debtor-in-possession ("DIP") financing to rank ahead of most other charges, appointing a monitor, and granting New Skeena the right to "proceed with an orderly disposition" of its assets in order to facilitate the "downsizing and consolidation of [its] business and operations". But the strenuous efforts made by many creditors and other stakeholders to streamline and restructure New Skeena's business — a mainstay of the economy of northwestern British Columbia — ultimately failed, and the decision was made to move the company into liquidation.

[2] On September 20, 2004, the Supreme Court lifted the stay previously imposed under the CCAA, imposed a new stay under the ***Bankruptcy and Insolvency Act***, and appointed Ernst & Young Inc. as receiver to offer for sale "all or any of the Assets, including any of the properties (whether real, personal or otherwise), rights, assets, businesses, and undertakings of the Company, whether *en bloc* or on a piecemeal basis, as a going concern or otherwise, but subject to the approval of [the Supreme] Court." An auction of many of the remaining assets is scheduled for April of this year.

[3] It is para. 17 of the September order which is significant for purposes of this case. It directed the Receiver to report to the Court concerning the "enforcement" of the so-called "Priority Charges" and the allocation of the sale proceeds of New Skeena's assets proposed to be made by the Receiver among the secured creditors. The order also specified that any proposed allocation could not defeat the priority afforded to any Priority Charges under the Court's previous orders or seek to invoke marshalling or other equitable principles applicable to creditors' remedies. In due course, the Receiver recommended a scheme of allocation of the Priority Charges and it was approved by the Chambers judge below. The discrete question raised by this appeal is whether he erred in so doing, and in particular, whether it was open to him to approve an allocation that may require one key creditor to pay as its share of the Priority Charges an amount greater than its secured charge and indeed greater than what is said to be the true value of the asset against which it holds its security.

[4] This question is complicated by two facts. First, the creditor with which we are concerned is the City of Prince Rupert, appellant in this court. Its security is a statutory tax lien and the enforcement thereof is governed by the ***Local Government Act***, R.S.B.C. 1996, c. 323. Under that Act, the local collector must in September of each year offer for sale by public auction any real estate on which taxes are delinquent. (Evidently, certain obligations under the tax sale provisions of the Act were postponed by special Act of the Legislature in response to the plight of Prince Rupert and other neighbouring municipalities affected by New Skeena's insolvency, but no further special deferments are anticipated.) The upset price at such auction is specified by s. 407(1) and in this case would exceed some

$18,000,000, the amount of the City's unpaid taxes. If no bid is received at least equal to the upset price, s. 407(4) of the Act states that the City "must be declared the purchaser" of the property. Thus it is possible the City will not receive an offer at or above the amount of its claim, and that it will be deemed to be the purchaser of the property. In return it would receive nil proceeds, at least until it succeeds in selling the property at some future time. Obviously, this could take years, and the ***Local Government Act*** preserves for some time the owner's ability to redeem the property: see ss. 414-418. In any event, the City stands to receive only the upset price and interest thereon.

[5] The second complicating factor is that the value of the property over which the City holds its statutory lien is New Skeena's now defunct kraft pulp mill, located on Watson Island. The value of this property is unknown: although in recent years it was assessed for tax purposes at some $8,480,000, an appraisal carried out in January 2004 set its value at only $3,920,000. Now, there are indications that the property may carry a large environmental liability. There is some evidence, which the Chambers judge below did not expressly adopt, that the cost of decommissioning the mill and restoring the property to its original condition might be as much as $100,000,000 — although it seems unlikely any purchaser of the mill site would be willing to do more than restore it to "industrial" standard. Remediation to that standard is expected to cost something less, and the Province has agreed to provide up to $30,000,000 for the latter purpose. However, the possibility of a large liability remains, and to date, no private party has expressed interest in acquiring the property on terms that the Receiver has recommended for acceptance.

[6] Together, these facts are said to place the City in a different position from that of other secured creditors: when the value of their interests falls below the amount of the secured indebtedness, most can simply accept the lesser amount, or even walk away from their secured claim. Indeed, most are lenders who have taken the business risk that their borrower will fail and that their security may prove inadequate to realize their claims. This is not true of the City, however: it is prohibited from accepting less than the statutory upset price, and "must" take the property as its own (subject to the owner's right to redeem) if no offer is received at or above the statutory minimum. This also gives rise to a general 'unfairness' argument that informs the City's other more specific arguments regarding process and jurisdiction.

Factual Background

[7] I turn first, however, to the background of the impugned order of December 1, 2004, which adopted the method of cost allocation proposed by the Receiver. I note at the outset that the City, like all other secured creditors, had consented to the granting of "super-priority" for the DIP financing approved by the Court early on in the CCAA proceeding. The initial order of November 19, 2003 granted to one DIP lender, NWBC Timber & Pulp Inc. ("NWBC"), security in an amount up to $2,300,000, "ranking in priority to all creditors of the Petitioners and any other encumbrances, security or security interests now outstanding save and except for the Administration Charge and the Directors' Charge which shall rank in priority to the DIP Charge." Subsequent orders reduced the principal amount of NWBC's priority and approved further borrowing from Northern Savings Credit Union ("NSCU") and granted that lender a charge ranking ahead of all charges (including

NWBC's DIP Charge) other than the Administration Charge. Still further DIP financing, the "Woodbridge DIP Loan", the "MatlinPatterson DIP Charge", and the "Papyrus DIP Charge", was approved on similar terms in the summer of 2004 without any objection being made by the other secured creditors. However, the CCAA stay was, as earlier mentioned, finally lifted on September 20, 2004.

[8] Pursuant to para. 17 of the Order of that date, Messrs. Ernst & Young prepared a report for the Court dated November 19, 2004 (the "Second Report"). The Receiver advised the Court of its progress (or lack thereof) in selling off the New Skeena assets and undertaking as a going concern. Under the heading "The Receiver's Sale Process", the Receiver stated:

> 33. At the commencement of the receivership process, the Receiver was advised by a number of significant secured creditors that they believed that the opportunities to transact with a credible *en bloc*, going concern buyer had been exhausted through what was expressed to be a lengthy and expensive CCAA process, and that they expected the Receiver to conduct a quick sale process with an emphasis on liquidation. The creditors were extremely clear in their communications with the Receiver that the administration, holding and preservation costs associated with the asset realization and receivership administration process were viewed as substantial. Their view was that a lengthy, multi-month asset marketing campaign was unnecessary and to the detriment of their recoveries.
>
> 34. The Receiver recognized the views expressed by these creditors with regard to the length of the sales process and the associated costs, but also recognized that it was important to pursue offers of an *en bloc* or operator nature, including opportunities for acquiring specific mill sites, concurrently with seeking liquidation proposals, given the very significant impact of the New Skeena assets on the economies of the local communities.
>
> 35. The Receiver commissioned an updated asset appraisal of the Company's machinery and equipment from Maynards

> Appraisals Ltd., the firm that conducted the January 2004 appraisal during the CCAA proceedings. <u>No updated appraisal was commissioned for the Company's mill site real estate, as the Receiver considered this to be of a lower cost benefit.</u> Appraisals of the Company's two residential properties situated in Prince Rupert were commissioned, and these properties were listed for sale with a local realtor. [Emphasis added.]

[9] The Receiver's proposal for the allocation of the "Court Ordered Charges" was set out in detail at Appendix F to the Report. The terms "Court Ordered Charges", "Priority Charges" and "CCAA Costs" were all used to refer to the aggregate of the "Administrative Charge" (consisting of the monitor's professional fees and fees for legal services rendered to the monitor and New Skeena), the "DIP Loan Charge" (consisting of amounts advanced by the DIP lenders mentioned above), and the "Directors' Charge" (consisting of amounts for which the directors of New Skeena might have become liable as a result of the insolvency). According to the report, the Administrative Charge amounted to approximately $1,484,000; the DIP Loan Charge was some $3,250,000; and no amount was outstanding in respect of the Directors' Charge.

[10] The Receiver noted that no attempt had been made in the CCAA proceedings to track these Charges "against the various assets of [New Skeena] or the interests of any creditor or creditor group" and that there had been no discussion of the burden each group of assets might be expected to bear in relation to the costs of the CCAA process. The Receiver expressed the view that it was important for the secured creditors to be able to assess their positions reasonably when considering the potential sale of the assets and that "[w]ithout a framework that contemplates

some reasonable expectation as a basis for distributing costs, a realistic assessment of potential sales [would] be very problematic for secured creditors to undertake." This was particularly so with respect to New Skeena's real estate, since it was uncertain when those assets would be sold and, the Receiver stated, it would be "cumbersome to rely on a framework for cost allocation that takes effect only upon the full liquidation of all assets." Further, it would be "neither productive nor accurate" to try to link the CCAA Costs to any specific asset or creditor. Accordingly, the Receiver recommended that:

> 15. As a proxy for the expected values being preserved or enhanced by undertaking the CCAA proceeding, and accordingly incurring the CCAA Costs, <u>an appropriate reference would be appraisals of real estate and equipment at the operating locations of New Skeena</u>. The Monitor commissioned these appraisals in January 2004 as part of the sales efforts at that time. Those appraisals represent information which was current at the time that the CCAA Costs were being incurred, and formed at least some context for the potential value of the restructuring efforts.
>
> 16. The real estate appraisals did not consider potential environmental issues that may be prevalent on a given site, and so do not necessarily represent the best possible indication of value. Not all operating locations were appraised, and the real estate information is therefore incomplete insofar as the major participants in the CCAA process are concerned.
>
> 17. One alternative would be to use the values provided by the BC Municipal Assessment Authority instead of the appraised values (the "Tax Values"). The Tax Values can consist of land only, or can include the improvements on the lands as well. Use of the Tax Values as a value basis has the advantage of being a consistent measure of value, in that each property has a Tax Value for assessment purposes, and has the further advantage of matching expected values against the basis by which the municipal tax obligations are computed.

> 18. When comparing the calculation of improvements for Tax Value purposes with the equipment appraisals performed by Maynards, it is apparent that there is opportunity for overlap between these two categories. There is not a direct method of assessing this potential overlap, or calculating a corrective measure. As well, when comparing the land portion of the Tax Value with the appraised values to the extent both are available, it would appear that the Tax Value of both lands and improvements is higher than the value attributed to the real estate in the appraisal information. Accordingly, it is the Receiver's view that preference should be given to use of the appraised value of the lands, where available, and to use Tax Values for those other properties where necessary.
>
> 19. The Receiver's proposal is to use appraised values as a basis for allocating the CCAA Costs pro rata against those operating assets for which appraisals are available, and in the cases where no land appraisals were commissioned to use the land portion only of the Tax Values, all on an interim basis as described further below. The use of Tax Values shall only apply to land at the operating locations of New Skeena.
>
> 20. Using appraised or assessed values instead of ultimate sale values to allocate costs represents, in some respects, an artificial measure by which to burden participants in the process. By using a measure that is a proxy for ultimate sales value, rather than that sales value itself, the Receiver recognizes that those who believe they may be adversely affected by this basis of allocation may question this proposal. [Emphasis added.]

This method, the Receiver stated, would provide an "independent basis" for dealing with the interests of secured creditors at an early stage of the distribution process. It would avoid "waiting for particular asset sales to occur before allocating costs", and minimize additional disputes "to the extent that actual sales of assets contain price allocations that may be arbitrary, as could occur in multi-asset sales or if secured creditors take assets using their security positions as partial satisfaction of the transaction price." In the Receiver's analysis, the certainty provided by the use of the appraised or assessed values would outweigh "the lack of precision inherent in using a measure other than the actual sales values obtained."

[11] Accordingly, the Receiver recommended that with respect to those operating lands and equipment for which appraisals or assessments were available, an interim allocation of the CCAA Costs in full would be carried out. But notwithstanding the use of the term "interim", no later adjustment would be made to reflect the actual sale of these assets, including the Prince Rupert mill site. In the Receiver's words:

> 26. The Receiver's proposal is to apportion the CCAA Costs pro rata against the equipment and lands appraised in January 2004, on the basis of appraised values or Tax Values, as the case may be, rather than eventual sale proceeds. It is not proposed that the calculation of allocated costs be adjusted subsequently as sales of those assets occur. [Emphasis added.]

[12] Under the heading "Distributions of Sale Proceeds", the Receiver acknowledged the possibility that certain assets could "accumulate a level of allocated costs in excess of their ultimate sales value." In such cases, the Receiver said:

> . . . it is proposed that the shortfall in cost recovery become an additional General Cost, and [be] allocated against the remaining appraised and/or sales values as the case may be.
>
> 40. In the event that a secured creditor seeks to recover the asset against which it holds security, as for example could occur in the instance of a municipality taking title to real property rather than it being sold by the Receiver, then the Receiver would ask that the Court permit such a transaction to be completed only if, and when, the secured creditor provides the Receiver with the cash equivalent of the applicable allocated costs against that asset, as calculated by the Receiver under this proposal. [Emphasis added.]

It is this aspect of the proposal to which the City of Prince Rupert objects.

[13] It does not appear that the recommendations contained in the Second Report were the subject of a court order. Rather, the Chambers judge requested certain additional information, leading to the Receiver's Third Report, dated November 29, 2004. It dealt with various substantive matters and again returned to the subject of cost allocation, on which the Receiver had received further comments from counsel for the concerned municipalities and others. The Receiver noted that certain of the municipalities (including Prince Rupert) had objected to the use of an appraisal that failed to consider any environmental liability attaching to the mill site. Another creditor had objected to the use of asset values generally, suggesting that funds actually generated from the DIP loans be traced to the locations or assets on which such funds had been spent, and that costs be allocated on that basis.

[14] With respect to Prince Rupert's objections, the Receiver responded as follows:

> 52. The assessed value for tax purposes of the Prince Rupert land is $8.48 million, whereas the appraised value used in our cost allocation proposal is $3.92 million. The environmental remediation program currently being funded by the Province has seen almost $19 million of a total funding available of $30 million already expended, and our understanding from discussions with the professional remediation firm is that the completion of this project will render the Watson Island site comparable in condition to other industrial sites in the Province. <u>The use of a value for the Prince Rupert lands is, in the Receiver's view, appropriate in the context of the ongoing remediation and the expectation that this likely will be a site with commercial value in the future</u>, given its physical attributes of rail and water access to facilitate shipping and materials handling opportunities.

> 53. The Receiver understands that any reductions by the Assessment Authority in assessed values, due to the closure of operations, will affect only the industrial improvements values and not the land values, and so the values used in the Receiver's proposal would be unaffected by that development which, in any event, is prospective. [Emphasis added.]

[15] With respect to the proposal that costs be linked to DIP loan expenditures, the Receiver predicted that hardly any costs could be directly tied to the interests of the secured creditors in real estate, which would mean that the cost burden would rest almost entirely on the secured creditors having interests in equipment and other operating assets. In conclusion, the Receiver stated:

> Using a method of allocation that simply traces costs gives no recognition to the underlying basis for the CCAA process and the restructuring effort, which is to preserve and enhance the value of all assets, including the real estate, and in the Receiver's view is therefore inappropriate.
>
> 56. The comments from counsel for the various affected creditors have been considered further by the Receiver, but the Receiver remains of the view that <u>the process set forward in our Receiver's Report #2 provides an appropriate outcome of allocation, taking into account the multiple objectives of early certainty as to the parties' exposure to costs, the relative ability of the affected assets to absorb the allocations (or, alternatively, the various parties' abilities to fund those costs) and the roles played by the various parties during the CCAA and receivership proceedings</u>. [Emphasis added.]

The Order of the Chambers Judge

[16] The matter came on for hearing before the Chambers judge on December 1, 2004. In his oral reasons, he briefly reviewed the Receiver's proposal as set out in

its Second and Third Reports. With specific reference to Prince Rupert's situation, he reasoned:

> With the exception of Prince Rupert all of the parties here want to have certainty at this stage. Prince Rupert says that the value that is proposed to be used in its case, which is the appraised value of $3.92 million, is unrealistic because it is simply not known whether this property will fetch that amount, or even any amount, given the environmental contamination issues.
>
> At paragraph 52 of his report number three, the Receiver addresses the conservatism in his proposal. The Receiver points out that the assessed value of the land set by Prince Rupert for tax purposes is some $8.48 million; the appraised value used by the Receiver for the purpose of this cost allocation proposal is $3.92 million.
>
> There has been an ongoing remediation effort on the Prince Rupert mill site, which has been funded by the Province. Some $19 million of a total funding available of $30 million has been spent. While there is some issue as to the likely market value of these lands, it is the Receiver's view that, given this remediation which has taken place, and given the remediation which is going to continue, that the appraised value figure is a realistic figure to use for the purposes of his proposal.
>
> The reality is that no method, in these circumstances, is perfect. The only way to achieve perfection, as I said at the outset, is to do nothing until everything has been sold. That clearly would not serve the interests of the parties and it is one that simply does not make sense. [paras. 16-19]

In the result, the Chambers judge concluded that it was in the best interests of all the parties to accept the Receiver's recommendation with respect to the cost allocations. The entered Order provided in this regard:

> 6. the Receiver's proposal:
>
> (a) to allocate the CCAA Costs (as defined in the Report) on a preliminary basis against only those assets consisting of equipment and real property which are identified in the illustrative chart attached to Appendix F to the Report

> (the "Assets"), pro rata based upon the appraised or assessed value of the Assets at January, 2004, provided that such preliminary allocation will be subsequently adjusted based upon:
>
> (i) the actual sale proceeds realized on the future disposition of the <u>remaining assets</u> of the Petitioners which do not have values attributed to them in Appendix F as aforesaid; or
>
> (ii) such other value as may be subsequently attributed to such remaining assets by the Court; and
>
> (b) to allocate the Receivership Costs (as defined in the Report) by:
>
> (i) firstly, applying specific costs directly attributable against specific assets; and
>
> (ii) secondly, applying any specifically allocated costs not fully recoverable from specific assets together with all general receivership costs which cannot be specifically allocated, pro rata against all assets on the same basis as the CCAA Costs;
>
> is hereby approved, provided that the obligations of any affected creditor to pay its portion of the allocated costs in relation to any asset where they hold a first priority position (subject to the prior CCAA Costs and Receivership Costs) is [sic] postponed, pending further application at the time that the Receiver applies for approval to distribute any of the proceeds generated from the sale of any of the Petitioners' assets; [Emphasis added.]

[17] It is worth emphasizing that notwithstanding the reference to "preliminary" allocation in subpara. 6(a) of the Order, the only adjustment contemplated is in respect of sale proceeds received from the "remaining assets" (which I understand consist mainly of intangibles such as forestry licences) and that no adjustment is contemplated in respect of the sale proceeds of the assets with which we are here concerned — those items of equipment and real property referred to in Appendix F

to the Receiver's Second Report. Further, the Order does not specifically incorporate the Receiver's recommendation that if and when a secured creditor seeks to recover an asset on which it holds its security, the Court will permit such a transaction to be completed "only if, and when, the secured creditor provides the Receiver with the cash equivalent of the applicable allocated costs against that asset, as calculated by the Receiver under this proposal." Instead, the Order "postpones" the obligation of any creditor to pay its portion of the allocated costs in respect of any asset on which it holds first priority, pending further application. However, the Chambers judge did approve the entire proposal for cost allocation set out in the Receiver's reports and counsel have all agreed that the Court intended to impose the condition on recovery described at para. 12 above. I will also proceed on that assumption, although it would have been preferable if the Order had been worded to reflect this important aspect of the recommendation.

On Appeal

[18] In this court, the City submits that the Chambers judge made two basic errors of law in acceding to the Receiver's recommendation regarding the allocation of CCAA Costs: first, that in exercising his discretion the Chambers judge "ignored" a relevant factor, namely, the actual value of the asset in question; and second, that it did not lie within the jurisdiction or discretion of the Chambers judge to approve an allocation that carried with it the risk that a secured creditor — i.e., the City — would have to pay to the Receiver an amount that exceeds the value of its security interest on the Watson Island property.

[19] Counsel for the City acknowledged that the CCAA, which consists only of 22 sections, gives the court a broad discretion, in the sense that the court must consider a wide variety of competing interests which are likely to vary greatly from case to case. (See S. Waddams, "Judicial Discretion", (2001) 1 ***Cmnwth. L.J.*** 59.) As we observed in the previous *Skeena* appeal (***Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*** (2003) 13 B.C.L.R. (4th) 236, 2003 BCCA 344), the case law that has developed under the CCAA "fills the gaps" between the provisions of the statute and has been informed by the "broad public policy objectives" thereof:

> There is now a large body of judge-made law which "fills the gaps" between these provisions. Most notably, courts appear to have given full effect to the "broad public policy objectives" of the Act, which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. . . .
>
> In accordance with these objectives, Canadian courts have adopted a "standard of liberal construction" that serves the interests of a "broad constituency of investors, creditors and employees" and reflects "diverse societal interests." (See *Re Smoky River Coal Ltd.* (1999) 175 D.L.R. (4th) 703 (Alta. C.A.), at 721-2.) [paras. 34-35]

[20] Consistent with this approach, Canadian courts have now accepted that their discretion may be exercised to permit DIP financing and to grant "super-priority" to DIP lenders, albeit subject to certain restrictions and safeguards: see Michael B. Rotsztain, "Debtor-in-Possession Financing in Canada: Current Law and a Preferred Approach", (2000) 33 Can. Bus. L.J. 283, at 284-87; and ***Re United Used Auto & Truck Parts Ltd.*** (1999) 12 C.B.R. (4th) 144 (B.C.S.C.), aff'd (2000) 16 C.B.R. (4th) 141 (B.C.C.A.), superseding the more restrictive approach taken in

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975) 59 D.L.R. (3d) 492, 21 C.B.R. (N.S.) 201 (Ont. C.A.) and ***Lochson Holdings Ltd. v. Eaton Mechanical Inc.*** (1984) 55 B.C.L.R. 54 (B.C.C.A.). Appellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters and will not exercise their own discretion in place of that already exercised by the court below. This court has stated that its powers should be exercised "sparingly" when it is asked to interfere with the exercise of discretion of a CCAA court: see ***Clear Creek***, *supra*, at para. 52, citing ***Re Pacific National Lease Holding Corp.*** (1992) 72 B.C.L.R. (2d) 368, and ***Re Smoky River Coal Ltd.*** (1999) 175 D.L.R. (4th) 703 (Alta. C.A.). In the more general context, I note the statement of Viscount Simon L.C. in ***Charles Osenton & Co. v. Johnston*** [1942] A.C. 130 (H.L.), which was quoted by the majority of the Supreme Court of Canada in ***Friends of the Old Man River Society v. Canada (Minister of Transport)*** [1992] 1 S.C.R. 3, at 76-77. Viscount Simon L.C. stated:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. [at 138]

At the same time, discretionary decisions are not immune from review. As Viscount Simon L.C. stated in the same case:

> But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient

> weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138]

(See also ***Harelkin v. University of Regina*** [1979] 2 S.C.R. 561 at 588, where it was said that in refusing to take into consideration a "major element for the determination of the case", the trial judge had failed to exercise his discretion on relevant grounds and thus gave the Court of Appeal "no choice" but to intervene.)

[21] The City contends that the Chambers judge in the case at bar "ignored" or failed to consider a relevant matter — the actual value of the Watson Island property — and proceeded on an irrelevant criterion — whether a previous appraisal had been carried out — in approving the allocation method he did. Mr. Janes referred us to ***Musqueam Indian Band v. Glass*** [2000] 2 S.C.R. 633, where the Supreme Court of Canada held that the Federal Court of Appeal had wrongly interfered with a trial judgment fixing the "value" of a leasehold interest in certain reserve lands. The Court of Appeal had ruled that the value should be determined on the basis of land in fee simple with no reduction for the fact that it was located on a reserve. However, the Supreme Court of Canada restored the trial judgment, Gonthier J. noting for the majority that the Indian band was bound to "accept the realities of the market". (Para. 44.) Similarly, in ***Cowichan Tribes v. Canada*** (2003) 314 N.R. 384, [2003] F.C.J. No. 1919, the Federal Court of Appeal upheld a trial judgment which, in determining the "fair market rental value" of property that was subject to flooding, took that susceptibility into account. Létourneau J.A. for the Court stated that "[i]t defies common sense to think that a prudent and reasonable

developer or tenant would allocate the same value to a land that is partly flooded annually as it would to a land that is not so flooded and that is ready for development or occupation. This is not a question of law: this is a fact of life, a practical reality which . . . the mortgage lenders and the insurers will soon remind you of when they assess the risk they have to assume." (Para. 9.)

[22] In response to the City's submission that the Chambers judge in the case at bar erred in the same manner as the Federal Court of Appeal in ***Glass***, counsel for the Receiver says it is implicit in the Chambers judge's Reasons that he did not accept the "negative value theory" with respect to Watson Island, particularly in light of the fact that the Province has already spent more than $19,000,000 in restoring the mill site. Mr. Millar characterized the evidence of remediation liability of $100,000,000 as "entirely vague" and noted that that estimate had included the cost of decommissioning and closure (dismantling, demolition, removal, transportation, resloping and grading) of the mill site. In his submission, it is unrealistic to think that this will ever be done in the near to middle term, and the Chambers judge must be taken to have been of the opinion that the property did have commercial value by reason of its location, its facilities, and the remediation work.

[23] In my view, these are the kinds of considerations which the Chambers judge (who has heard most if not all of the Chambers applications relating to New Skeena) was especially qualified to make. Moreover, I do not agree that the Chambers judge "ignored" the issue of the true value of the Watson Island property. He specifically referred to this matter at paras. 16-18 of his Reasons (quoted above), but at the end of the day he concluded that "perfection" in terms of matching values with costs, was

outweighed by the need for certainty and expediency. In my view, assuming for the moment that the Court had the jurisdiction to make the order it did, the Chambers judge was entitled to weigh these competing interests and to decide that the interests of all the creditors as a group overshadowed the City's particular objections.

[24] Two other factors raised by the City, however, do in my view cast greater doubt on the Court's exercise of its discretion. First, there is the fact that Prince Rupert's security and the remedies available to it are very different from those of other creditors. As has been seen, if the Watson Island property cannot be sold, the ***Local Government Act*** requires Prince Rupert to take the land, environmental liabilities and all, whether or not it will realize anything after payment of its share of the CCAA Costs. Not surprisingly, there is no case law directly on point, but in ***Re Hunters Trailer & Marine Ltd.*** (2001) 305 A.R. 175, [2001] A.J. No. 1638 (Alta. Q.B.), the Court said it would be unfair to ignore "differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from CCAA proceedings" in allocating CCAA costs. Thus the Court in ***Hunters*** approved the allocation of a share of CCAA costs to a mortgage lender that was smaller than the shares allocated to other creditors. Wachowich C.J.Q.B. commented:

> The CCAA recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of

> UMC's security, the remedies that were available to it and the extent of its recovery.
>
> Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of CCAA costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitor's fees and $500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.
>
> Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.
>
> Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors. . . .
>
> I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above. [paras. 20-23 and 26]

[25] My second concern is that the Chambers judge proceeded on the assumption that there were urgent time pressures militating in favour of cost allocations that provided immediate certainty to creditors of what they were likely to be receiving net of the CCAA Costs. Indeed, at para. 3 of his Reasons, the Chambers judge noted that "time is the enemy of enterprise value" and at para. 19 that it would clearly not serve the interests of the parties to "do nothing until everything has been sold". But at this state of New Skeena's existence, the hope of "enterprise value" has had to give way to the reality of liquidation value, all efforts at restructuring the business of

the company as a going concern having failed. As in ***Re Weststar Mining Ltd.*** (1993) 75 B.C.L.R. (2d) 16 (B.C.C.A.), "The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities. . . ." (Para. 58, *per* McEachern C.J.B.C. dissenting, whose judgment was adopted by the Supreme Court of Canada on appeal at [1993] 2 S.C.R. 448.) The Chambers judge was not facing a "now or never" determination. As Mr. Janes noted, he could have elected to recognize the unusual position of the City and await any sale that might occur within a reasonable time. Failing such a sale, he could assign a value based on more up-to-date evidence. In the meantime, interim allocations and distributions could be made. In this regard, I note that para. 4 of the December 1 Order stated:

> 4. The sale proceeds from the sale of each specific asset shall stand in the place and stead of the asset sold and all liens, claims, encumbrances and other interests that are attached to an asset prior to its sale shall attach to the sale proceeds with the same validity, priority and in the same amounts, and subject to the same defences, that existed when the liens, claims, encumbrances and other interests attached to the asset;

As counsel for the Receiver suggested, this provision obviates in large measure any time pressure which might have made a more exact allocation of costs and proceeds impractical. Assets can be sold to the highest bidder free and clear of encumbrances. The charges attach instead to the proceeds held by the Receiver, and interim allocations and distributions can be made subject to final adjustment, all without unduly inconveniencing creditors.

[26] I would prefer, however, not to decide this appeal on the basis that the Chambers judge erred in the exercise of his discretion by failing to give due weight

to the two factors I have described. Again, an appellate court should not interfere with an exercise of discretion in the present context where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion. Instead, I turn to the more fundamental question of jurisdiction — whether it lay within the Chambers judge's authority to adopt a method of cost allocation that might require the City to pay as its share of CCAA Costs an amount greater than the value of the land over which it holds its tax lien. I note that Mr. Janes and Mr. Millar have confirmed their view that this question relates to the equitable and statutory jurisdiction of the Court under the CCAA rather than under the ***Bankruptcy and Insolvency Act***.

[27] Mr. Janes for the City submitted that the potential imposition of a "personal liability" on the City over and above its interest in the Watson Island property is fundamentally inconsistent with the entire CCAA scheme, which empowers the court to impose stays and compromise creditors' rights but not to impose further financial liabilities on creditors. He characterizes the scheme as providing a "shield, not a sword". In his submission, this principle is implicit in s. 11 of the Act, which permits a court to <u>stay</u>, to <u>restrain</u> and to <u>prohibit</u> various proceedings (see especially, ss. 11(3) and (4)); and it is explicit in s. 11.3, which states:

> 11.3 No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.
[Emphasis added.]

Further, Mr. Janes contends that the orders made during the CCAA proceedings in this case which permitted the DIP loans and granted the "super-priority" to them, all contemplated that the CCAA Costs would be paid out of the proceeds of realization of the assets, not out of additional funds to be advanced by creditors. Certainly there was no explicit reference to the possibility that any secured creditor might have to advance or contribute funds beyond its existing exposure.

[28] Mr. Janes also notes what he calls the "perverse" effect of the cost allocation order in this case: while the unsecured creditors, who were the parties who stood to gain the most from the attempted restructuring of New Skeena, will bear none of the CCAA Costs under the proposed allocation, the City of Prince Rupert will, if the Watson Island property cannot be sold for the statutory "upset price", actually end up worse off. Its unpaid tax debt will go unpaid and it will have to pay something — likely between $1.5 and $2.5 million — in CCAA Costs. This is particularly anomalous when one considers that the Legislature intended to grant municipalities such as the City of Prince Rupert a very high level of priority for its claims for unpaid taxes.

[29] Counsel also notes the caution with which courts have approached the granting of the "extraordinary" remedy of priority for DIP financing, as illustrated by ***United Used Auto***, *supra*, at paras. 21-30 (B.C.S.C.). In that case, Tysoe J. quoted a passage from the judgment of Blair J. in ***Re Royal Oak Mines Inc.*** (1999) 6 C.B.R. (4th) 314 ((Ont. Gen. Div.) and a passage from a judgment of Farley J. in

Royal Oak Mines Inc. (1999) 7 C.B.R. (4th) 293 (Ont. Gen. Div.). Farley J. stated in part:

> Aside from the question of the lienholders who have registered liens which but for the Initial Order granted by Blair J. (but subject to the comeback clause) would have priority over the DIP financing, I see no reason to interfere with this superpriority granted. It would seem to me that Blair J. engaged properly in a balancing act as to the $8.4 million of superpriority DIP financing as authorized. I am in accord with his views as expressed in *Re Skydome Corporation* [(1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div.)], where Blair J. stated [at para. 13]:
>
>> This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors - in the exercise of balancing the prejudices between the parties which is inherent in these situations - have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) are examples of the flexibility which courts bring to situations such as this. See also *Re Lehndorff Gen Partner* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Olympia & York Developments Limited v. Royal Trustco* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).
>
> Implicit in his analysis and part of the equation is the reasonably anticipated benefits for all concerned which derive from these sacrifices. [para. 5; emphasis added.]

Tysoe J. in ***United Used Auto*** stated that in his view, "there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated." (Para. 28.) He was not so satisfied in that case and therefore declined to approve the application for a prior charge to secure DIP financing which was before him.

[30] The City emphasizes the underlined sentence in the quotation above from ***Re Skydome Corporation*** and contrasts that with the situation here, where the City

may well be "compelled" to advance further funds from its pocket simply in order to "recover" an asset that will fall into its possession in any event as a matter of law and that has little or no market value at present. (I note parenthetically that no argument was made by the City to the effect that the imposition on the City of the condition reproduced at para. 12 of these Reasons contravenes s. 403(1) of the ***Local Government Act***, which requires that the local collector offer "each parcel of real property on which taxes are delinquent" for sale by public auction on the last Monday in September. See the discussion in ***Clear Creek***, *supra*, at paras. 40-42.)

[31] The Receiver contends on the other hand that the proposed cost allocation is simply a consequence of the original grant of priority to the DIP financing early on in the CCAA process, and that it was "implicit in any priority scenario that where a creditor took title to an asset, it would have to first satisfy the burden of the Charge." In the Receiver's analysis, the question in this case is not whether the Order was made without jurisdiction by virtue of the fact that it imposes a "personal liability" on the City, but rather whether it is appropriate that "if the City takes the property in lieu of taxes, it must as a condition of that taking, discharge or pay any priority charge that affects the property. That the City would have to discharge that liability upon taking title is a most uncontroversial and self-evident proposition. If one takes the benefit of an asset [one] must discharge the burdens associated with it."

[32] Counsel also emphasizes that under the terms of the Order and the Receiver's recommendation, the City would not be required to "ante up" any amount unless it decided to take the property into its own name — i.e., that the City's obligation to pay the share of the CCAA Costs would not apply if the Watson Island

property were sold to a third party without the City having to "recover" it. Further, since the mill was the "primary asset" of New Skeena, the City should, Mr. Millar argues, properly bear a large portion of the costs incurred in trying to sell the business as a going concern — a possibility that had obvious potential benefits for the City and its inhabitants. As for s. 11.3 of the CCAA, Mr. Millar says that it is not aimed at the situation with which we are concerned, but rather is intended to allow creditors the right to require "C.O.D." payment under supply contracts with the insolvent company.

[33] I agree that para. (a) of s. 11.3 was intended for the purpose Mr. Millar describes, but para. (b) appears to have a wider reach that is engaged by the facts of this case, assuming the Chambers judge's order of December 1, 2004 was an order "made under s. 11" of the CCAA. (On this latter point, neither counsel for the City nor the Receiver argued to the contrary.) In my view, the effect of the Order is to require the further advance of money or credit in certain circumstances. Considering the purpose and tenor of the Act, which does generally operate as a "shield, not a sword", I am persuaded that the Chambers judge strayed beyond his authority in acceding to the recommendation of the Receiver that if a secured creditor sought to recover the asset against which it holds security, the creditor should be required as a condition of such transaction to pay to the Receiver in cash the amount of CCAA Costs allocated against that asset. To the extent that a creditor could be required to pay funds in excess of the value of its security interest, such a condition was not, in my view, an inevitable aspect of the granting of DIP priority but

instead was an unusual feature that, in the almost unique circumstances of this case, contravenes s. 11.3(b). I would therefore allow the appeal.

[34] The question then is what order this court should make to permit the sale of New Skeena's assets to proceed as quickly and conveniently as possible, while recognizing the City's unusual situation as a secured creditor. The City sought an order to the effect that the CCAA costs should be allocated on the basis of actual values as and when they are realized, or alternatively, that the Watson Island property be treated in the same way as the "remaining assets" referred to in the Order — i.e., based upon such values as may be attributed by the court. I find the latter alternative more attractive in that it does not affect all the other assets, minimizes the accounting that will be required, and thus retains much of the efficiency of the original order. It will be clear from these Reasons, however, that if and when the time comes for the Court to allocate a value to the Watson Island property for the purposes of allocating the CCAA Costs, the effect of the order cannot be to require that Prince Rupert pay cash from its pocket as a condition of taking the property, the "value" (as determined by the Court) of which is less than the amount required to be paid.

Costs

[35] The City sought an order of costs "on a substantial indemnity scale, such costs not to form part of the Receiver's charge against the assets of the bankrupt." I would ask that the City provide us with written submissions of law concerning this

prayer, to be filed within 15 days of the issuance of these Reasons. I would then ask the Receiver to file its written submissions within 10 days of the latter date.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Esson"

I Agree:

"The Honourable Mr. Justice Smith"

TAB 2

COURT OF APPEAL FOR ONTARIO

CITATION: Essar Steel Algoma Inc. (Re), 2017 ONCA 478
DATE: 20170608
DOCKET: M47815/M47846

Cronk, Blair and van Rensburg JJ.A.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

Peter H. Griffin, Matthew B. Lerner, Kim Nusbaum and Robert Trenker, for the Moving Parties, GIP Primus LP and Brightwood Loan Services LLC

Patricia D.S. Jackson, Andrew Gray, Jeremy Opolsky and Alexandra Shelley, for the Moving Party, Port of Algoma Inc.

Ashley Taylor, Eliot Kolers and Sanja Sopic, for the Applicants/Respondents

Clifton P. Prophet, Nicholas Kluge and Delna Contractor, for the Monitor Ernst & Young Inc.

Heard: June 2, 2017 (In Writing)

Motions for leave to appeal from the order of Justice Frank Newbould of the Superior Court of Justice, dated April 28, 2017.

Reasons for Decision

Background

[1] GIP Primus LP and Brightwood Loan Services LLC (collectively "GIP") and Port of Algoma Inc. ("Portco") apply for leave to appeal the order of Newbould J. dated April 28, 2017. The order was made in the context of insolvency proceedings under the CCAA[1] involving Essar Steel Algoma Inc. ("Algoma") and related companies. Newbould J. is the supervising CCAA judge in those proceedings.

[2] Algoma and its predecessors are no strangers to restructuring proceedings. The first CCAA proceedings were commenced in 1991. A second CCAA restructuring took place in 2001. By 2014 Algoma was in further need of a cash injection and an attempt was made to address the problem through a solvent restructuring under the *Canada Business Corporations Act*.[2] This resulted in a complex transaction in the course of which GIP advanced $150 million which was then paid to Algoma as the major portion of the purchase price in what is referred to by the parties as the "Port Transaction". That overall transaction involved four basic components:

> (i) the sale by Algoma to Portco of the port facilities at Sault Ste. Marie, Ontario;

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[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
[2] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

(ii) a lease of the port lands to Portco for a period of 50 years;

(iii) a Cargo Handling Agreement, whereby Algoma was to pay Portco US$36 million annually, in monthly instalments, for use of the port and cargo-handling facilities; and

(iv) a Shared Services Agreement that required Portco to pay Algoma US$11 million annually, in monthly instalments, in exchange for Algoma providing operation and maintenance services at the port.

[3] At the end of the day, Algoma received a total purchase price of US$171.5 million. Of that amount, US$150 million was advanced by GIP to Portco which, in turn, used it to pay Algoma. Portco paid a small further amount itself and the balance of the purchase price was paid by way of a US$19.8 million promissory note from Portco to Algoma (the “Note”). Portco’s obligation under the Note was subsequently assumed by Essar Global Fund Ltd. (“EGFL”), the indirect parent company of both Portco and Algoma. The structure of the Cargo Handling Agreement and the Shared Services Agreement was designed to provide Portco with a net stream of payments that would enable it to service the GIP loan.

[4] Unfortunately, the restructuring was unsuccessful. Algoma filed for protection under the CCAA in November, 2015. DIP lenders provided financing during the proceedings.

[5] Under the Initial CCAA Order, Algoma was required to pay post-filing expenses as set out in a cash-flow budget approved by the DIP lenders, and for a period of time after the filing Algoma continued to make regular payments under the Cargo Handling Agreement. These payments stopped in May, 2016, however, when the DIP lenders refused to approve cash-flow budgets providing for those payments so long as the $19.8 million Note remained outstanding.

[6] This triggered proceedings that have ultimately led to these motions for leave to appeal.

The First Motion

[7] In June, 2016, Portco brought a motion – supported by GIP – for an order requiring Algoma to resume payments under the Cargo Handling Agreement, relying on the provisions of s. 11.01(a) of the CCAA as the basis for the order. Section 11.01(a) permits a company under CCAA protection to make payment for post-filing goods and services provided to it. Portco argued it was providing post-filing services under the Cargo Handling Agreement.

[8] There was also an issue raised by the Monitor and the DIP lenders as to whether there was a right, on the part of Algoma, to set off payments due under the Cargo Handling Agreement against the amount outstanding on the Note.

[9] The CCAA Judge dismissed the motion. He held that s. 11.01(a) was not applicable because, in fact, it was Algoma and its employees, and not Portco, who were providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. He concluded that it was premature to deal with the set-off issue. In dismissing the motion, he said that the dismissal was "without prejudice to it being brought back on after the set-off issue [had been] determined".

[10] No steps were taken to seek leave to appeal from this decision.

<u>The Second Motion</u>

[11] Not to be deterred, however, Portco – again supported by GIP – brought a second motion in October, 2016, seeking the same relief. Again Portco and GIP relied on s. 11.01(a). But this time, they presented a different argument. The Cargo Handling Agreement was in reality a licensing agreement, they submitted, and Algoma was not entitled to enter onto the premises without paying under the license.

[12] The CCAA Judge dismissed the motion again. First, he held that the issue of s. 11.01(a)'s applicability had been decided on the previous motion – from

which no leave to appeal had been sought – and could not be re-litigated under the guise of a different argument which could have been raised on the First Motion. In holding that the s. 11.01(a) issue had already been finally decided against Portco, and with respect to the "without prejudice" aspect of the first order, he was very clear:[3]

> I must say that when I stated that the first Portco motion was dismissed without prejudice to it being brought back on after the set-off issue was determined, it was not intended to enable Portco to raise anew those issues that had been decided against it. It was intended to permit Portco to come back if it succeeded on the set-off point or the issues raised by the Monitor. Portco however continues to raise issues already decided against it.

[13] Secondly, and in any event, the CCAA Judge rejected the licensing argument. He further concluded that even if Portco were free to raise the s. 11.01(a) issue – which it was not free to do – he would not have ordered payment of amounts due under the Cargo Handling Agreement at that stage in the face of related oppression remedy proceedings involving the Port Transaction that were pending before him as well.

[14] No steps were taken to seek leave to appeal from this second order.

The Oppression Proceedings

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[3] 2016 ONSC 6459, at para. 9.

[15] In September, 2016, the CCAA Judge had authorized the Monitor to commence oppression remedy proceedings on behalf of Algoma with regard to the Port Transaction. EGFL (the obligor under the Note) asserted a counterclaim in those proceedings, arguing that the amounts owing to Portco under the Cargo Handling Agreement could be set off against the $19.8 million Note and that that amount had then been exceeded, with the result that payments should resume under the Cargo Handling Agreement.

[16] The oppression remedy proceedings were heard by Newbould J. as well, in early 2017. On March 6, 2017, he released his reasons. He found the Port Transaction was oppressive and unfairly disregarded the interests of Algoma's trade creditors, employees, pensioners and retirees, but did not set aside the transaction. Instead, he ordered that the transaction documents be amended in various ways, the particulars of which are not important to the leave to appeal issues. He declined to deal with the set-off issue in those proceedings, however, concluding instead that "the appropriate place to make this claim is in the CCAA proceedings."

The Third Motion

[17] Very quickly – in April, 2017 – the s. 11.01(a) issue was brought back again, this time by way of a GIF motion, supported by Portco. In an April 28th endorsement, Newbould J. once again dismissed the motion. This time he said:[4]

> This is the third time that this argument has been advanced. It was unsuccessfully argued by Portco on two previous motions requesting orders that the payments under the Cargo Handling Agreement resume. On the first occasion, it was argued that Portco was providing services to Algoma on the Port facilities and that section 11.01(a) required immediate payment. I held that Portco was not providing the services but rather Algoma personnel who were doing all of the work. On the second occasion Portco added the argument that Portco was licensing the Port facilities to Algoma and that the payments under the Cargo Handling Agreement were for that purpose and therefore had to be made. I held that it was not open to Portco to make that new argument but that in any event I did not accept it…
>
> Portco adds another argument why the access of Algoma to the Port facilities is a licence. Again, that should have been argued in the first go-around on the point. It says that under the Cargo Handling Agreement, Algoma can enter the property only if it makes payment under that agreement. I do not agree. What the Cargo Handling Agreement provides in section 3.3 is that notwithstanding that Algoma's access to the Port is non-exclusive, Algoma shall have priority access so long as it makes its payments due under the Cargo Handling Agreement. That in no way can be construed to be a licence. That section recognizes Algoma's right to access to the Port facilities as provided for in the Lease.
>
> In short, even if it were permissible for Portco or GIP to again raise section 11.01(a), which it is not, I cannot find

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[4] 2017 ONSC 2585, at paras. 10-12.

> that there was a licence relationship between Algoma and Portco regarding the Port assets.

[18] It is this order that is the subject of these motions for leave to appeal.

Analysis

[19] Leave to appeal is to be granted sparingly in CCAA proceedings. This is because of the "real time" dynamic of CCAA matters and the "generally discretionary character underlying many of the orders made by supervising judges in such proceedings" and the deference to be accorded to those decisions. In considering whether to grant leave, the court will consider whether:

> (i) the proposed appeal is *prima facie* meritorious or frivolous;
>
> (ii) the point on the proposed appeal is of significance to the practice;
>
> (iii) the point on the proposed appeal is of significance to the proceeding; and
>
> (iv) whether the proposed appeal will unduly hinder the progress of the action.

See *Re Stelco Inc.*, [2005] O.J. No. 4883 (C.A.), at paras. 15-20; *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

[20] In our view, the leave motions fail on the first two of these factors.

The Merits

[21] GIP and Portco propose identical questions to be determined on the appeal if leave is granted:

> (i) Did the motion judge err in concluding that [GIP and Portco were] precluded from arguing that Algoma is required by section 11.01(a) of the CCAA to make payments under the Cargo Handling Agreement?
>
> (ii) Did the motion judge err in his interpretation of section 11.01(a) of the CCAA?

[22] The application and interpretation of s. 11.01(a) of the CCAA are precisely the issues that were addressed by the motion judge in the First Motion, and in the Second Motion (in addition to whether those issues were *res judicata*), and in the Third Motion (which led to the order from which leave to appeal is now sought). In spite of the moving parties' attempts on the Second and Third Motions to wrap their arguments in different packaging, the issues remained the same: the interpretation of s. 11.01(a) and its application in the particular circumstances of this CCAA proceeding.

[23] Those issues have now been determined adversely against the moving parties three times. No steps were taken to obtain leave to appeal from the motion judge's orders on the First Motion or the Second Motion. We are not persuaded there is *prima facie* merit in the attempt now to seek leave to appeal from a third unsuccessful attempt to invoke s. 11.01(a) of the CCAA.

[24] The moving parties argue that the landscape has changed since Newbould J.'s determination of the oppression remedy proceedings.[5] They submit that, in declining to deal with the set-off issue in those proceedings and determining that "the appropriate place to make [that] claim is in the CCAA proceedings", he opened the door for a re-consideration of the s. 11.01(a) issue. The record does not support that submission.

[25] Newbould J. dealt with the set-off counterclaim in one paragraph at the end of his reasons in the oppression remedy proceedings. He said:[6]

> Portco has made a counterclaim for a declaration that the $19.8 million note has been paid in full as a result of set-off and for payments beyond that amount said to be owing under the Cargo Handling Agreement. When and how the set-off occurred is not in the record and whether that could be affected by the stay of proceedings in the CCAA has not been argued. Nor are the amounts said to be owing set out with any precision. In my view the appropriate place to make this claim is in the CCAA proceedings and I do not intend to deal with it in this counterclaim.

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[5] An appeal from that order is scheduled to be heard in this Court in August of this year.
[6] 2017 ONSC 1366, at para. 147.

[26] We see nothing in this disposition to suggest that Newbould J. had somehow signalled that he was re-opening – even if he were entitled to do so – the s. 11.01(a) issues, which he had clearly determined against the moving parties' interests on the First and Second Motions. Nor is there any indication in his reasons provided on the Third Motion – which was heard after his decision in the oppression remedy proceedings had been released – that he intended that to be the case. Indeed, as stated in the passage of his reasons on the Third Motion set out above, quite the opposite was the case.

[27] The same parties have now joined issue on the same legal questions (the interpretation and application of s. 11.01(a) in the circumstances of the CCAA proceedings) three times. The CCAA Judge, presiding in a court of competent jurisdiction, had finally determined those legal questions twice before the Third Motion was launched, and there were no attempts to appeal. All the relevant factors for the application of issue estoppel are present and the decisions are binding on the moving parties, absent a successful appeal: see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at para. 25; *Diamond v. Western Realty Co.*, [1924] S.C.R. 308, at para. 35. They deprive the proposed appeal of the merit required for leave to appeal to be granted.

[28] The moving parties raise an additional argument, however. They submit that, even if the elements of issue estoppel have been established, the court

retains a residual discretion to decline to apply the doctrine, and that the CCAA Judge failed to take that factor into consideration.

[29] We disagree. In concluding that payments to Portco under the Cargo Handling Agreement should not resume, the CCAA Judge considered and weighed the interests of all stakeholders involved in the CCAA proceeding – including the fact that to allow the payments to resume would be to permit a breach of the DIP financing then in place, thereby jeopardizing that financing – and concluded that it would not be appropriate in the circumstances to lift the CCAA stay in respect of those payments. In doing so, he was exercising the same discretion that would apply to the estoppel issue. We see no error that would justify granting leave to appeal in the exercise of that discretion.

Significance to the Practice

[30] We accept that the s. 11.01(a) issues have considerable significance for this particular CCAA proceeding, but we are not persuaded that they have significance for the practice in the circumstances of this proceeding.

[31] Whether s. 11.01(a) is available to benefit the moving parties, thereby giving them an advantage over other stakeholders in terms of the servicing of the GIP loan, depends upon the interpretation and application of the particular agreements that underlie the Port Transaction and upon how they are being carried out in practice. Thus, the proposed appeals arise out of the unique and

inter-related agreements that formed the Port Transaction. We see little of assistance to the general practice of insolvency law that would arise in the proposed appeals.

Undue Hindrance of the Proceedings

[32] We do not think that granting leave to appeal would unduly hinder the progress of the CCAA proceedings, given that the appeals could be heard together with the pending appeal in the oppression remedy proceedings in August. However, in view of the foregoing conclusions, this does not assist the moving parties in the circumstances.

Disposition

[33] For the reasons set out above, the motions for leave to appeal are dismissed.

[34] The Monitor and Algoma are each entitled to their costs of the leave motions, fixed in the amount of $3,000, as against the moving parties, jointly and severally.

"E.A. Cronk J.A."
"R.A. Blair J.A."
"K. van Rensburg J.A."

TAB 3

In the Court of Appeal of Alberta

Citation: Hurricane Hydrocarbons Ltd. v. Komarnicki, 2007 ABCA 361

Date: 20071119
Docket: 0701-0086-AC
Registry: Calgary

Between: **Action No.: 0101-04991**

Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC

Applicants (Respondents/Plaintiffs)

\- and -

John J. Komarnicki

Respondent (Appellant/Defendant)

Between: **Action No.: 0101-5441**

Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC

Applicants (Respondents/Plaintiffs)

\- and -

John J. Komarnicki

Respondent (Appellant/Defendant)

Between: **Action No.: 0001-16208**

John J. Komarnicki

Respondent (Appellant/Defendant)

- and -

Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC

Applicants (Respondents/Plaintiffs)

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Madam Justice Constance Hunt
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Application to Strike the Appeal

Memorandum of Judgment

The Court:

[1] The applicants, Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC (collectively, the Hurricane companies), apply to strike the appeal of the respondent, Komarnicki, on the basis that he failed to obtain leave pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA). The application is granted and the appeal is struck.

Factual background

[2] The applicants, Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc., received creditor protection under the CCAA on May 14, 1999. The respondent submitted a notice of claim in the CCAA proceedings alleging wrongful dismissal from employment with Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc., which they disputed.

[3] No determination was made on the merits of the disputed claim prior to February 28, 2000 when the Plan of Compromise and Arrangement (Plan) received court approval. The Plan provided that any disputed claim not resolved by March 31, 2005 was deemed to be forever extinguished, terminated and cancelled.

[4] In October 2000, the respondent commenced a claim in the Court of Queen's Bench seeking damages for wrongful dismissal from Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc.

[5] On February 28, 2001, the Hurricane companies commenced an action in the Court of Queen's Bench seeking indemnity from the respondent for costs or damages resulting from the Hurricane companies' defence of various claims (Hurricane #1 action). Because counsel for the Hurricane companies did not immediately receive a filed copy of the statement of claim, out of an abundance of caution to avoid expiry of a limitation period, a second identical statement of claim was filed on March 1, 2001 (Hurricane #2 action). The Hurricane #1 action was served in January 2002 and the Hurricane #2 action was never served. The Hurricane #1 and #2 actions were not claims within the CCAA proceedings.

[6] On August 9, 2002, Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc. filed a statement of defence to the respondent's wrongful dismissal action. On August 14, 2002, the respondent filed a statement of defence to the Hurricane #1 action.

[7] The March 31, 2005 drop dead date passed without resolution of the respondent's wrongful dismissal claim.

[8] On March 22, 2006, almost one year past the drop dead date, the respondent filed a statement of defence and counterclaim in the Hurricane #2 action. The counterclaim is virtually identical to the wrongful dismissal action. On October 13, 2006, the respondent applied to the Court of Queen's Bench for a declaration that he was entitled to take the next step in his wrongful dismissal action and counterclaim in Hurricane #2 action, and sought to add to the Hurricane #1 action a counterclaim, which was, again, virtually identical to the wrongful dismissal action and the counterclaim in the Hurricane #2 action. The Hurricane companies applied to strike the wrongful dismissal action and the counterclaim in Hurricane #2 action, and opposed the addition of a counterclaim in the Hurricane #1 action.

[9] The chambers judge dismissed the wrongful dismissal action, struck the counterclaim and refused to allow the addition of a counterclaim to the Hurricane #1 action.

[10] The respondent filed a notice of appeal in this Court and was advised by the Deputy Registrar that leave pursuant to section 13 of the CCAA might be required. The Hurricane companies brought this motion to strike the appeal.

Issue

[11] Does section 13 of the CCAA apply to the respondent's wrongful dismissal action and counterclaim?

Relevant legislation

[12] Section 13 of the CCAA provides:

> Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Decision

[13] The requirement for leave furthers the objects and purpose of the CCAA which has been described by Farley J. in *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 at para.31 (Ont.Gen. Div.) as follows:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court.

[14] To further the goal of enabling a company to deal with creditors in order to continue to carry on business, the CCAA proceedings seek to resolve matters and obtain finality without undue delay. A drop dead date is one means of bringing disputed claims to an end and allowing a company to move forward. The requirement for leave to appeal similarly reinforces the finality of orders made under a CCAA proceeding and prevents continuing litigation where there are no serious and arguable grounds of significance to the parties. As noted by numerous courts, delay and uncertainty caused by appeals is a matter of concern in a CCAA proceeding: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 62, [1999] A.J. No. 185 at para. 22, citing *Re Pacific National Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.).

[15] The scope of CCAA proceedings has been interpreted expansively by the courts and may even include non-judicial proceedings because the objective is to include proceedings that may work against the interests of creditors and render impossible the achievement of effective arrangements: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179, 237 A.R. 326 at para. 31.

[16] Before us, the respondent conceded that the wrongful dismissal action was a "claim" in the CCAA proceeding and that leave is required. However, the respondent says that the counterclaims ought not to be considered "claims" because they were filed in the Hurricane #1 and #2 actions which were not CCAA proceedings. The respondent submits that it would be unfair to permit Hurricane to pursue its actions, but to prevent him from advancing his counterclaim.

[17] We conclude that the decision of the chambers judge is an order or decision made under the CCAA because its operation affects a claim submitted in the CCAA proceedings. The respondent submitted a claim in the CCAA for wrongful dismissal. His claim was disputed; it was not excluded from the Plan, was not resolved before the drop dead date and no extension of that deadline was obtained. The Court of Queen's Bench action and the counterclaims are all based on the same alleged wrongful dismissal that the respondent claimed in the CCAA proceedings. The chambers judge recognized that the respondent was attempting to prosecute his wrongful dismissal claim when it has already been deemed to be extinguished, terminated and cancelled by the terms of the Plan.

[18] It follows that the respondent must obtain leave to appeal the decision of the chambers judge. There was no proper application for leave before us and we make no decision in that regard. Accordingly, the application is granted and the appeal is struck.

Application heard on November 15, 2007

Memorandum filed at Calgary, Alberta
this 19th day of November, 2007

McFadyen J.A.

Hunt J.A.

Rowbotham J.A.

Appearances:

R. F. Steele
for the Applicants

L. W. Scott, Q.C.
for the Respondent

TAB 4

COURT OF APPEAL FOR ONTARIO

CITATION: Essar Steel Algoma Inc. (Re) 2016 ONCA 138
DATE: 20160219
DOCKET: M46093 & M46104

Brown J.A. (In Chambers)

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA

Markus Koehnen and Jeffrey Levine, for the moving parties/responding parties by way of cross-motion, The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company

Eliot Kolers and Maria Konyukhova, for the responding parties/moving parties by way of cross-motion, Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA

Nicholas Kluge and Delna Contractor, for the Monitor, Ernst & Young Inc.

Heard: February 16, 2016

ENDORSEMENT

I. THE MOTIONS

[1] Essar Steel Algoma Inc., and certain related companies (collectively, "Essar"), are under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*"). The Cleveland-Cliffs Iron Company, Cliffs Mining Company, and Northshore Mining Company (collectively, "Cliffs"), move for directions as to whether they require leave to appeal from the order of the *CCAA* judge, Newbould J., dated January 25, 2016 (the "Order"). Whether leave to appeal is required or not, Cliffs seeks a stay of the contract dispute motion Essar has brought against Cliffs before the *CCAA* judge pending Cliffs' exercise of its appeal rights in respect of the Order.

[2] Essar brings a cross-motion for an order expediting the hearing of Cliffs' motion for leave to appeal, or its appeal.

[3] At the hearing of the motions, I released an endorsement (the "Endorsement") in which I concluded that Cliffs required leave to appeal the Order and its leave to appeal motion should be expedited. I also granted a stay of Essar's contract dispute motion pending the determination of Cliffs' leave to appeal motion. These are my reasons for so ordering.

II. BACKGROUND

[4] Essar manufactures steel in Sault Ste. Marie, Ontario. Iron ore pellets are a key input in its manufacturing process. In 2002, Essar's predecessor entered

into a long-term iron ore pellet supply contract with Cliffs (the "Contract"). The Contract obliged Essar to purchase iron ore pellets exclusively from Cliffs until 2016 and to purchase a portion of its pellets from Cliffs from 2017 until 2024.

[5] In recent years the business relationship between Essar and Cliffs has been a rocky one, with disputes arising over the quantities of iron ore pellets Essar was obliged to order and take up under the Contract.

[6] In January 2015, Cliffs filed a complaint in the United States District Court for the Northern District of Ohio (Eastern District) (the "Ohio Court") alleging that Essar had breached the Contract by failing to take timely delivery of iron ore pellets in the requisite amounts. In late July 2015, Cliffs brought a motion for partial summary judgment. The motion was decided on October 7, 2015. The Ohio Court dismissed Cliffs' motion for summary judgment for breach of contract relating to Essar's 2014 quantity nomination, but granted its motion to dismiss Essar's counterclaim with respect to moisture content. A trial of all the issues in the Ohio litigation was scheduled to commence on December 7, 2015.

[7] On October 5, 2015, Cliffs terminated the Contract alleging multiple material breaches by Essar.

[8] On November 9, 2015, Essar sought and obtained an initial order under the *CCAA*. On November 10, 2015, Essar's foreign representative sought and obtained orders under Chapter 15 of the U.S. Bankruptcy Code, 11 U.S.C (2010)

recognizing and enforcing in the United States the orders granted in the *CCAA* proceeding, which was recognized as the foreign main proceeding.

[9] On November 11, 2015, Essar filed with the Ohio Court a notice that the Ohio litigation was automatically stayed in respect of Essar. On December 3, 2015, the Ohio Court dismissed Cliffs' action without prejudice. As a result, the scheduled trial of Cliffs' action did not proceed. Cliffs has moved to vacate that dismissal, but no decision has been rendered on its motion.

[10] In mid-November, Essar served a motion under s. 11.4 of the *CCAA* seeking an order declaring Cliffs a critical supplier; the motion did not proceed because Essar was able to find short-term alternate suppliers.

III. PROCEEDINGS UNDER APPEAL

[11] On December 8, 2015, Essar moved in the *CCAA* proceeding for a declaration that Cliffs' purported termination of the Contract was not effective and Cliffs must supply Essar with iron ore pellets at the Contract price (the "Contract Dispute Motion"). Essar also sought orders directing Cliffs to comply with the Contract and to pay damages resulting from the purported termination of the Contract.

[12] On December 23, 2015, Cliffs served a motion seeking an order dismissing Essar's Contract Dispute Motion on the ground that the Ontario court

lacks jurisdiction to grant the relief sought or, alternatively, Ontario is not the convenient forum in which to adjudicate the dispute.

[13] Cliffs' motion was heard on January 14, 2015 by Newbould J., the judge conducting the *CCAA* proceedings in respect of Essar. The *CCAA* judge dismissed Cliffs' motion in an Order and Endorsement dated January 25, 2016. He held that the Ontario court has jurisdiction over Essar's Contract Dispute Motion and Cliffs had not demonstrated that a clearly more appropriate forum than Ontario existed in which to adjudicate the dispute.

IV. ISSUES

[14] Cliffs moves in this court for directions and for a stay of the Order pending Cliff's exercise of its appeal rights. Cliffs argues that it is not required to obtain leave to appeal the Order. Alternatively, Cliffs submits that in the event "leave is granted from a portion of the decision of" the *CCAA* judge, that appeal should be consolidated "with the other aspects of the appeal which Cliffs has as of right."

[15] Essar has brought a cross-motion seeking an order expediting the hearing of Cliffs' leave to appeal motion, if required, or the hearing of the appeal.

V. WHETHER CLIFFS REQUIRES LEAVE TO APPEAL THE ORDER

[16] Section 13 of the *CCAA* requires that "any person dissatisfied with an order or a decision made under this Act" obtain leave to appeal. The sole issue

on Cliffs' motion for directions is whether the Order of the *CCAA* judge was "made under" the *CCAA.*

[17] The Order resulted from a motion brought in the Essar *CCAA* proceeding, before the judge seized with hearing all matters in the Essar *CCAA* proceeding, with the judge explaining, in his reasons, how he was exercising his powers as a *CCAA* judge. The Order bears a style of cause stating that it was made "In the Matter of the *Companies' Creditors Arrangement Act*" in respect of a "Plan of Compromise or Arrangement of Essar Steel Algoma Inc." and other companies.

A. Positions of the Parties

[18] Nevertheless, Cliffs submits that the Order was not "made under" the *CCAA*, for two reasons. First, the fact that an order is made "in" a *CCAA* proceeding does not necessarily mean that it was "made under" the *CCAA*. Second, an order is not "made under" the *CCAA* if it is one that "could have properly been made in a normal civil action without any regard to the *CCAA* or the *CCAA* proceeding." According to Cliffs, to constitute an order "made under" the *CCAA*, the order must rely upon or be grounded in a specific section of the *CCAA*. In support of its submissions, Cliffs relies on decisions made by Tysoe J.A. in *Sandvik Mining & Construction Canada Inc. v. Redcorp Ventures Ltd.*, 2011 BCCA 333, 94 C.B.R. (5th) 53, and O'Brien J.A. in *Monarch Land Ltd. v.*

Sanderson of Fish Creek (Calgary) Developments Ltd., 2014 ABCA 143, 575 A.R. 46.

[19] Essar submits that *CCAA* proceedings have a wide scope. Consequently, if *CCAA* considerations inform the decision and exercise of discretion of the judge, the decision can fairly be said to be "made under" the *CCAA*. Such considerations informed the making of the Order, so leave to appeal is required.

B. Analysis

The Purpose of s. 13 of the *CCAA*

[20] The analysis must start with an examination of the legislative purpose underlying the leave requirement contained in s. 13 of the *CCAA*. In *Hurricane Hydrocarbons Ltd. v. Komarnicki*, 2007 ABCA 361, 425 A.R. 182, the Alberta Court of Appeal observed that the requirement for leave to appeal furthers the objects and purpose of the *CCAA*. At paras. 14 and 15, the court stated:

> To further the goal of enabling a company to deal with creditors in order to continue to carry on business, the CCAA proceedings seek to resolve matters and obtain finality without undue delay…The requirement for leave to appeal similarly reinforces the finality of orders made under a CCAA proceeding and prevents continuing litigation where there are no serious and arguable grounds of significance to the parties. As noted by numerous courts, delay and uncertainty caused by appeals is a matter of concern in a CCAA proceeding: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 62, [1999] A.J. No. 185 at para. 22, citing *Re Pacific National Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.).

> The scope of CCAA proceedings has been interpreted expansively by the courts and may even include non-judicial proceedings because the objective is to include proceedings that may work against the interests of creditors and render impossible the achievement of effective arrangements: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179, 237 A.R. 326 at para. 31.

[21] More recently, in *Re AbitibiBowater Inc.*, 2010 QCCA 965, 68 C.B.R. (5th) 57, at para. 26, Chamberland J.A. described the purpose of the leave to appeal requirement in s. 13 of the *CCAA*:

> This requirement stems from a clear intention of Parliament to restrict appeal rights having regard to the nature and object of CCAA proceedings; an appeal court should be cautious about intervening in the CCAA process. This is not to say that leave will never be granted but it should be so only "sparingly" (*In Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]), at 272).

[22] That legislative purpose for the leave requirement supports an expansive interpretation of the term "made under" the Act in s. 13: *Re Smoky River Coal Ltd.*, 1999 ABCA 62, 237 A.R. 83, at para. 20. Such an expansive interpretation was adopted by Paperny J.A. in *Re Concrete Equities Inc.*, 2012 ABCA 91, [2012] A.W.L.D. 2836, at para. 16, where she held that when "*CCAA* considerations informed the decision of and the exercise of discretion by the chambers judge … it can be fairly said that the order was made 'under' the *CCAA* in accordance with section 13 of the Act."

The Decisions in *Sandvik Mining* and *Monarch Lands*

[23] Cliffs submits that the interpretation given to "made under" the Act in *Concrete Equities* should be limited to the facts of that case, where there was no dispute that the notices of disallowance dealt with by the chambers judge resulted from a claims process ordered under the *CCAA*. Cliffs argues that the *Sandvik Mining* and *Monarch Lands* decisions employed different interpretations of "made under" the Act which are more appropriate for the present case.

[24] I agree that both the *Sandvik Mining* and *Monarch Lands* decisions offer guidance on the meaning of "made under" the *CCAA*, but I do not accept Cliffs' submission that the principles emerging from those cases would lead to the conclusion that Cliffs is not required to seek leave to appeal from the Order. Both cases involved exceptional fact situations that lay beyond the boundaries of the usual *CCAA* proceeding.

[25] Dealing first with the *Sandvik Mining* decision, Tysoe J.A. concluded that the decision of the judge below regarding the ownership of some equipment was not an order "made under" the *CCAA*, notwithstanding that the order resulted from an application styled as brought in a *CCAA* proceeding involving Redcorp and related companies. Tysoe J.A. wrote, at para. 9: "it does not follow from the fact that the order was made in the *CCAA* proceeding that it was necessarily an order made under the *CCAA.*" He continued by observing the judge below "did

not rely on any provision of the *CCAA*, and the determination of the issue in question was not incidental to any order made under the *CCAA*." Tysoe J.A. went on to state, at para. 11:

> It was a decision made under general law and the *Sale of Goods Act*, and while the decision may have been made within the *CCAA* proceeding as a matter of convenience, it was a decision that was made independently of the provisions of the *CCAA* and the *BIA* and of any order previously made under the *CCAA*.

[26] Those statements must be understood in the specific factual context in which they were made. In *Sandvik Mining*, the debtor companies had secured an initial order under the *CCAA* in March 2009. Two months later, a judge lifted the stay of proceedings against certain creditors, appointed an interim receiver over some of the debtors' assets, and discharged the monitor from most of its duties. A month after that, the debtors were assigned into bankruptcy. Almost two years later, the receiver brought its application seeking a declaration regarding the ownership of the equipment and styled the application as one brought in the *CCAA* proceeding. It was against that background that Tysoe J.A. stated, at para. 8:

> In my opinion, the order or decision of [the judge below] was not made under the *CCAA*. The efforts to reorganize Redcorp had come to an end, and there was no ongoing attempt to have Redcorp file a plan of arrangement. [The receiver] simply filed its application in the *CCAA* proceeding as a matter of convenience. The fact that [the receiver] was appointed

> in the *CCAA* proceeding did not require the application to be filed in that proceeding. [The receiver] could have, and more properly should have, commenced a separate proceeding. [The receiver] was not appointed as interim receiver or receiver pursuant to the *CCAA*, but rather pursuant to the *BIA* and the *Law and Equity Act*, R.S.B.C. 1996, c. 253 (while the order lifting the stay undoubtedly had to be made within the *CCAA* proceeding, there is a question in my mind about the appropriateness of appointing receivers within *CCAA* proceedings after the reorganization attempt has failed).

[27] *Sandvik Mining*, therefore, involved a case where the *CCAA* proceedings had run their course and failed, but the *CCAA* court file had not yet been closed. The receiver, "as a matter of convenience", took advantage of that state of affairs to bring its application in the *CCAA* court file. The message from the *Sandvik Mining* decision is that where the *CCAA* proceedings have come to an end for all intents and purposes, an order made several years later in a dormant *CCAA* court file may well not be an order "made under" the *CCAA*.

[28] Cliffs also relies on the decision in *Monarch Land*, which considered whether an order resulting from a trial of issues was "made under" the *CCAA*, and therefore required leave to appeal. Again, the context of that case explains its result.

[29] Sanderson was one of a group of companies that obtained an initial order under the *CCAA*. In those proceedings, a trial of issues was directed. Prior to the trial, the list of issues was expanded. As a result, the trial judge considered two

issues: (i) an accounting for sale proceeds as between two of the secured creditors of the debtors; and (ii) the ownership of parking stalls pursuant to an agreement between the debtor and a secured creditor.

[30] In respect of the first part of the trial order – dealing with the accounting between two secured creditors – O'Brien J.A. stated, at para. 11:

> It is common ground that the accounting issue arises out of a Postponement and Priority Agreement, a separate and distinct agreement between CMI and Monarch. Monarch concedes that this determination, including the limitations issue, "could properly have been made in a normal civil action between Monarch and CMI without any regard to the CCAA", and accordingly that no leave is required with respect to that part of the judgment.

[31] However, O'Brien J.A. concluded that the part of the trial order disposing of the second issue concerning the ownership of the parking stalls was "made under" the *CCAA*. Distinguishing the case from *Sandvik Mining*, he wrote, at paras. 7 and 8:

> Here the order of Horner J., the supervising judge in the CCAA proceedings, granted "a trial of an issue ... to determine whether the Purchase and Sale Agreement of December 1, 2010, between [Sanderson] and [Monarch] included parking stalls for the development of phase 3 of the Sanderson project". She lifted the stay in the CCAA proceedings specifically for that purpose. It is common ground that the subject Purchase and Sale Agreement was approved by an order made in the CCAA proceedings…
>
> In my view, it cannot be said, as it was in *Sandvik*, that "the determination of the issue in question was not

> incidental to any order made in the CCAA". To the contrary, the issue Horner J directed to trial required the interpretation of an agreement that the court had expressly approved in the CCAA proceedings, and involved the need to interpret the order approving the sale. Both interpretations had a potential impact upon other Sanderson's other creditors in addition to CMI and Monarch.

[32] Accordingly, *Sandvik Mining* and *Monarch Land* involved circumstances which lay beyond the boundaries of the usual *CCAA* proceeding: in *Sandvik Mining*, the *CCAA* proceeding had run its course long before the order was made, and in *Monarch Land* an issue between two secured creditors was tacked on, as a matter of procedural convenience, to a trial of an issue in the *CCAA* proceeding. Consequently, I do not think that *Sandvik Mining's* distinction between an order "made in" a *CCAA* proceeding and one "made under" the *CCAA* or *Monarch Land's* reference to orders that "could properly have been made in a normal civil action" offers general guidance for considering whether leave to appeal is required under s. 13 of the *CCAA*.

A Purpose-Focused Approach to s. 13 of the *CCAA*

[33] The inquiry, instead, should be purpose-focused. When asked to determine whether an order requires leave to appeal under s. 13 of the *CCAA*, an appellate court should ascertain whether the order was made in a *CCAA* proceeding in which the judge was exercising his or her discretion in furtherance of the purposes of the *CCAA* by supervising an attempt to reorganize the

financial affairs of the debtor company, either by way of plan of arrangement or compromise, sale, or liquidation: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para. 59. If the order resulted from such an exercise of judicial decision-making, then it is an order "made under" the *CCAA* for purposes of s. 13.

[34] To aid that purpose-focused inquiry, the case law has identified some indicia about when an order is "made under" the *CCAA*. In *Sandvik Mining*, Tysoe J.A. stated a court should ask whether the order was "necessarily incidental to the proceedings under the *CCAA*" or "incidental to any order made under the *CCAA*": at paras. 9 and 10. In *Monarch Land*, O'Brien J.A. looked at whether the order required the interpretation of a previous order made in the *CCAA* proceeding or involved an issue that impacted on the restructuring organization of the insolvent companies: at paras. 8 and 15. As mentioned, in *Concrete Equities*, Paperny J.A. stated that s. 13 of the *CCAA* would apply if "*CCAA* considerations informed the decision of and the exercise of discretion by the chambers judge" or "if a claim is being prosecuted by virtue of or as a result of the *CCAA*": at paras. 16 and 17. Finally, additional indicia were identified by this court in *Re Hemosol Corp.*, 2007 ONCA 124, at para. 3:

> In our view, the proceeding before the motion judge and the decision under appeal were conducted and rendered under the CCAA within the meaning of s. 13 and therefore leave to appeal is required. The notice of motion and the reasons of the motion judge explicitly

> state that the matter is a CCAA proceeding. Directions were sought, amongst other things, to determine rights and requirements of voting in relation to the proposed plan of arrangement. There was no independent originating process to justify any other conclusion. The order determined rights arising under an agreement that arose out of and that was related entirely to the CCAA proceeding.

Application of the Purpose-Focused Approach

[35] Applying those principles to the present case, I conclude that the Order was "made under" the *CCAA*. It was made by the judge supervising an active *CCAA* proceeding in furtherance of the purposes of the *CCAA*. The evidence before the *CCAA* judge disclosed that what, if any, rights Essar possesses under the Contract, which Cliffs purported to terminate on October 5, 2015, is an issue in the *CCAA* proceeding. In its Sixth Report dated January 11, 2016, the Monitor stated that Essar is preparing a business plan that will form part of the information made available to potential purchasers or investors in its Sale and Investment Solicitation Process ("SISP") recently approved under the *CCAA*. The Monitor reported: "A key component of the Business Plan is Algoma's raw material supply strategy, and in particular its strategy for the supply of iron ore pellets… In canvassing the iron ore pellet market and finalizing its supply strategy, Algoma needs certainty concerning the status of the Cliffs Contract." Based on that and other evidence, the *CCAA* judge concluded, at para. 31, that the "claim of Essar Algoma against Cliffs is an asset of the applicants to be dealt

with in this Court." See also, *Re Montréal, Maine & Atlantic Canada Co.,* 2013 QCCS 5194 (Que. S.C.), at paras. 17 and 19.

[36] Cliffs advances two additional reasons about why the Order was not "made under" the *CCAA*. I do not accept either.

[37] First, Cliffs submits that the *CCAA* judge did not, on the face of his reasons, rely on a specific section of the *CCAA* to assume jurisdiction. In *Sandvik Mining*, Tysoe J.A. commented that the judge below had not relied on any provision of the *CCAA*. However, it does not follow, as Cliffs submits, that an order is not "made under" the *CCAA* unless the judge expressly relies on a section of the Act in granting the order. In *Century Services,* the Supreme Court of Canada recognized that a judge supervising a *CCAA* proceeding will draw on both statutory authority under the *CCAA* and the court's residual authority under its inherent and equitable jurisdiction in order to decide specific issues that arise during the *CCAA* proceeding. Deschamps J. stated, at para. 65:

> I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding…

[38] In any event, the *CCAA* judge expressly relied on s. 11 of the *CCAA* in his decision on jurisdiction. He stated, at para. 28:

> The CCAA provides in section 11 that a court has jurisdiction to make any order "that it considers appropriate in the circumstances". A CCAA court clearly has the power as per *Century Services* to make the procedural orders of the kind sought by Essar Algoma in this case. See also *Smokey River Coal Ltd., Re,* (1999), 12 C.B.R. (4th) 94 (Alta. C. A.) at paras. 60 and 67 per Hunt J.A. in which he held that a judge has the discretion under the CCAA to permit issues to be decided in another forum (in that case arbitration) but is under no obligation to do so. [Footnotes omitted.]

[39] Whether or not the *CCAA* judge was correct at law in reaching that conclusion is a matter for consideration by the leave to appeal panel, but is not relevant to the inquiry into the proper route Cliffs must follow to appeal the Order. The *CCAA* judge purported to rely on s. 11 of the *CCAA* in making the Order, so the Order was "made under" the *CCAA*.

[40] Second, Cliffs argues that because the contractual claim Essar seeks to assert against Cliffs could properly have been made in a normal civil action without regard to the *CCAA*, the Order was not "made under" the *CCAA*. I do not accept this submission. To decide the appeal route Cliffs must follow, the issue is not what claims Essar could have asserted in some hypothetical proceeding; the issue is how to characterize the Order – was it "made under" the *CCAA*? The purpose-focused inquiry under s. 13 of the *CCAA* must look at the order actually made, not at some order that could have been made in a hypothetical proceeding.

Conclusion

[41] For these reasons, I concluded that the Order was "made under" the *CCAA*, and Cliffs therefore required leave to appeal under s. 13 of the *CCAA*.

VI. ORDER EXPEDITING LEAVE TO APPEAL

[42] Cliffs' motion for leave to appeal will be heard by a panel of this court on an expedited basis. In the Endorsement, I gave directions that the parties serve and file the completed leave materials no later than Wednesday, February 24, 2016, so that the materials could be placed before the panel on February 25, 2016.

VII. STAY PENDING APPEAL

[43] Cliffs seeks a stay of Essar's Contract Dispute Motion before the *CCAA* judge pending its leave to appeal motion. Essar opposes the request for a stay.

[44] As set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, at p. 334, the three-part test for obtaining a stay pending appeal requires the moving party to demonstrate (a) there is a serious question to be determined on the appeal, (b) the moving party will suffer irreparable harm if the stay is not granted, and (c) the balance of convenience favours granting the stay: *Yaiguaje v. Chevron Corp.*, 2014 ONCA 40, 315 O.A.C. 109, at para. 3.

A. Serious Question

[45] Cliffs has demonstrated that its leave to appeal motion raises a serious question to be determined. Essar conceded as much in its factum when it stated that this was, at best, a “neutral factor.” And, at the hearing, Essar advised it was not contesting that the serious question factor had been satisfied. In my view, that was a proper concession to make given the low threshold to meet on this factor. Cliffs’ stay motion turns on the other two factors.

B. Irreparable harm

Positions of the parties

[46] Cliffs submits if a stay is not issued, it would effectively be deprived of the right to seek leave to appeal because Essar’s Contract Dispute Motion would proceed before the *CCAA* judge in the face of Cliffs’ jurisdictional challenge.

[47] The parties provided an update on what has transpired in that proceeding since the Order was made. Last week, the parties participated in two conference calls with the *CCAA* judge to discuss the procedure by which Essar’s Contract Dispute Motion would be adjudicated in the *CCAA* proceeding. Counsel advised that a further videoconference call was scheduled to take place on Wednesday, February 17, 2016 before the *CCAA* judge at which time they expected the judge would render a decision on the adjudication procedure. Cliffs stated it was not participating voluntarily in those scheduling calls, even though it had been

permitted to file its procedural proposals with the *CCAA* judge on a without prejudice basis.

[48] Cliffs submits that although Essar has undertaken not to treat Cliffs' participation in the scheduling and organization of the Contract Dispute Motion as an attornment to the jurisdiction of the Ontario court, conflicting decisions from this court create the risk that such an undertaking might not be given effect, posing a serious risk to Cliffs' ability to challenge the Ontario court's jurisdiction.

[49] In response, Essar argues that a stay is not necessary in light of its agreement to expedite the hearing of Cliffs' motion for leave to appeal and the undertakings it has given on the stay motion.

[50] Essar filed an affidavit from its Chief Financial Officer, Rajat Marwah. He deposed that Essar wants the parties to ready themselves for an adjudication of the Contract Dispute Motion. To that end, Essar has proposed to Cliffs that it deliver its responding affidavit evidence on the dispute on "an informal, without-prejudice basis outside the formal bounds of these court proceedings." Essar, in turn, would complete certain documentary disclosure. Mr. Marwah provided the court with three undertakings in order to permit Cliffs to exercise its appeal rights while enabling preparation to continue on the Contract Dispute Motion:

> (i) Cliffs would not be required to file in the *CCAA* court any affidavit or other material delivered in preparation for the contract dispute hearing;

(ii) Essar undertakes not to argue that the delivery of such materials by Cliffs or the taking of any steps toward a hearing of Essar's motion would amount to an act of attornment to the jurisdiction of the Ontario court; and

(iii) Essar would not invoke the jurisdiction of the Ontario court until Cliffs' appeal or motion for leave to appeal has been decided.

Analysis

[51] Over the past decade, judges of this court sitting in Chambers on stay motions have expressed different views about whether a party risks attorning to the jurisdiction of the Ontario court by performing court-ordered procedural steps in the face of the party's on-going challenge to the court's jurisdiction. Some decisions have viewed such participation as risking attornment, thereby creating some risk of irreparable harm: *M.J. Jones Inc. v. Kingsway General Insurance Co.* (2004), 72 O.R. (3d) 68, 242 D.L.R. (4th) 139 (C.A.), at paras. 27-31; *Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC*, 2014 ONCA 546, 122 O.R. (3d) 472, at paras. 29-36. On the other hand, in *Van Damme v. Gelber*, 2013 ONCA 388, 115 O.R. (3d) 470, at paras. 21-23, the court minimized any such risk from court-ordered participation, and in *Yaiguaje v. Chevron Corp.*, at para. 11, MacPherson J.A. regarded any risk as a weak factor in the irreparable harm analysis.

[52] I need not express a view on the effect of court-ordered participation in a proceeding on a party's ability to continue to advance a jurisdictional challenge

because decisions of this court uniformly have held that where the responding party provides the court with undertakings of the kind given by Essar in this case, the undertakings significantly reduce or remove the risk of irreparable harm.

[53] In *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2011 ONCA 620, 283 O.A.C. 321, at para. 14, Laskin J.A. described the undertakings given by BTR:

> BTR wants to proceed with the Ontario action. It is content to have LBIE deliver a statement of defence without filing it with the court. It undertakes not to argue that delivery of the statement of defence or participation in examinations for discovery constitute acts of attornment. <u>BTR also undertakes not to invoke the jurisdiction of the Ontario court</u>, by, for example, a motion for summary judgment, while LBIE's leave motion is outstanding. [Emphasis added.]

[54] Laskin J.A. did not consider the delivery of a statement of defence or participation in discoveries outside of the "formal bounds" of the court proceedings as amounting to attornment: at para. 31. Similar undertakings given in *Yaiguaje v. Chevron Corp.*, led MacPherson J.A., at paras. 11 and 16, to follow the decision in *BTR Global* and conclude that the moving parties had made a very weak showing that they would suffer irreparable harm.

[55] In light of the undertakings given by Essar to the court in the present case, I conclude that Cliffs have not demonstrated that they would suffer irreparable harm if a stay pending appeal is not granted.

C. Balance of convenience

[56] Both parties point to some "big picture" factors as tipping the balance of convenience in their favour. Cliffs contends that Essar will not suffer any prejudice should a stay not issue because to date it has found sufficient quantities of replacement iron ore pellets. As well, Essar did not pursue its critical supplier motion in the *CCAA* proceeding.

[57] On its part, Essar stresses the need for an expedited determination of the contract dispute in light of the end of April deadline for bids under the SISP process. Essar also advises that the Chapter 15 court in Delaware has deferred Cliffs' motion to lift the *CCAA* stay until the jurisdiction issue is resolved.

[58] Although these factors are relevant to the determination of which party will suffer the greater harm from the granting or refusal of a stay, in my view the most significant factor is much narrower in scope. While the parties did not file on this stay motion the procedural proposals they have presented to the *CCAA* judge, Essar advises that neither proposal contemplates Cliffs delivering any materials over the next two weeks. Instead, during that time Essar will be required to deliver certain productions.

[59] In those circumstances, the balance of convenience favours granting a stay. I have ordered Cliffs' leave to appeal motion to be expedited. As a result, within the next two weeks the leave motion will be placed before a panel of this

court for determination. If leave is not granted, the Contract Dispute Motion can proceed on the merits with little delay in preparation having occurred. If leave to appeal is granted, then the leave panel will consider whether or not to continue the stay.

D. Conclusion

[60] In *BTR Global*, Laskin J.A. stated, at para. 16, that the three components of the stay test "are interrelated in the sense that the overriding question is whether the moving party has shown that it is in the interests of justice to grant a stay." In my view, the most significant factor affecting the interests of justice is the balance of convenience. It favours granting a stay. I therefore granted a stay in the terms set out in para. 3 of the Endorsement:

> As to that part of Cliffs' motion which seeks a stay of Essar's contract motion before the *CCAA* judge pending its exercise of appeal rights in respect of the Order, I grant a stay of Essar's contract motion until such time as the panel of this court disposes of Cliffs' motion for leave to appeal. If the panel grants leave to appeal, the panel may consider whether or not to continue the stay based upon the stay motion materials already filed with the court.

[61] Having granted a stay, I went on to state in para. 4 of the Endorsement:

> Of course, nothing in this endorsement prevents Cliffs from voluntarily taking steps to prepare for an adjudication of the contract dispute with Essar, without prejudice to its argument that the Superior Court of Justice of Ontario lacks the jurisdiction to adjudicate that dispute. As part of such voluntary steps, it is always

> open to Cliffs to request, on a voluntary, without prejudice basis, the informal assistance of the *CCAA* judge on any hearing planning or preparation issues, and it is always open to the *CCAA* judge to provide any such requested informal assistance on a without prejudice basis.

VIII. DISPOSITION

[62] For the reasons set out above, I ordered (i) Cliffs to seek leave to appeal the Order under s. 13 of the *CCAA*, (ii) the hearing of the leave to appeal motion be expedited, and (iii) the issuance of a stay pending the disposition of the leave to appeal motion in the terms set out in para. 3 of the Endorsement.

"David Brown J.A."

TAB 5

DATE: 20010525
DOCKET: M27359

COURT OF APPEAL FOR ONTARIO

RE: **IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 AND THE BUSINESS CORPORATIONS ACT, R.S.O. 1990, c. B.16**

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT WITH RESPECT TO ALGOMA STEEL INC.

ALGOMA STEEL INC. (Applicant/Responding Party)

BEFORE: **OSBORNE A.C.J.O., DOHERTY AND MACPHERSON JJ.A.**

COUNSEL: **John B. Laskin and David Outerbridge**
for the moving party First Mortgage Noteholders

Michael Barrack, Geoff Hall and Sarit Batner
for the responding party Algoma Steel Inc.

John T. Porter, Alan Merskey and Mario Forte
for the DIP Lenders

Ken Rosenberg, Lily Harmer and Marcus Knapp
for the United Steelworkers of America

James H. Grout
for the Monitor

Andrew Hatnay
for the Superintendent of Financial Services

Michael Weinczok
for the Directors of Algoma Steel Inc.

HEARD: **May 18, 2001**

On appeal from the order of Justice James M. Farley dated April 23, 2001.

ENDORSEMENT

-

[1] The First Mortgage Noteholders ("the Noteholders") seek leave to appeal, pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("the *CCAA*"), from the order of Farley J. dated April 23, 2001. The Noteholders are a consortium of about a dozen companies and groups which holds first mortgage notes totalling about $550 million issued by the respondent Algoma Steel Inc. ("Algoma").

[2] Farley J.'s order was an initial order made pursuant to s. 11(3) of the *CCAA*, on a motion by Algoma. It was made without notice to the Noteholders. The essence of Farley J.'s order was an authorization to Algoma to obtain additional financing ("the DIP Financing") from its existing bank lenders during the 30 day stay period permitted by s. 11(3) of the *CCAA*. The purpose of the order was to respond, on an urgent and interim basis, to a serious negative cash flow crisis at Algoma. Indeed, without short-term financial assistance designed to serve as a base for restructuring Algoma's current indebtedness, Algoma might well have had to cease operations. The order also gave priorities (which the parties call superpriorities) to the DIP Financing charge and to certain Administration and Directors Charges over the Noteholders' existing security.

[3] In his endorsement, Farley J. said, *inter alia*:

> Algoma qualifies as a corporation with the threshold debt re seeking relief under the CCAA.
>
> . . . . .
>
> The noteholders who are owed in excess of $1/2 billion were not represented today for the very simple reason that none of them were served. The reason for that as I understand it is that there is no set up at the present time of a Creditor's Committee or any equivalent. *I note that there is a comeback clause and I would particularly emphasize that if it is felt appropriate and needed, this clause should be used on a timely basis.*
>
> Order to issue as per my fiat.

[Emphasis added.]

[4] The comeback clause in the underlined passage is reflected in paragraph 48 of Farley J.'s order:

> 48.THIS COURT ORDERS that any interested person may apply to this court to vary or rescind this order or seek other relief upon seven (7) days' notice to the Applicant, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this court may order.

[5] Once the Noteholders became aware of Farley J.'s order, they decided to challenge it. They did so in two ways: by seeking leave to appeal to this court and by initiating a motion to vary before Farley J. The former proceeded before this court, on a preliminary basis, on May 15 and, on the merits, on May 18. The latter was scheduled to be heard by Farley J. on May 23.

[6] The Noteholders seek leave to appeal Farley J.'s order on three bases, which they frame as Proposed Questions for this court:

> (1)Did the motions judge exceed his jurisdiction in making the initial order by altering existing priorities of and between secured creditors through the granting of superpriorities without the consent of the First Mortgage Noteholders?
>
> (2)Did the motions judge exceed his jurisdiction or otherwise err in law by granting these superpriorities without any notice to the First Mortgage Noteholders or to the trustee under the trust indenture?
>
> (3)Did the motions judge err in law by failing: (a) to treat the First Mortgage Noteholders in an equitable and even-handed manner relative to the Bank Lenders; and (b) to give due regard to the prejudice suffered by the First Mortgage Noteholders as a result of the initial order?

[7] In our view, the motion for leave to appeal is premature. Initial orders, made on a without notice basis, are specifically authorized by s. 11(1) of the *CCAA*. Proceedings under the *CCAA* are often urgent, complex and dynamic. The

Algoma proceedings fit that description. Farley J. was faced with complex facts and a difficult decision potentially implicating the closure of one of the largest companies in Ontario. Moreover, he had to make his decision in a very timely fashion. In these circumstances, he recognized that his initial order might not be acceptable to all interested parties, including some of Algoma's creditors. That is why he included a comeback clause in his order and specifically invited parties to resort to it in his endorsement.

[8] The fact that the *CCAA* provides that an appeal of an initial order is only available with leave indicates that appeals in *CCAA* proceedings should be limited. An appeal court should be cautious about intervening in the *CCAA* process, especially at an early stage. On this point, we are attracted to the reasoning of MacFarlane J.A. (in chambers) in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. 265 at 272 (B.C.C.A.):

> [T]here may be an arguable case for the petitioners to present to a panel of this court on discrete questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. . . .
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.
>
> . . . In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellant proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

[9] Like MacFarlane J.A., we do not say that leave to appeal should never be granted in the midst of *CCAA* proceedings. However, it is premature to grant such leave at this juncture in the Algoma proceedings. Farley J.'s order was only an initial order brought on an urgent basis to deal with seemingly desperate circumstances. Moreover, the order specifically opened the proceedings to all interested parties and invited dissatisfied parties to bring their concerns to the court on a timely basis. The Noteholders availed themselves of this opportunity by initiating a motion to vary which was scheduled to be heard on the very day the initial order expired. In our view, this is precisely how a dynamic *CCAA* proceedings should unfold. Accordingly, it would be unwise to interrupt this normal and desirable process by granting leave to appeal at this juncture. The issues that the Noteholders want to raise can be considered by Farley J., importantly in the context of the entire proceedings with which he is familiar. Moreover, if at a later point in time this court grants leave to appeal, it will then have the benefit of the considered reasons of the motions judge flowing from a complete record and from full argument by all interested parties.

[10] For these reasons, the motion for leave to appeal is dismissed, without prejudice to the right of the Noteholders, or any other interested party, to make a similar motion at a later juncture in the proceedings, and to do so on an expedited basis. Only the United Steelworkers of America requested their costs of the motion. They are entitled to their costs which we would fix at $1000.

"C. A. A. Osborne A.C.J.O."
" D. Doherty J.A."
"J. C. MacPherson J.A."

TAB 6

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-020594-107
(500-11-036133-094)

DATE: MAY 18, 2010

IN THE PRESENCE OF THE HONOURABLE JACQUES CHAMBERLAND, J.A.

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND AND LABRADOR
PETITIONER – Petitioner
v.

ABITIBIBOWATER INC. AND OTHERS
RESPONDENTS – Debtors
and
ERNST & YOUNG INC.
IMPLEADED PARTY – Monitor
and
AD HOC COMMITTEE OF BONDHOLDERS
and
AD HOC COMMITTEE OF THE SENIOR SECURED NOTEHOLDERS AND U.S. BANK NATIONAL ASSOCIATION, INDENTURE TRUSTEE FOR THE SENIOR SECURED NOTEHOLDERS
IMPLEADED PARTIES

JUDGMENT

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[1] I am seized, as a judge in chambers, of a motion by petitioner Her Majesty the Queen in the Right of the Province of Newfoundland and Labrador (the "Province") for leave to appeal from a judgment rendered by Gascon J. of the Quebec Superior Court,

on March 31, 2010, under the *Companies' Creditors Arrangement Act* (R.S. Canada, 1985, c. C-36, as amended) (the "CCAA").[1]

****

[2] The respondents ("Abitibi") form one of the world's largest publicly traded pulp and paper manufacturers.

[3] From approximately 1905 to the end of 2008, it carried on extensive industrial activities at several locations in the province of Newfoundland and Labrador: mining and processing of minerals, at Buchans; pulp and paper operations, at Grand Falls-Windsor and Stephenville; shipping and storing, at Botwood; and logging camps at many different locations across the province.

[4] On December 4, 2008, Abitibi announced the closure of its last remaining mill operation in the province, that located at Grand Falls-Windsor; the mill closure was scheduled to be effective March 2009.

[5] On December 16, 2008, the Province introduced and passed the *Abitibi-Consolidated Rights and Assets Act* (S.N.L. 2008, c. C-A-1.01) (the "*Abitibi Act*"), the purpose of which was, as summarized by the judge of first instance (at par. 54), a) to seize with immediate effect substantially all of the assets, property and undertakings of Abitibi in the province, b) to cancel substantially all outstanding water and hydroelectric contracts and agreements between Abitibi and the Province, c) to cancel pending legal proceedings of Abitibi against the Province in respect of water rights, d) to deny Abitibi any compensation for the seized assets and, finally, e) to deny Abitibi access to the courts to seek redress.[2]

[6] In April 2009, Abitibi filed a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement ("NAFTA") for the losses allegedly arising from this confiscation effected by the Province.[3]

[7] Abitibi also filed for protection under the CCAA.

[8] On April 17, 2009, the Quebec Superior Court issued an initial order (the "Initial Order") pursuant to the CCAA with respect to Abitibi. The initial stay of proceedings has been extended a few times since, and more recently to June 18, 2010.

---

1 Any reference to the CCAA shall refer to the version of the Act applicable to the present proceedings, and not to the "Amended CCAA" in force since the amendments of September 18, 2009.

2 "According to Abitibi, its losses resulting from the enactment of the *Abitibi Act* will exceed $300 million" (judgment *a quo*, par. 59).

3 "(…) Abitibi officially filed, on February 25, 2010, a Notice of Arbitration under chapter 11 of NAFTA to pursue its claim for redress" (judgment *a quo*, par. 62).

[9] During the restructuring process undertaken as a result, a First Stay Extension Order was issued on May 14, 2009 and a Claims Procedure Order (the "CPO") on August 26, 2009, the purpose of the CPO being to set up a claims procedure for Abitibi's creditors.

[10] On June 12, 2009, the Province asked Abitibi to provide certain reports for the Abitibi sites, including environmental site assessment reports. On June 18, 2009, Abitibi replied that the request would remain under consideration in light of the *Abitibi Act*, the Initial Order issued under the CCAA and another pending ministerial order concerning the Buchans site. In July 2009, the Province's attorneys retained the services of environmental consultants to undertake environmental site assessments at the sites. On September 3, 2009, Abitibi and the Province entered into an agreement whereby the former would provide access to the sites to the environmental consultants for the purpose of conducting the assessments envisaged, subject to a number of conditions.

[11] On October 16, 2009, the Province filed a Motion for a Declaration that the Petitioner is entitled to Access the Electronic Data Rooms Created by the Debtors (the "Data Room Motion"), the result of which is summarized by the judge of first instance in the judgment *a quo*:

> [72] In that motion, the Province alleged that it needed to access the electronic data rooms of Abitibi to properly assess its financial status and make informed decisions in the restructuring. It maintained that it had a duty to inform itself of the present and future potential ability of Abitibi to cover the Province's claims.
>
> [73] In particular, the Province argued that Abitibi was responsible towards it for alleged environmental contamination from the mine located in Buchans. Relying on numerous media reports that it then filed in the record, the Province claimed that because of Abitibi's economic activities, the latter had exposed itself to many environmental obligations, the precise extent of which remained unclear.
>
> [74] The Province notably alleged that it had incurred significant costs in that regard. It added, furthermore, that agreements had been entered into for the Province's environmental consultants to have access to the sites for the purpose of determining the full nature and extent of Abitibi's environmental obligations.
>
> [75] On November 9, 2009, the Court dismissed the Data Room Motion with costs. The Province did not appeal that ruling.
>
> [76] The Court notably concluded that the Province had not yet provided reasonable and convincing evidence in support of its alleged status of potential creditor for environmental problems resulting from Abitibi's economic activities.

> [77] The Court emphasized that the Province wanted access to the electronic data rooms not to enhance the restructuring process, but to assess the extent of Abitibi's present and future ability to cover its undetermined and potential environmental claims that had yet to be filed in the claims process:
>
> > [88] Lastly, the alleged legitimate public interest relied upon by the Province is not in furtherance of the purposes of the *CCAA*. It is, to the contrary, in furtherance of the Province's own interest of determining the real value of its potential claims that are yet to be established.
> >
> > [89] Put otherwise, the Province wants to have access to the electronic data rooms to better evaluate whether Abitibi's pockets will, one day, be deep enough.

[12] In November 2009, the Province's environmental consultants issued the reports setting out the results of their environmental site assessment reports.[4]

[13] On November 12, 2009, the Minister of Environment and Conservation of the Province, acting pursuant to *The Environmental Protection Act*, S.N.L. 2002, C-E-14.2, section 99 (the "*EPA")*, issued five Ministerial Orders against Abitibi (the "EPA Orders"), which the judge of first instance summarizes as follows:

> [15] The EPA Orders were in relation to five (5) sites located in Newfoundland and Labrador ("**NL**") where Abitibi had carried on industrial activities at different times between 1905 and 2008. In essence, they purported to order Abitibi to perform, at its own expense, the following:
>
> a) the submission for approval by the Province, by January 15, 2010, of a detailed Remediation Action Plan for all sites identified as allegedly having exceedances greater than the applicable limits;
>
> b) the completion of the approved site remediation actions by January 15, 2011, or by another date as may be agreed upon with the Province's Department of Environment and Conservation ("**ENVC**"); and
>
> c) the closure of all landfills and lagoons/impoundments associated with each site by January 15, 2011.

[14] On the very same day, the Province served the Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act (the "EPA Motion"), the conclusions of which read as follows in its amended version of February 15, 2010:

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4 "These reports concluded that the Abitibi Sites covered by the assessments (and, in many instances, the property adjacent thereto) suffered from extensive contamination allegedly in excess of applicable standards" (judgment *a quo*, par. 78).

> **GRANT** this amended motion for a declaration regarding orders issued pursuant to the *Environmental Protection Act*, S.N.L. 2002, chap. E-14.02.
>
> **DECLARE** that the Claims Procedure Order shall not bar, extinguish or otherwise affect the enforceability of orders made against the Debtors, the Property or the Directors (all as defined in the Initial Order) or others, by Her Majesty the Queen in Right of the Federal or a provincial government, or her agents, pursuant to her exercise of powers, rights or duties in relation to matters involving public health, safety, security, public order or the environment, provided that any financial or monetary fines or orders may be affected by the Claims Procedure Order.
>
> **DECLARE** that, for greater certainty, that the orders issued by the Minister against Abitibi on 12 November 2009 pursuant to s. 99 of the EPA are not barred or extinguished and their enforceability is not otherwise affected by the Claims Procedure Order and, in particular, but without limiting the generality of the foregoing, by paragraphs 3(1) and 15 of that order.
>
> **EXEMPT**, if applicable, the Petitioner from having to serve this motion and from any notice or delay of presentation.
>
> **GRANT** such further and other relief as this Court deems just and proper.
>
> **GRANT** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.
>
> **THE WHOLE WITHOUT COSTS**, save and except in case of contestation.

[15] For the Province, the EPA orders are in relation to the environment. They are not financial or monetary fines or orders and cannot qualify as "Claims'" under the CCAA. They simply require Abitibi to take steps to comply with its statutory obligations under the Province's *EPA*. As such the EPA Orders fall within the ambit of the First Stay Extension Order (par. 10.1) and are neither stayed nor subject to the claims process. In the alternative, if the judge intended for the CPO to nevertheless bar, extinguish or otherwise affect the enforceability of orders like the EPA Orders, he would be acting outside its statutory jurisdiction. In other words, to the extent that the CPO affects the enforceability of the EPA Orders it is constitutionally ineffective.

[16] In regard to this alternative constitutional argument the Province served a Notice of Intention pursuant to Article 95 of the *Quebec Code of Civil Procedure* to the Attorney General for Canada and all the other provinces:

> [25] In that regard, the Province served a Notice of Intention pursuant to Article 95 *C.C.P.* to the Attorney Generals for Canada and all the other provinces, indicating that it was hereby seeking a declaration that:

> (1) a court vested with jurisdiction over a company pursuant to the *CCAA* does not possess the constitutional competence to exercise a statutory or discretionary power to bar or extinguish liabilities, obligations or duties owed to a province arising out of laws enacted by its legislature pursuant to s. 92 of the *Constitution Act, 1867*, save and except to the extent that the liability, obligation or duty is a "claim provable" within the meaning of s. 2 of the *BIA*;
>
> (2) a court vested with jurisdiction over a company pursuant to the *CCAA* does not possess the constitutional competence to exercise a statutory or discretionary power to fetter the discretion of a Minister of a provincial Crown under a law validly enacted by that province; and
>
> (3) the Quebec Superior Court does not have the constitutional competence to exercise a statutory or discretionary power under the *CCAA* to bar the enforcement of or to extinguish the non-monetary EPA Orders issued by the Province or to fetter the discretion of the Minister under the *EPA*.[5]

[17] As a result of this Notice of Intention, the Province of British-Columbia intervened to support the EPA Motion; the other Attorneys General did not.

[18] The EPA Motion was contested by Abitibi, which not only asked for its dismissal but also sought itself a declaration confirming that:

> (a) the EPA Orders are stayed by the stay of proceedings issued in the Initial Order and are not subject to the narrow exception provided at paragraph 10.1 of the First Stay Extension Order; and
>
> (b) the Province's filing of any claim based in whole or in part on the EPA Orders is now barred by paragraph 15 of the Claims Procedure Order, such that no extension of the Claims Bar Date should be granted to allow the latter to file a claim on that basis in the claims process.

[19] Abitibi's position was supported by key groups of its creditors and by the Impleaded Party (the "Monitor") who, however, did not express any view on the issue of the extension, if any, of the claims bar date for the benefit of the Province.

[20] The Motion was heard by Gascon J. on February 24, 25 and 26, 2010.

*****

[5] Judgment *a quo*, par. 25.

[21] The judgment *a quo* was rendered on March 31, 2010. It is 312 paragraphs long. The questions to be resolved are identified at par. 125 of the judgment *a quo*:

> [125] Based on this review of the motion at issue, the positions of the parties involved, and the applicable factual background and legal framework, the questions to be resolved in this case can be summarized as follows:
>
> a) what is the true nature of the EPA Orders? Are they orders issued in regard of statutory non-monetary obligations of Abitibi or orders that are in substance financial or monetary in nature?
>
> b) if the EPA Orders are orders issued in regard of statutory non-monetary obligations of Abitibi, does the Court have either the statutory jurisdiction or constitutional authority to include them in the definition of "Claim" found in the Claims Procedure Order?

[22] Gascon J.'s reasoning is summarized at paragraph 127-139:

> [127] Contrary to Abitibi, the Province and the HMQBC did not put much emphasis on the factual context relevant to the questions at issue. With all due respect to their position, the Court considers that this case must, in the end, be decided first and foremost taking into consideration the particular fact pattern in dispute.
>
> [128] To that end, nobody truly contests that in facilitating the conclusion of an arrangement under the *CCAA*, the Court has jurisdiction to subject "claims" to a claims process and to determine who Abitibi's "creditors" might be in that regard. In doing so, the Court can certainly seek to uncover the true nature of the EPA Orders. Their proper characterization is within the jurisdiction of the Court.
>
> [129] Despite being framed as "regulatory orders", the EPA Orders have the effect of compelling Abitibi to expend material sums of money to remediate property that it either no longer owns or no longer uses in its business, while having little or no net value to Abitibi and its stakeholders.
>
> [130] In the Court's opinion, based on the evidence filed in the record, the EPA Orders are in substance financial or monetary in nature. Consequently, they are not exempted from the First Stay Extension Order or the Claims Procedure Order.
>
> [131] As a result, the monetary consequences of these orders should be treated as claims in these *CCAA* proceedings. Such claims shall be subject to compromise and the Province, if it asks and is allowed to file a late proof of claim in this respect, shall be entitled to participate in the negotiation of, and to receive its pro-rata distribution under, any plan of arrangement to be filed by Abitibi.

[132] There is, accordingly, no basis in fact or in law to grant the conclusions sought in the EPA Motion. This would have the effect of giving the Province a preference over other creditors, which is simply unacceptable.

[133] To reach this conclusion, the Court relies on many considerations, including:

- The provisions of the *CCAA*;
- The true nature and impact of the EPA Orders;
- The factual context of their issuance and their content;
- The Province's behavior prior and after their issuance;
- The EPA and the applicable case law; and
- The end result of the Province's position.

[134] In view of this conclusion, it is not necessary to discuss the Province's and the Intervening Parties' other arguments on the lack of statutory jurisdiction or constitutional authority for the Court to include statutory non-monetary obligations in the definition of "Claim" found in the Claims Procedure Order.

[135] As the Court concludes that the Province's EPA Orders are indeed claims because of their obvious financial and monetary nature, the determination of these other questions will have to wait another day, if not another restructuring. Declaratory judgments and questions of statutory jurisdiction or constitutional authority should not be issued or decided in a factual vacuum. As shown here, the facts involved are normally critical in assessing such matters.

[136] This finding entails the dismissal of the Intervention of HMQBC and the AGBC as well.

[137] Abitibi remains in ownership and occupation of the relevant properties it still possesses in BC. No orders of any sort and no notice of non-compliance are outstanding in regard of any environmental obligations of Abitibi in that province. Simply put, there are no pending issue to resolve between Abitibi and the Intervening Parties.

[138] This being so, the conclusions sought by Abitibi in its Amended Contestation will be granted, albeit only in part. The Court considers that it is premature to immediately rule that the Province is barred from filing any late claim in the claims process as a result of the EPA Orders. This issue will be addressed, if need to, if and when such a request is in fact presented.

> [139] The Court's explanations follow.

[23] The conclusions of the judgment read as follows:

> [307] **DISMISSES** the Amended Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act of the Petitioner, Her Majesty the Queen in Right of the Province of Newfoundland and Labrador (the "**Province**");
>
> [308] **DISMISSES** the Intervention of the Intervening Parties, Her Majesty the Queen in right of the Province of British Columbia (the "**HMQBC**") and the Attorney General for British Columbia (the "**AGBC**");
>
> [309] **DECLARES** that the orders issued against the Debtors by the Minister of Environment and Conservation of the Province on November 12, 2009, pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, chap. E-14.02, (the "**EPA Orders**"), are stayed under paragraph 10 of the Initial Order issued by the Court on April 17, 2009, and are not subject to the exception found at paragraph 10.1 of that Initial Order;
>
> [310] **DECLARES** that the Province's filing of any claim based on the EPA Orders is subject to the Claims Procedure Order issued by the Court on August 26, 2009, including the claims process detailed therein;
>
> [311] **RESERVES** to the Province its right, if any, to request an extension of the Claims Bar Date (as defined in the Claims Procedure Order) in that regard and to the Debtors their right, if any, to contest any such extension request;
>
> [312] **WITH COSTS** against the Province in favor of the Debtors, but **WITHOUT COSTS** against the HMQBC and the AGBC.

*****

[24] A summary presentation of the Province's grounds of appeal, going by chapter titles only, would read as follows:

1. The judge of first instance disregarded the principles of federalism.

    i) He was required to give effect to the *EPA* and the *Abitibi Act* but failed to do so;

    ii) The Minister of Environment and Conservation, and not the judge acting pursuant to the CCAA, has the exclusive jurisdiction to decide how the *EPA* is to be applied to Abitibi;

iii) The Legislature of the Province, and not the judge acting pursuant to the CCAA, has the exclusive jurisdiction to determine property and civil rights in the Province.

2. Provincial legislation operates in the insolvency context.

3. The CCAA cannot be interpreted to give a judge acting pursuant to the CCAA the power to immunise Abitibi from compliance with the EPA Orders or to avoid the *Abitibi Act*.

   i) The judge acting pursuant to the CCAA cannot define "claim" however he or she wishes;

   ii) The judge acting pursuant to the CCAA does not have the discretionary power to ensure a successful restructuring regardless of the law.

*****

[25] There is no appeal as of right from decisions made under the CCAA; leave to appeal is a condition precedent to an appeal being allowed to proceed (s. 13 CCAA).

[26] This requirement stems from a clear intention of Parliament to restrict appeal rights having regard to the nature and object of CCAA proceedings; an appeal court should be cautious about intervening in the CCAA process. This is not to say that leave will never be granted but it should be so only "sparingly" (*In Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265, at 272 (B.C.C.A.)).

[27] The test for determining whether leave should be granted was enunciated by Wittman J.A. (as he then was) in *Re : Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 33 (C.A. Alta):

> The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: (…) Subsumed in the general criterion are four applicable elements: (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and (4) whether the appeal will unduly hinder the progress of the action.

[28] This test was considered and applied by this Court in many instances.

[29] The burden rests on the party applying for leave to demonstrate that the cumulative criteria set forth above are met.

[30] This is the test I intend to apply here.

[31] It is my view that the Province's application raises no issue which satisfies the test for granting leave to appeal under the CCAA.

[32] The Province's grounds of appeal are ably couched in constitutional terms (articulated mainly around the power of a judge acting pursuant to the CCAA to "immunise" a company from compliance with orders issued under provincial environmental legislation or to avoid the consequences of provincial expropriation legislation) but, as the judge of first instance noted, these constitutional issues, albeit of undeniable intellectual interest, are of no genuine importance in the face of his conclusion regarding the true nature of the EPA Orders.

[33] The judgment *a quo* does not "immunise" Abitibi from compliance with the EPA Orders, it merely characterizes these orders in the context of the restructuring process engaged pursuant to the CCAA.

[34] As a matter of fact, Gascon J. declined to grant Abitibi's conclusion seeking, in its Amended Contestation of January 20, 2010, a declaration confirming that the EPA Orders were stayed and that the Province's filing of a claim based on such orders is now barred by the terms of the CPO (par. 15 thereof); on the contrary, he explicitly reserved the Province's right to seek an extension of the claims bar date in order to file a claim and, should its claim be allowed, to participate in the negotiation of, and share in the proceeds from, any plan of arrangement, alongside Abitibi's other unsecured creditors. There is thus no question of relieving Abitibi from its environmental obligations under the Province's relevant legislation.

[35] The first question the judge of first instance had to answer was whether the EPA Orders were issued in regard to statutory non-monetary obligations of Abitibi or were in substance financial or monetary in nature. All parties appearing before him agreed that if the EPA Orders were financial or monetary in nature, as opposed to being pure regulatory orders, they then would fall within the meaning of "claim" under the CCAA and "provable or contingent claim" under the BIA; a claims process such as the one ordered in the Abitibi restructuring would therefore cover them.

[36] A judge acting pursuant to the CCAA has jurisdiction to subject "claims" to a precise claims process and to determine who Abitibi's "creditors" might be in that regard. As mentioned above, the Province does not dispute this essential premise; rather it disputes whether the EPA Orders were properly found to be truly financial or monetary in nature.

[37] In my view there is no reasonable chance of success to the Province's position in this connection.

[38] Gascon J. found, on the facts and in the context of this case, that the EPA Orders were in substance financial or monetary in nature. This is essentially a finding of fact reached after considering 1) the true nature and impact of the CCAA (judgement

a quo, par. 160-183), 2) the factual context of the issuance of the EPA Orders, and their content (par. 184-211), 3) the Province's behaviour prior and after the issuance of the EPA Orders (par. 212-236), 4) the *EPA* and the applicable case law (par. 237-271) and 5) the end result of the Province's position (par. 272-296).

[39] I fail to see how this conclusive finding of fact definitively fixing the true character of the dispute as being in pith and substance one which relates to a monetary claim against Abitibi could be successfully challenged in appeal.

[40] The Province's position is a) that it alone holds the right to modify the nature of its claim – from one issued in regard of Abitibi's statutory non-monetary obligation into a financial or monetary one – by converting the regulatory order into a monetary one, using the debt-creating provision of the *EPA*,[6] and b) that it can, if it so chooses, postpone that conversion until after the restructuring is completed.

[41] This position is, in my opinion, untenable in the context of an insolvent company involved in a restructuring process pursuant to the CCAA; this contention, as Gascon J. observed, boils down to claiming "that a provincial regulator could have the non reviewable right to determine whether obligations it controls or creates will be subject to compromise under the CCAA or whether they will enjoy a superiority beyond the reach of compromise" (judgment *a quo*, par. 273).

[42] The judge of first instance, acting pursuant to the CCAA, had jurisdiction to subject all "claims" against Abitibi to a claims process (the "CPO"), to determine who Abitibi's "creditors" might be and, in that context, to determine the nature of the EPA Orders without being bound to the form in which the Province had clothed its position.

[43] The compromise of monetary claims is at the very core of the bankruptcy and insolvency jurisdiction underpinning the CCAA. It was made clear in the evidence adduced before the judge of first instance that the EPA Orders advanced by the Province, if found to survive the CCAA process uncompromised, would be fatal to a restructuring of Abitibi.

[44] I agree with counsel for Abitibi that there is nothing new or unusual in the analysis brought by the judge of first instance of what a "claim" is under the CCAA: the broad definition of "claim" under the CCAA includes "contingent claims", a legal reality reflected in the definition of "claim" in the CPO which, it is worth noting in passing, was not contested by the Province, either before it was issued, by making representations to the judge of first instance, or after, by lodging an appeal against it, despite the fact that its name appeared on the service list and that it was made aware of its existence (judgment *a quo*, footnote 9).

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6 S. 102(2) of the *EPA* permits the minister to take action to carry out the terms of the order if the person to whom it is directed fails to comply with it; the costs, expenses or charges so incurred are recoverable "as a debt owed to the Crown".

[45] Again I agree with counsel for Abitibi that Gascon J., by dismissing the notion that the Province could choose the timing of the creation of its financial or monetary claim against Abitibi deriving from the EPA Orders, properly prevented it from gaining an unfair advantage over the company's other creditors, the whole in line with the purposes of the CCAA.

[46] For these reasons, and without getting into all the details of the reasoning of the judge of first instance, I see no *prima facie* merit to the appeal envisaged by the Province.

[47] In the context of an appeal presenting no reasonable chance of success, it becomes obvious that the appeal proceedings would "unduly hinder the progress of the action". The fundamental purpose of the CCAA proceedings is to enable Abitibi to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. All parties to the CCAA proceedings, except the Province, agree that the appeal would necessarily lengthen the restructuring process and would, according to the Monitor (Plan of Argument of the Monitor, May 10, 2010, par. 10), "hinder the ability of [Abitibi] to successfully restructure".

[48] A draft of Abitibi's plan of arrangement or compromise was filed on May 4, 2010 with a view, according to its attorneys, to conforming to a timetable for a rapid exit from the CCAA proceedings by the end of September 2010. If leave to appeal was to be granted, the fate of the EPA Orders would in all likelihood remain outstanding at the time of the meeting of creditors and the vote in respect of Abitibi's plan. According to the Monitor, the fact that the matter is not finally determined prior to the vote in respect of the plan will have a material impact on the net value available to Abitibi's creditors and create concerns for the sources of potential exit financing. The restructuring process, concludes the Monitor, will likely become more complicated, including further delays and costs.

[49] One final word before concluding. The Province is concerned with the judge of first instance referring to the possibility for Abitibi "to raise the counter-claim argument in front of the CCAA Court"[7] notwithstanding the fact that the *Abitibi Act* immunises the Crown from all proceedings based on a cause of action arising from or incidental to the operation of the Act.

[50] This concern does not justify, in my opinion, granting leave to appeal. First, this statement from the judge of first instance is nowhere to be found in the conclusions of the judgement *a quo*. Second, the statement is only one of the many reasons expressed by the judge of first instance to justify the dismissal of the Province's motion. Third, no doubt this issue will be raised again, and fully debated, if the Province is allowed to file a late claim based on the EPA Orders.

[7] Judgment *a quo*, par. 189.

[51] The Province's Motion for Leave to Appeal pursuant to Sections 13 and 14 of the CCAA is dismissed, with costs.

JACQUES CHAMBERLAND, J.A.

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Mrs. Catherine Powell
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For Petitioner

Mr. Sean F. Dunphy
Mr. Joseph Reynaud
STIKEMAN ELLIOTT
For Respondents

Mr. Robert I. Thornton
THORNTON GROUT FINNIGAN
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FISHMAN FLANZ MELAND PAQUIN
For Enrst & Young Inc.

Mr. Fred Myers
GOODMANS
and
Mtre Jean-Yves Simard
LAVERY, DE BILLY
For the Ad Hoc Committee of Bondholders

Mtre Vanessa Jodoin
BORDEN, LADNER, GERVAIS
For the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Date of hearing: May 12, 2010

TAB 7

Her Majesty The Queen in Right of the Province of Newfoundland and Labrador *Appellant*

v.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders) *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty The Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada *Interveners*

Indexed as: Newfoundland and Labrador *v.* AbitibiBowater Inc.

2012 SCC 67

File No.: 33797.

2011: November 16; 2012: December 7.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and Insolvency — Provable claims — Contingent claims — Corporation filing for insolvency protection — Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order — Whether environmental protection orders are monetary claims that

Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador *Appelante*

c.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., comité ad hoc des créanciers obligataires, comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Sa Majesté la Reine du chef de la Colombie-Britannique, Ernst & Young Inc., en sa qualité de contrôleur, et Les Ami(e)s de la Terre Canada *Intervenants*

Répertorié : Terre-Neuve-et-Labrador *c.* AbitibiBowater Inc.

2012 CSC 67

N^{o} du greffe : 33797.

2011 : 16 novembre; 2012 : 7 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Réclamations prouvables — Réclamations éventuelles — Demande de protection contre l'insolvabilité par une société — Ordonnances environnementales émises par la province contre la société et demande, par la province, d'un jugement déclarant que les ordonnances ne constituent pas des « réclamations » aux termes de la Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, *can be compromised in corporate restructuring under CCAA — Whether CCAA is ultra vires or constitutionally inapplicable by permitting court to determine whether environmental order is a monetary claim.*

A was involved in industrial activity in Newfoundland and Labrador (the "Province"). In a period of general financial distress, it ended its last operation there, filed for insolvency protection in the United States and obtained a stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Province subsequently issued five orders under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, requiring A to submit remediation action plans for five industrial sites it had occupied, three of which had been expropriated by the Province, and to complete the remediation actions. The Province also brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to A's proposed reorganization did not bar the Province from enforcing the environmental protection orders. The Province argued that the environmental protection orders were not "claims" under the *CCAA* and therefore could not be stayed and subject to a claims procedure order. It further argued that Parliament lacked the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that were validly made in the exercise of a provincial power. A contested the motion, arguing that the orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order. The *CCAA* court dismissed the Province's motion. The Court of Appeal denied the Province leave to appeal.

Held (McLachlin C.J. and LeBel J. dissenting): The appeal should be dismissed.

Per Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: Not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified

ch. C-36 (« LACC »), et qu'elles ne sont pas assujetties à l'ordonnance relative à la procédure de réclamations — Les ordonnances environnementales constituent-elles des réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration sous le régime de la LACC? — La LACC est-elle ultra vires ou constitutionnellement inapplicable en permettant au tribunal de déterminer si une ordonnance environnementale constitue une réclamation pécuniaire?

A a poursuivi des activités industrielles à Terre-Neuve-et-Labrador (la « province »). Dans une période de grandes difficultés financières, elle a mis un terme à ses activités dans la province, elle a présenté une demande de protection contre l'insolvabilité aux États-Unis et elle a obtenu une suspension des procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). La province a par la suite prononcé cinq ordonnances environnementales en vertu de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2, contraignant A à présenter des plans de restauration pour cinq sites industriels qu'elle avait occupés, dont trois avaient été expropriés par la province, et à réaliser les plans de restauration approuvés. La province a également demandé par requête un jugement déclarant qu'une ordonnance relative à la procédure de réclamations rendue aux termes de la *LACC* dans le cadre de la réorganisation proposée de A n'empêchait pas la province d'exécuter les ordonnances environnementales. La province a plaidé que les ordonnances environnementales ne constituent pas des « réclamations » au sens de la *LACC* et que leur exécution ne peut donc être suspendue ni être assujettie à une ordonnance relative à la procédure de réclamations. Elle a de plus fait valoir que le pouvoir du Parlement de légiférer en matière de faillite et d'insolvabilité ne lui confère pas la compétence constitutionnelle pour suspendre l'application des ordonnances prononcées dans l'exercice valide de pouvoirs provinciaux. A a contesté la requête et a soutenu que les ordonnances étaient de nature pécuniaire et qu'elles étaient donc visées par la définition du terme « réclamation » utilisé dans l'ordonnance relative à la procédure de réclamations. Le juge chargé d'appliquer la *LACC* a rejeté la requête de la province et la Cour d'appel a rejeté la demande d'autorisation d'appel de la province.

Arrêt (la juge en chef McLachlin et le juge LeBel sont dissidents) : Le pourvoi est rejeté.

Les juges Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis : Les ordonnances des organismes administratifs ne sont pas toutes de nature pécuniaire, et donc des réclamations prouvables dans le cadre de procédures d'insolvabilité, mais at the outset of the proceedings. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims or orders on the basis of form alone. If the order is not framed in monetary terms, the *CCAA* court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process in a case such as the one at bar. First, there must be a debt, a liability or an obligation to a creditor. In this case, the first criterion was met because the Province had identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred as of a specific time. This requirement was also met since the environmental damage had occurred before the time of the *CCAA* proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. The present case turns on this third requirement, and the question is whether orders that are not expressed in monetary terms can be translated into such terms.

A claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred. The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. In the context of an environmental protection order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim. If there is sufficient certainty in this regard, the court will conclude that the order can be subject to the insolvency process.

certaines peuvent l'être en dépit du fait qu'elles ne sont pas quantifiées dès le début des procédures. En matière environnementale, le tribunal chargé de l'application de la *LACC* doit déterminer s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers l'organisme administratif qui a prononcé l'ordonnance. En pareil cas, la question pertinente ne se résume pas à déterminer si l'organisme a formellement exercé son pouvoir de réclamer une dette. Le tribunal qui évalue une réclamation ou une ordonnance ne se limite pas à un examen de sa forme. Si l'ordonnance n'est pas formulée en termes pécuniaires, le tribunal doit déterminer, en fonction des faits en cause et du cadre législatif applicable, si elle constitue une réclamation qui sera assujettie au processus de réclamation.

Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité dans une affaire telle celle en l'espèce, les ordonnances doivent satisfaire à trois conditions. Premièrement, il doit s'agir d'une dette, d'un engagement ou d'une obligation envers un créancier. En l'espèce, il a été satisfait à la première condition puisque la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance à un moment précis. Il a également été satisfait à cette condition puisque les dommages environnementaux sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. La présente affaire est centrée sur cette troisième condition, et la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes.

Il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu. Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural. Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

Certain indicators can guide the *CCAA* court in this assessment, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. The analysis is grounded in the facts of each case. In this case, the *CCAA* court's assessment of the facts, particularly its finding that the orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

Certains indicateurs permettent de guider le tribunal dans cette analyse, notamment si les activités se poursuivent, si le débiteur exerce un contrôle sur le bien et s'il dispose des moyens de se conformer à l'ordonnance. Il est également possible pour le tribunal de prendre en compte les conséquences qu'entraînerait sur le processus d'insolvabilité le fait d'exiger du débiteur qu'il se conforme à l'ordonnance. L'analyse est fondée sur les faits propres à chaque cas. En l'espèce, l'appréciation des faits par le tribunal, plus particulièrement sa constatation que les ordonnances constituaient la première étape en vue de la décontamination des sites par la province, ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire.

Subjecting such orders to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay a debt. It merely ensures that the Province's claim will be paid in accordance with insolvency legislation. Full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third party creditors and replace the polluter-pay principle with a "third-party-pay" principle. Moreover, to subject environmental protection orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities. Reorganization made necessary by insolvency is hardly ever a deliberate choice, and when the risks corporations engage in materialize, the dire costs are borne by almost all stakeholders.

Le fait d'assujettir ces ordonnances au processus de réclamations n'éteint pas les obligations environnementales qui incombent au débiteur, pas plus que le fait de soumettre à ce processus les réclamations des créanciers n'éteint l'obligation du débiteur de payer ses dettes. Le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. Le respect intégral des ordonnances dont la nature pécuniaire est reconnue transférerait le coût de la décontamination aux tiers créanciers et substituerait au principe du pollueur-payeur celui du « tiers-payeur ». En outre, l'assujettissement des ordonnances environnementales à la procédure de réclamations n'équivaut pas à convier les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales. Une réorganisation rendue nécessaire par l'insolvabilité de la société peut difficilement être assimilée à un choix délibéré, et lorsque les risques auxquels s'exposent les sociétés se concrétisent, la quasi-totalité des personnes ayant des intérêts dans la société en supportent les terribles coûts.

Because the provisions on the assessment of claims in insolvency matters relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. The interjurisdictional immunity doctrine is also inapplicable, because a finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities; its claim is simply subject to the insolvency process.

L'application de la doctrine des pouvoirs accessoires n'est pas pertinente en l'espèce car les dispositions régissant l'évaluation des réclamations en matière d'insolvabilité sont directement reliées à la compétence du législateur fédéral. La doctrine de la protection des compétences exclusives ne s'applique pas non plus parce qu'une conclusion selon laquelle un créancier œuvrant dans le domaine de l'environnement détient une réclamation pécuniaire ne modifie en rien les activités de ce créancier; sa réclamation est simplement assujettie au processus d'insolvabilité.

Per McLachlin C.J. (dissenting): Remediation orders made under a province's environmental protection

La juge en chef McLachlin (dissidente) : Les ordonnances exigeant la décontamination émises aux termes legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They may only be reduced to monetary claims which can be compromised under *CCAA* proceedings in narrow circumstances where a province has done the remediation work, or where it is "sufficiently certain" that it will do the work. This last situation is regulated by the provisions of the *CCAA* for contingent or future claims. The test is whether there is a likelihood approaching certainty that the province will do the work. "Likelihood approaching certainty" recognizes that the government's decision is discretionary and may be influenced by competing political and social considerations, which are not normally subject to judicial consideration. Insofar as this determination touches on the division of powers, I am in substantial agreement with Deschamps J.

d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. Ces ordonnances ne peuvent être converties en réclamations pécuniaires pouvant faire l'objet de transactions dans le cadre de procédures engagées aux termes de la *LACC* que dans certaines circonstances particulières, lorsqu'une province a exécuté les travaux ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux. Cette deuxième situation est prévue par les dispositions de la *LACC* relatives aux réclamations éventuelles ou futures. Le critère consiste à déterminer s'il existe une probabilité proche de la certitude que la province exécutera les travaux. Une « probabilité proche de la certitude » reconnaît que la décision du gouvernement est discrétionnaire et peut être influencée par des considérations politiques et sociales concurrentes qui sont normalement soustraites à l'examen judiciaire. Dans la mesure où cette décision touche le partage des pouvoirs, je souscris pour l'essentiel à l'opinion exprimée par la juge Deschamps.

Apart from the orders related to the work done or tendered for on the Buchans property, the orders for remediation in this case are not claims that can be compromised. The *CCAA* maintains the fundamental distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy. The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. His failure to consider that question requires this Court to answer it in his stead. There is nothing on the record to support the view that the Province will move to remediate the properties. It has not been shown that the contamination poses immediate health risks which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. The Province retained a number of options, including leaving the sites contaminated, or calling on Abitibi to remediate following its emergence from restructuring. There is nothing in the record that makes it more probable, much less establishes "sufficient certainty", that the Province will opt to do the work itself.

À l'exception des ordonnances relatives aux travaux sur le site de Buchans déjà exécutés ou à l'égard desquels des appels d'offres ont été lancés, les ordonnances exigeant la décontamination en l'espèce ne constituent pas des réclamations pouvant faire l'objet de transactions dans le cadre d'une restructuration. La *LACC* établit une distinction fondamentale entre les exigences réglementaires découlant d'une loi d'application générale visant la protection du public, d'une part, et les réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration engagée sous le régime de la *LACC* ou en matière de faillite, d'autre part. Le juge de première instance ne s'est jamais posé la question cruciale de savoir s'il était « suffisamment certain » que la province exécuterait elle-même les travaux. Le fait qu'il n'ait pas examiné cette question oblige notre Cour à y répondre à sa place. Aucune preuve au dossier ne laisse croire que la province entreprendra la décontamination des sites. Il n'a pas été démontré que la contamination pose pour la santé des risques immédiats exigeant la prise de mesures dans les plus brefs délais. Il n'a pas été démontré que la province a pris quelque mesure que ce soit pour réaliser des travaux. Et il n'a pas été démontré que la province a prévu des sommes d'argent pour ces travaux ou qu'elle a même songé à en prévoir. La province a conservé un certain nombre de choix, notamment laisser les sites contaminés, ou demander à Abitibi d'exécuter les travaux lorsqu'elle aura complété sa restructuration. Rien au dossier n'indique qu'il est plus probable, et encore moins qu'il est « suffisamment certain », que la province choisira d'exécuter elle-même la décontamination.

Per LeBel J. (dissenting): The test proposed by the Chief Justice according to which the evidence must show that there is a "likelihood approaching certainty" that the Province would remediate the contamination itself is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J. best reflects how both the common law and the civil law view and deal with contingent claims. Applying that test, the appeal should be allowed on the basis that there is no evidence that the Province intends to perform the remedial work itself.

Le juge LeBel (dissident) : Le critère que propose la Juge en chef, selon lequel la preuve doit démontrer une « probabilité proche de la certitude » que la province se chargerait de la décontamination, ne constitue pas le critère établi pour déterminer si, et de quelle façon, une réclamation éventuelle peut être liquidée en droit de la faillite et de l'insolvabilité. Le critère de ce qui est « suffisamment certain » qu'énonce la juge Deschamps reflète mieux la façon dont la common law et le droit civil envisagent et traitent les réclamations éventuelles. En appliquant ce critère, il y aurait lieu d'accueillir le pourvoi puisqu'aucune preuve ne confirme l'intention de la province d'exécuter elle-même les travaux de décontamination.

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David R. Wingfield, *Paul D. Guy* and *Philip Osborne*, for the appellant.

Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu, L.C. 1997, ch. 12.

Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005), L.C. 2007, ch. 36, art. 65.

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David R. Wingfield, *Paul D. Guy* et *Philip Osborne*, pour l'appelante.

Sean F. Dunphy, *Nicholas McHaffie*, *Joseph Reynaud* and *Marc B. Barbeau*, for the respondents.

Christopher Rupar and *Marianne Zoric*, for the intervener the Attorney General of Canada.

Josh Hunter, *Robin K. Basu*, *Leonard Marsello* and *Mario Faieta*, for the intervener the Attorney General of Ontario.

R. Richard M. Butler, for the intervener the Attorney General of British Columbia.

Roderick Wiltshire, for the intervener the Attorney General of Alberta.

Elizabeth J. Rowbotham, for the intervener Her Majesty The Queen in Right of British Columbia.

Robert I. Thornton, *John T. Porter* and *Rachelle F. Moncur*, for the intervener Ernst & Young Inc., as Monitor.

William A. Amos, *Anastasia M. Lintner*, *Hugh S. Wilkins* and *R. Graham Phoenix*, for the intervener the Friends of the Earth Canada.

The judgment of Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

[1] DESCHAMPS J. — The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[2] Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body

Sean F. Dunphy, *Nicholas McHaffie*, *Joseph Reynaud* et *Marc B. Barbeau*, pour les intimés.

Christopher Rupar et *Marianne Zoric*, pour l'intervenant le procureur général du Canada.

Josh Hunter, *Robin K. Basu*, *Leonard Marsello* et *Mario Faieta*, pour l'intervenant le procureur général de l'Ontario.

R. Richard M. Butler, pour l'intervenant le procureur général de la Colombie-Britannique.

Roderick Wiltshire, pour l'intervenant le procureur général de l'Alberta.

Elizabeth J. Rowbotham, pour l'intervenante Sa Majesté la Reine du chef de la Colombie-Britannique.

Robert I. Thornton, *John T. Porter* et *Rachelle F. Moncur*, pour l'intervenante Ernst & Young Inc., en sa qualité de contrôleur.

William A. Amos, *Anastasia M. Lintner*, *Hugh S. Wilkins* et *R. Graham Phoenix*, pour l'intervenant Les Ami(e)s de la Terre Canada.

Version française du jugement des juges Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis rendu par

[1] LA JUGE DESCHAMPS — La question soulevée dans le présent pourvoi est de savoir si des ordonnances d'un organisme administratif relatives à des travaux de décontamination peuvent être traitées comme des réclamations pécuniaires aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »).

[2] Un organisme administratif peut être appelé à intervenir dans le cadre de procédures de réorganisation lorsqu'il prononce une ordonnance intimant au débiteur de se conformer à une règle prescrite par la loi. En principe, une réorganisation ne permet pas à une personne d'ignorer ses obligations légales. Par ailleurs, en certaines circonstances, une ordonnance valable et exécutoire sera assujettie

makes an environmental order that explicitly asserts a monetary claim.

[3] In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the *CCAA* if the order does not require the debtor to make a payment. I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

[4] The case at bar concerns contamination that occurred, prior to the *CCAA* proceedings, on property that is largely no longer under the debtor's possession and control. The *CCAA* court found on the facts of this case that the orders issued by Her Majesty the Queen in right of the Province of Newfoundland and Labrador ("Province") were simply a first step towards remediating the contaminated property and asserting a claim for the resulting costs. In the words of the *CCAA* court, "the intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to

à un arrangement conclu en vertu de la *LACC*. C'est le cas notamment lorsqu'un organisme administratif prononce une ordonnance environnementale qui est explicitement formulée en termes pécuniaires.

[3] En d'autres circonstances, il est plus difficile de savoir si une ordonnance peut être traitée comme une réclamation pécuniaire. L'appelante et certains des intervenants affirment qu'une ordonnance émise par un organisme de protection de l'environnement ne constitue pas une réclamation au sens de la *LACC* si elle n'exige pas du débiteur qu'il lui paye un montant d'argent. Je conviens que les ordonnances des organismes administratifs ne constituent pas toutes des réclamations pécuniaires, et donc des réclamations prouvables dans le cadre de procédures d'insolvabilité, mais certaines peuvent l'être en dépit du fait qu'elles ne sont pas quantifiées dès le début des procédures. En matière environnementale, le tribunal chargé de l'application de la *LACC* doit déterminer s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers l'organisme administratif qui a prononcé l'ordonnance. En pareil cas, la question pertinente ne se résume pas à déterminer si l'organisme a formellement exercé son pouvoir de réclamer une dette. Lorsque le tribunal évalue une réclamation (ou une ordonnance) il ne se limite pas à un examen de sa forme. Si l'ordonnance n'est pas formulée en termes pécuniaires, le tribunal doit déterminer, en fonction des faits en cause et du cadre législatif applicable, si elle constitue une réclamation qui sera assujettie au processus de réclamation.

[4] Le présent pourvoi a trait à des dommages environnementaux survenus avant que les procédures sous le régime de la *LACC* ne soient engagées, des dommages causés à des terrains qui, en majeure partie, ne sont plus en la possession du débiteur ni sous son contrôle. Le tribunal de première instance a conclu, selon les faits en l'espèce, que les ordonnances émises par Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador (« province ») ne constituaient que la première étape en vue de restaurer les sites contaminés et de réclamer les coûts engagés. Comme l'a exprimé le juge de

recover amounts of money to be eventually used for the remediation of the properties in question" (2010 QCCS 1261, 68 C.B.R. (5th) 1, at para. 211). As a result, the *CCAA* court found that the orders were clearly monetary in nature. I see no error of law and no reason to interfere with this finding of fact. I would dismiss the appeal with costs.

première instance, [TRADUCTION] « les ordonnances avaient pour effet attendu, pratique et réaliste d'établir le fondement d'une réclamation permettant à la province de récupérer des sommes d'argent qui seraient utilisées pour procéder aux travaux de décontamination » (2010 QCCS 1261, 68 C.B.R. (5th) 1, par. 211). Par conséquent, pour le tribunal, les ordonnances étaient clairement de nature pécuniaire. Je ne vois aucune erreur de droit ni aucune raison de modifier ces conclusions de fait. Je suis d'avis de rejeter le pourvoi avec dépens.

I. Facts and Procedural History

I. Faits et historique judiciaire

[5] For over 100 years, AbitibiBowater Inc. and its affiliated or predecessor companies (together, "Abitibi") were involved in industrial activity in Newfoundland and Labrador. In 2008, Abitibi announced the closure of a mill that was its last operation in that province.

[5] Pendant plus d'une centaine d'années, AbitibiBowater Inc., et ses auteurs ou sociétés filiales (ensemble, « Abitibi ») ont poursuivi des activités industrielles à Terre-Neuve-et-Labrador. En 2008, Abitibi a annoncé la fermeture de la dernière des scieries qu'elle exploitait dans cette province.

[6] Within two weeks of the announcement, the Province passed the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 ("*Abitibi Act*"), which immediately transferred most of Abitibi's property in Newfoundland and Labrador to the Province and denied Abitibi any legal remedy for this expropriation.

[6] Dans les deux semaines qui ont suivi cette annonce, la province a adopté l'*Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, ch. A-1.01 (« *Abitibi Act* »), qui transférait immédiatement à la province la plus grande partie des biens d'Abitibi situés à Terre-Neuve-et-Labrador et privait la société de tous recours judiciaires en relation avec cette expropriation.

[7] The closure of its mill in Newfoundland and Labrador was one of many decisions Abitibi made in a period of general financial distress affecting its activities both in the United States and in Canada. It filed for insolvency protection in the United States on April 16, 2009. It also sought a stay of proceedings under the *CCAA* in the Superior Court of Quebec, as its Canadian head office was located in Montréal. The *CCAA* stay was ordered on April 17, 2009.

[7] La fermeture de sa scierie à Terre-Neuve-et-Labrador est l'une des nombreuses décisions prises par Abitibi dans une période où de grandes difficultés financières touchaient ses activités au Canada et aux États-Unis. Le 16 avril 2009, elle a présenté une demande de protection contre l'insolvabilité aux États-Unis. Elle a également demandé à la Cour supérieure du Québec, à Montréal, où elle a son siège social au Canada, une suspension des procédures en vertu de la *LACC*. La suspension a été ordonnée le 17 avril 2009.

[8] In the same month, Abitibi also filed a notice of intent to submit a claim to arbitration under NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*,

[8] Au cours du même mois, Abitibi a aussi déposé un avis d'intention de soumettre une plainte à l'arbitrage en vertu de l'ALENA (*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis d'Amérique et le gouvernement des États-Unis du Mexique*,

Can. T.S. 1994 No. 2) for losses resulting from the *Abitibi Act*, which, according to Abitibi, exceeded $300 million.

R.T. Can. 1994 n^{o} 2) relativement à des pertes découlant de l'application de l'*Abitibi Act*, lesquelles totalisaient, selon Abitibi, une somme supérieure à 300 millions de dollars.

[9] On November 12, 2009, the Province's Minister of Environment and Conservation ("Minister") issued five orders (the "*EPA* Orders") under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). The *EPA* Orders required Abitibi to submit remediation action plans to the Minister for five industrial sites, three of which had been expropriated, and to complete the approved remediation actions. The *CCAA* judge estimated the cost of implementing these plans to be from "the mid-to-high eight figures" to "several times higher" (para. 81).

[9] Le 12 novembre 2009, le ministre provincial de l'Environnement et de la Conservation (« ministre ») a prononcé, en vertu de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2 (« *EPA* »), cinq ordonnances (les « ordonnances *EPA* ») contraignant Abitibi à présenter au ministre des plans de restauration pour cinq sites industriels, dont trois avaient été expropriés, et à réaliser les plans de restauration approuvés. Le juge chargé de l'instance instituée sous le régime de la *LACC* a évalué les coûts de la mise en œuvre de ces plans à une somme se situant [TRADUCTION] « entre cinquante et cent millions de dollars », ou « plusieurs fois plus élevée » (par. 81).

[10] On the day it issued the *EPA* Orders, the Province brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to Abitibi's proposed reorganization did not bar the Province from enforcing the *EPA* Orders. The Province argued — and still argues — that non-monetary statutory obligations are not "claims" under the *CCAA* and hence cannot be stayed and be subject to a claims procedure order. It further submits that Parliament lacks the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that are validly made in the exercise of a provincial power.

[10] Le jour même où elle émettait les ordonnances *EPA*, la province a demandé par requête un jugement déclarant qu'une ordonnance relative à la procédure de réclamations rendue aux termes de la *LACC* dans le cadre de la réorganisation proposée d'Abitibi n'empêchait pas la province d'exécuter les ordonnances *EPA*. La province a soutenu — et soutient toujours — que des obligations légales de nature non pécuniaire ne constituent pas des « réclamations » au sens de la *LACC* et que leur exécution ne peut donc être suspendue ni être assujettie à une ordonnance relative à la procédure de réclamations. Elle fait de plus valoir que le pouvoir du Parlement de légiférer en matière de faillite et d'insolvabilité ne lui confère pas la compétence constitutionnelle pour suspendre l'application des ordonnances prononcées dans l'exercice valide de pouvoirs provinciaux.

[11] Abitibi contested the motion and sought a declaration that the *EPA* Orders were stayed and that they were subject to the claims procedure order. It argued that the *EPA* Orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order.

[11] Abitibi a contesté la requête et a demandé un jugement déclarant que les ordonnances *EPA* avaient été suspendues et qu'elles étaient assujetties à l'ordonnance relative à la procédure de réclamations. Abitibi a soutenu que les ordonnances *EPA* étaient de nature pécuniaire et qu'elles étaient donc visées par la définition du terme « réclamation » utilisé dans l'ordonnance relative à la procédure de réclamations.

[12] Gascon J. of the Quebec Superior Court, sitting as a *CCAA* court, dismissed the Province's motion. He found that he had the authority to characterize the orders as "claims" if the underlying regulatory obligations "remain[ed], in a particular fact pattern, truly financial and monetary in nature" (para. 148). He declared that the *EPA* Orders were stayed by the initial stay order and were not subject to the exception found in that order. He also declared that the filing by the Province of any claim based on the *EPA* Orders was subject to the claims procedure order, and reserved to the Province the right to request an extension of time to assert a claim under the claims procedure order and to Abitibi the right to contest such a request.

[13] In the Court of Appeal, Chamberland J.A. denied the Province leave to appeal (2010 QCCA 965, 68 C.B.R. (5th) 57). In his view, the appeal had no reasonable chance of success, because Gascon J. had found as a fact that the *EPA* Orders were financial or monetary in nature. Chamberland J.A. also found that no constitutional issue arose, given that the Superior Court judge had merely characterized the orders in the context of the restructuring process; the judgment did not "'immunise' Abitibi from compliance with the EPA Orders" (para. 33). Finally, he noted that Gascon J. had reserved the Province's right to request an extension of time to file a claim in the *CCAA* process.

II. Positions of the Parties

[14] The Province argues that the *CCAA* court erred in interpreting the relevant *CCAA* provisions in a way that nullified the *EPA*, and that the interpretation is inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity. The Province further submits

[12] Le juge Gascon de la Cour supérieure du Québec, siégeant aux termes de la *LACC*, a rejeté la requête de la province. Il a statué qu'il avait le pouvoir de qualifier les ordonnances de « réclamations » si les obligations légales sous-jacentes [TRADUCTION] « demeur[aient], dans une situation factuelle particulière, de nature véritablement financière et pécuniaire » (par. 148). Il a déclaré que les ordonnances *EPA* avaient été suspendues en vertu de l'ordonnance de suspension initiale et qu'elles n'étaient pas visées par l'exception énoncée dans cette ordonnance. Il a également déclaré que la présentation, par la province, de toute réclamation fondée sur les ordonnances *EPA* était assujettie à l'ordonnance relative à la procédure de réclamations; il a réservé à la province le droit de demander par requête une prorogation du délai pour présenter une réclamation en vertu de la procédure de réclamations et a confirmé le droit d'Abitibi de contester une telle requête.

[13] En Cour d'appel, le juge Chamberland a rejeté la demande d'autorisation d'appel présentée par la province (2010 QCCA 965, 68 C.B.R. (5th) 57). À son avis, l'appel n'avait aucune chance raisonnable de succès parce que le juge Gascon avait conclu, comme question de faits, que les ordonnances *EPA* étaient de nature financière ou pécuniaire. Le juge Chamberland a également estimé qu'aucune question constitutionnelle ne se posait, car le juge de la Cour supérieure n'avait fait que qualifier les ordonnances dans le contexte du processus de restructuration; le jugement ne [TRADUCTION] « "soustrayait" pas Abitibi à son obligation de se conformer aux ordonnances *EPA* » (par. 33). Enfin, il a fait remarquer que le juge Gascon avait réservé à la province le droit de demander la prorogation de délai pour produire une réclamation en vertu de la *LACC*.

II. Thèses des parties

[14] La province soutient que le tribunal de première instance a commis l'erreur d'interpréter les dispositions applicables de la *LACC* de façon à invalider l'*EPA* et que cette interprétation est incompatible tant avec la doctrine des pouvoirs accessoires qu'avec celle de la protection des compétences

that, in any event, the *EPA* Orders are not "claims" within the meaning of the *CCAA*. It takes the position that "any plan of compromise and arrangement that Abitibi might submit for court approval must make provision for compliance with the *EPA* Orders" (A.F., at para. 32).

exclusives. La province fait de plus valoir que, de toute façon, les ordonnances *EPA* ne constituent pas des « réclamations » au sens de la *LACC*. Elle soutient que [TRADUCTION] « tout plan de transaction et d'arrangement qu'Abitibi pourrait soumettre à l'approbation du tribunal doit prévoir qu'[Abitibi] doit se conformer aux ordonnances *EPA* » (m.a., par. 32).

[15] Abitibi contends that the factual record does not provide a basis for applying the constitutional doctrines. It relies on the *CCAA* court's findings of fact, particularly the finding that the Province's intent was to establish the basis for a monetary claim. Abitibi submits that the true issue is whether a province that has a monetary claim against an insolvent company can obtain a preference against other unsecured creditors by exercising its regulatory power.

[15] Abitibi soutient que l'application des doctrines constitutionnelles ne trouve aucun fondement dans les faits du dossier. Elle appuie sa position sur les conclusions de fait tirées par le tribunal de première instance, plus particulièrement celles où le tribunal conclut que l'intention de la province était d'établir le fondement d'une réclamation pécuniaire. Abitibi plaide que la véritable question est de savoir si, par l'exercice de son pouvoir de réglementation, une province ayant une réclamation pécuniaire à faire valoir contre une entreprise insolvable peut obtenir une préférence à l'encontre d'autres créanciers non garantis.

III. Constitutional Questions

[16] At the Province's request, the Chief Justice stated the following constitutional questions:

1. Is the definition of "claim" in s. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this definition includes statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

2. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to bar or extinguish statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

3. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to

III. Questions constitutionnelles

[16] À la demande de la province, la Juge en chef a formulé les questions constitutionnelles suivantes :

1. La définition d'une « réclamation » énoncée au par. 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-elle les pouvoirs du Parlement du Canada ou est-elle constitutionnellement inapplicable dans la mesure où elle englobe les obligations légales auxquelles le débiteur est assujetti en application de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

2. L'article 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-il les pouvoirs du Parlement du Canada ou est-il constitutionnellement inapplicable dans la mesure où il confère aux tribunaux la compétence pour libérer le débiteur des obligations légales auxquelles il est ou pourrait être assujetti en application de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

3. L'article 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-il les pouvoirs du Parlement du Canada ou est-il constitutionnellement inapplicable dans la mesure

review the exercise of ministerial discretion under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

où il confère aux tribunaux la compétence pour réviser l'exercice du pouvoir discrétionnaire conféré au ministre par l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

[17] I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However, the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 65) (the "2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

[17] Je souligne que la question de savoir si, aux termes de la *LACC*, un tribunal a compétence constitutionnelle pour suspendre l'application d'une ordonnance provinciale qui *ne* constitue *pas* une réclamation pécuniaire ne se pose pas en l'espèce parce que l'ordonnance de suspension en cause ne visait pas ces ordonnances. La question pourrait toutefois se poser dans d'autres affaires. En 2007, par l'ajout du par. 11.1(3) de la *LACC*, le législateur fédéral a explicitement conféré aux tribunaux compétents aux termes de la *LACC* le pouvoir de suspendre l'application des ordonnances d'un organisme administratif qui ne constituent pas des réclamations pécuniaires (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)*, L.C. 2007, ch. 36, art. 65) (les « modifications de 2007 »). Ainsi, les tribunaux auront l'occasion d'analyser la question soulevée par la province lorsque le contexte factuel s'y prêtera. La seule question constitutionnelle qui requiert une réponse en l'espèce a trait à la compétence d'un tribunal, aux termes de la *LACC*, de déterminer si une ordonnance environnementale qui n'est pas formulée en termes pécuniaires constitue, en fait, une réclamation pécuniaire.

[18] Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament. Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process. There is no need to perform a detailed analysis of the pith and substance of the provisions on the assessment of claims in insolvency matters to conclude that the federal legislation governing the characterization of an order as a monetary claim is valid. Because the provisions relate directly to Parliament's jurisdiction,

[18] Le traitement équitable et ordonné des réclamations présentées par des créanciers contre un débiteur insolvable se situe au cœur même de la législation en matière d'insolvabilité, un domaine de compétence attribué au législateur fédéral. L'établissement de règles relatives à l'évaluation des réclamations des créanciers, comme celle permettant de déterminer si un créancier fait valoir une réclamation pécuniaire, concerne directement le traitement équitable et ordonné des créanciers dans le cadre d'un processus établi en matière d'insolvabilité. Il n'est pas nécessaire d'analyser en détail le caractère véritable des dispositions régissant l'évaluation des réclamations en matière d'insolvabilité pour conclure à la validité du texte législatif fédéral

the ancillary powers doctrine is not relevant to this case. I also find that the interjurisdictional immunity doctrine is not applicable. A finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process.

permettant d'établir qu'une ordonnance constitue une réclamation pécuniaire. L'application de la doctrine des pouvoirs accessoires n'est pas pertinente en l'espèce car les dispositions en cause sont directement reliées à la compétence du législateur fédéral. J'estime également que la doctrine de la protection des compétences exclusives ne s'applique pas en l'espèce. Une conclusion selon laquelle un créancier œuvrant dans le domaine de l'environnement détient une réclamation pécuniaire ne modifie en rien les activités de ce créancier. La réclamation de ce dernier est simplement assujettie au processus d'insolvabilité.

[19] What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process. Environmental claims do not have a higher priority than is provided for in the *CCAA*. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453). Environmental claims are given a specific, and limited, priority under the *CCAA*. To exempt orders which are in fact monetary claims from the *CCAA* proceedings would amount to conferring upon provinces a priority higher than the one provided for in the *CCAA*.

[19] Ce que soutient en fait la province, c'est que les tribunaux devraient examiner la forme des ordonnances plutôt que leur substance. Je ne vois aucune raison empêchant l'examen du choix par la province d'un type d'ordonnance donnée afin de déterminer si la forme choisie concorde avec l'objectif véritable qui se dégage des gestes qu'elle a posés. Si ces gestes indiquent qu'elle fait effectivement valoir une réclamation prouvable au sens de la législation fédérale, alors cette réclamation peut être assujettie au processus d'insolvabilité. Les réclamations en matière d'environnement ne bénéficient pas d'un rang supérieur à celui prévu par les dispositions de la *LACC*. Privilégier l'examen de la substance d'une ordonnance plutôt que de sa forme permet d'éviter qu'un organisme administratif obtienne de façon artificielle une priorité de rang supérieure à celle que la législation fédérale attribue à la réclamation. Notre Cour a depuis longtemps reconnu qu'une province ne pouvait perturber les priorités établies par le régime fédéral d'insolvabilité (*Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453). La *LACC* établit une priorité précise et limitée à l'égard des réclamations en matière environnementale. Le fait de soustraire aux procédures d'insolvabilité les ordonnances qui sont en fait des réclamations pécuniaires équivaudrait à accorder aux provinces une priorité d'un rang supérieur à celui prévu par la *LACC*.

IV. Claims Under the *CCAA*

IV. Réclamations sous le régime de la *LACC*

[20] Several provisions of the *CCAA* have been amended since Abitibi filed for insolvency

[20] Plusieurs dispositions de la *LACC* ont été modifiées depuis qu'Abitibi a présenté une demande

protection. Except where otherwise indicated, the provisions I refer to are those that were in force when the stay was ordered.

de protection contre l'insolvabilité. À moins d'indication contraire de ma part, les dispositions que je cite sont celles qui étaient en vigueur lorsque la suspension des procédures a été ordonnée.

[21] One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

[21] Une des caractéristiques principales du régime créé par la *LACC* est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis.

[22] Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

> **12.** (1) [Definition of "claim"] For the purposes of this Act, "claim" means any <u>indebtedness</u>, <u>liability</u> or <u>obligation of any kind</u> that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.
>
> (2) [Determination of amount of claim] For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (*a*) the amount of an unsecured claim shall be the amount
>
> . . .
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; . . .

[22] L'article 12 de la *LACC* énonce les règles de base pour déterminer si une ordonnance constitue une réclamation pouvant être assujettie au processus applicable en matière d'insolvabilité :

> **12.** (1) [Définition de « réclamation »] Pour l'application de la présente loi, « réclamation » s'entend de toute <u>dette</u>, tout <u>engagement</u> ou toute <u>obligation d'un genre quelconque</u> qui, s'il n'était pas garanti, constituerait une dette prouvable en matière de faillite au sens de la *Loi sur la faillite et l'insolvabilité*.
>
> (2) [Détermination du montant de la réclamation] Pour l'application de la présente loi, le montant représenté par une réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :
>
> *a*) le montant d'une réclamation non garantie est le montant :
>
> . . .
>
> (iii) dans le cas de toute autre compagnie, dont la preuve pourrait être établie en vertu de la *Loi sur la faillite et l'insolvabilité*, mais si le montant ainsi prouvable n'est pas admis par la compagnie, ce montant est déterminé par le tribunal sur demande sommaire par la compagnie ou le créancier;

[23] Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

[24] This definition is completed by s. 121(1) of the *BIA*:

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[25] Sections 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

121. . . .

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

135. . . .

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[26] These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

[23] L'article 12 de la *LACC* renvoie aux règles de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). L'article 2 de la *LFI* définit ainsi une réclamation prouvable en matière de faillite :

« réclamation prouvable en matière de faillite » ou « réclamation prouvable » Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité de la présente loi par un créancier.

[24] Cette définition est complétée par le par. 121(1) de la *LFI* :

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

[25] Les paragraphes 121(2) et 135(1.1) de la *LFI* donnent des indications additionnelles lorsqu'il s'agit de déterminer si une ordonnance constitue une réclamation prouvable :

121. . . .

(2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

135. . . .

(1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

[26] Ces dispositions font ressortir trois conditions pertinentes à la présente affaire. Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. Je vais examiner chacune de ces conditions à tour de rôle.

[27] The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

[28] The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

> **11.8** . . .
>
> (9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, <u>whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced</u>.

[29] The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases,

[27] La définition de réclamation prouvable établie par la *LFI* et incorporée par renvoi à la *LACC* exige qu'une personne ait qualité de créancier. Les lois régissant l'environnement pourvoient généralement à la création d'un organisme chargé de voir au respect des obligations qui y sont prévues. La plupart des organismes administratifs peuvent agir à titre de créanciers en relation avec les obligations pécuniaires ou non pécuniaires imposées par ces lois. À cette première étape qui consiste à déterminer si un organisme administratif est un créancier, il n'est pas encore pertinent de décider si l'obligation peut être formulée en termes pécuniaires. Cette question sera abordée à un stade ultérieur. À cette étape, la seule question à trancher est de savoir si l'organisme administratif a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi. Lorsqu'il le fait, il s'identifie alors comme créancier et la condition de cette étape est espectée.

[28] L'examen de la seconde condition repose sur le par. 121(1) de la *LFI* qui impose que la réclamation ait pris naissance dans un délai donné. Celle-ci doit se fonder sur une obligation « contractée antérieurement à cette date [la date à laquelle le failli devient failli] ». Comme il est souvent difficile d'établir la date à laquelle un dommage lié à l'environnement est survenu, le par. 11.8(9) de la *LACC* prévoit une certaine flexibilité pour ce qui est des réclamations en matière d'environnement :

> **11.8** . . .
>
> (9) La réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un bien immeuble de la compagnie débitrice constitue une réclamation, <u>que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi</u>.

[29] La réclamation du créancier sera exemptée de l'exigence découlant de la procédure unique si l'obligation correspondante du débiteur n'a pas pris naissance dans le délai fixé pour que la réclamation soit incluse dans le processus d'insolvabilité. À titre d'exemple, cela pourrait s'appliquer aux obligations que la loi impose à un débiteur concernant

the damage continues to be sustained after the reorganization has been completed.

[30] With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

[31] However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update" (1998), 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

[32] Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Evidence of the Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority (s. 11.8(8) *CCAA*). Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably.

ses activités polluantes qui se poursuivent après la réorganisation, parce qu'en pareilles circonstances, des dommages sont encore causés après que la réorganisation ait été complétée.

[30] En ce qui concerne la troisième condition, soit qu'il doit être possible d'attribuer à l'obligation une valeur pécuniaire, la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes. Je souligne que lorsqu'un organisme administratif réclame une somme qui est due à la date pertinente, il formule ainsi son ordonnance en termes pécuniaires. Le tribunal n'a alors aucune détermination à faire à cette étape car ce qui est réclamé est une « dette » et est, par conséquent, clairement visé par la définition d'une « réclamation » prévue au par. 12(1) de la *LACC*.

[31] Toutefois, parce qu'elles sont utilisées pour traiter divers enjeux environnementaux, les ordonnances peuvent se présenter sous plusieurs formes et peuvent viser notamment la cessation ou le contrôle d'une activité, la prévention et la décontamination (D. Saxe, « Trustees' and Receivers' Environnmental Liability Update » (1998), 49 C.B.R. (3d) 138, p. 141). Lorsqu'ils analysent une ordonnance qui n'est pas formulée en des termes pécuniaires, les tribunaux doivent en examiner la substance et appliquer les règles régissant l'évaluation des réclamations.

[32] Le législateur fédéral reconnaît que les organismes administratifs doivent à l'occasion exécuter des travaux de décontamination (voir Chambre des communes, *Témoignages du Comité permanent de l'industrie*, n° 16, 2e sess., 35e lég., 11 juin 1996). En pareil cas, la réclamation relative aux frais de décontamination est assujettie à la procédure de réclamations en matière d'insolvabilité mais elle est garantie par une charge réelle grevant l'immeuble contaminé et certains immeubles connexes et bénéficie d'un rang prioritaire (par. 11.8(8) *LACC*). Ainsi, le législateur a établi un équilibre entre l'intérêt du public à l'égard de l'application de la réglementation environnementale et les intérêts des tiers créanciers qui doivent être traités de façon équitable.

[33] If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) of the *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

[33] Si le législateur fédéral avait eu l'intention d'obliger le débiteur à supporter dans tous les cas tous les coûts des travaux de décontamination, il aurait accordé à l'État une priorité applicable à la totalité des actifs du débiteur. Compte tenu de l'historique des dispositions législatives et des objectifs du processus de réorganisation, le fait que la priorité de l'État aux termes du par. 11.8(8) de la *LACC* soit limitée au bien contaminé et à certains biens liés m'amène à conclure qu'une exemption à l'égard des ordonnances environnementales serait incompatible avec la législation en matière d'insolvabilité. Aussi respectueux soient-ils des mesures prises par les organismes administratifs, les tribunaux sont tenus d'appliquer les règles générales.

[34] Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

[34] Contrairement à l'approche qui prévaut dans le contexte des procédures régies par la common law ou le droit civil, il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu (en common law, voir *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79, par. 17-18; en droit civil, voir les art. 1497, 1508 et 1513 du *Code civil du Québec*, L.Q. 1991, ch. 64). Ainsi, la définition générale de « réclamation » de la *LFI* englobe des réclamations éventuelles et *futures* qui seraient inexécutoires en common law ou en droit civil. En ce qui concerne les réclamations non liquidées, le tribunal chargé de l'application de la *LACC* a le même pouvoir d'évaluer leur montant qu'un tribunal saisi d'une affaire sous le régime de la common law ou du droit civil.

[35] The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to

[35] C'est pour assurer l'équité entre les créanciers ainsi que, pour le débiteur, le caractère définitif de la procédure d'insolvabilité que la *LFI* et la *LACC* englobent un large éventail de réclamations. Dans le cadre de la liquidation d'une société, il est plus équitable de permettre au plus grand nombre possible de créanciers de participer au processus et de se partager le produit de la liquidation. Cela permet d'inclure les créanciers dont les réclamations ne sont pas venues à échéance lorsque le débiteur corporatif devient failli, et ainsi éviter que, ayant cessé ses activités, le débiteur ne puisse pas satisfaire à un jugement rendu en leur faveur. L'approche est quelque peu différente dans

ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

le contexte d'une proposition concordataire présentée par une société ou d'une réorganisation. Dans ces cas, l'objectif que sous-tend une interprétation large est non seulement de garantir l'équité entre créanciers, mais aussi de permettre au débiteur de prendre un nouveau départ dans les meilleures conditions possibles à la suite de l'approbation d'une proposition ou d'un arrangement.

[36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

[36] Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural (*Confederation Treasury Service Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire afin d'obtenir le remboursement de ses débours. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

[37] The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude

[37] Lorsqu'il détermine si une ordonnance constitue une réclamation prouvable, le tribunal chargé de l'application de la *LACC* doit, dans une certaine mesure, examiner les actes posés par l'organisme administratif. Cet examen se rapproche à certains égards de celui d'un contrôle judiciaire. La différence se situe, toutefois, au niveau de l'objet de l'évaluation que doit faire le tribunal. Son examen ne porte pas sur l'exercice du pouvoir discrétionnaire par l'organisme administratif. Il doit plutôt déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Par exemple, si le débiteur continue d'exercer les activités faisant l'objet de l'intervention de l'organisme administratif, il est fort possible que le tribunal conclue que l'ordonnance ne peut être incorporée au processus d'insolvabilité parce que ces activités et les dommages en découlant se poursuivront après la réorganisation et qu'elles excéderont donc le délai prescrit pour la production d'une

that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain that the regulatory body will have to perform the work.

[38] Certain indicators can thus be identified from the text and the context of the provisions to guide the *CCAA* court in determining whether an order is a provable claim, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The *CCAA* court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

[39] Having highlighted three requirements for finding a claim to be provable in a *CCAA* process that need to be considered in the case at bar, I must now discuss certain policy arguments raised by the Province and some of the interveners.

[40] These parties argue that treating a regulatory order as a claim in an insolvency proceeding extinguishes the debtor's environmental obligations, thereby undermining the polluter-pay principle discussed by this Court in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24. This objection

réclamation. Par contre, si l'organisme administratif, n'ayant aucune solution réaliste autre que celle d'effectuer lui-même les travaux de décontamination, ne fait que retarder la production d'une réclamation pécuniaire dans le but d'améliorer sa position par rapport à celle des autres créanciers, le tribunal pourrait conclure que cette démarche n'est pas compatible avec le régime d'insolvabilité et décider que l'ordonnance doit être traitée dans le cadre du processus de réclamations. De même, si le débiteur n'exerce aucun contrôle sur le bien et ne dispose pas, ni ne disposera, de façon réaliste, des moyens pour effectuer les travaux de décontamination, le tribunal pourrait conclure de façon suffisamment certaine que l'organisme administratif devra exécuter les travaux.

[38] Il est ainsi possible de discerner, grâce au libellé des dispositions et à leur contexte, certains indicateurs qui permettent de guider le tribunal au moment de déterminer si l'ordonnance constitue une réclamation prouvable, notamment si les activités se poursuivent, si le débiteur exerce un contrôle sur le bien et s'il dispose des moyens de se conformer à l'ordonnance. Il est également possible pour le tribunal de prendre en compte les conséquences qu'entraînerait sur le processus d'insolvabilité le fait d'exiger du débiteur qu'il se conforme à l'ordonnance. Puisque l'analyse qu'il convient de réaliser est fondée sur les faits propres à chaque cas, il n'est pas nécessaire que tous ces indicateurs soient présents, et d'autres peuvent également devenir pertinents.

[39] Après avoir souligné les trois conditions qui permettent en l'espèce de conclure qu'une ordonnance constitue une réclamation prouvable dans le cadre d'un processus régi par la *LACC*, il me faut examiner certains arguments de principe que la province et certains intervenants ont fait valoir.

[40] Ils ont plaidé que le fait d'assimiler une ordonnance d'un organisme administratif à une réclamation dans le cadre de procédure en insolvabilité éteint les obligations environnementales auxquelles le débiteur est tenu, minant par le fait même le principe du pollueur-payeur examiné par notre Cour dans l'arrêt *Cie pétrolière Impériale*

demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third-party-pay" principle in place of the polluter-pay principle.

[41] Nor does subjecting the orders to the insolvency process amount to issuing a licence to pollute, since insolvency proceedings do not concern the debtor's future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colourful analogy of two American scholars, "Debtors in bankruptcy have — and should have — no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute" (D. G. Baird and T. H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199, at p. 1200).

[42] Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure

ltée c. Québec (Ministre de l'Environnement), 2003 CSC 58, [2003] 2 R.C.S. 624, par. 24. Cet argument démontre une mauvaise compréhension de la nature des procédures en matière d'insolvabilité. Le fait d'assujettir une ordonnance au processus de réclamations n'éteint pas les obligations environnementales qui incombent au débiteur, pas plus que le fait de soumettre à ce processus les réclamations des créanciers n'éteint l'obligation du débiteur de payer ses dettes. Le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. De plus, le respect intégral des ordonnances dont la nature pécuniaire est reconnue transférerait le coût de la décontamination aux tiers créanciers, y compris aux créanciers involontaires, par exemple les créanciers en responsabilité délictuelle ou extra-contractuelle. Dans un contexte d'insolvabilité, la position de la province aurait comme résultat de lui accorder non seulement une super-priorité, mais aussi de reconnaître l'application d'un principe du « tiers-payeur » plutôt que celui du pollueur-payeur.

[41] Par ailleurs, l'assujettissement des ordonnances au processus d'insolvabilité n'autorise pas une personne à polluer, car la procédure en insolvabilité ne touche pas les actes que le débiteur posera dans le futur. Le débiteur réorganisé doit se conformer pour l'avenir à la réglementation environnementale, comme le ferait toute autre personne. Pour citer une analogie haute en couleurs de deux universitaires américains, [TRADUCTION] « [l]es débiteurs en faillite n'ont pas — et ne devraient pas avoir — une autorisation plus étendue de polluer en violation d'une loi qu'ils n'en ont de vendre de la cocaïne » (D. G. Baird et T. H. Jackson, « Comment : *Kovacs* and Toxic Wastes in Bankruptcy » (1984), 36 *Stan. L. Rev.* 1199, p. 1200).

[42] En outre, il arrive que des sociétés exercent des activités comportant des risques. Peu importe les risques en cause, une réorganisation rendue nécessaire par l'insolvabilité de la société peut difficilement être assimilée à un choix délibéré. Lorsque les risques se concrétisent, la quasi-totalité des personnes ayant des intérêts dans la société en

in order to rid themselves of their environmental liabilities.

supportent les terribles coûts. L'assujettissement des ordonnances à la procédure de réclamations n'équivaut pas à convier les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales.

[43] And the power to determine whether an order is a provable claim does not mean that the court will necessarily conclude that the order before it will be subject to the *CCAA* process. In fact, the *CCAA* court in the case at bar recognized that orders relating to the environment may or may not be considered provable claims. It stayed only those orders that were monetary in nature.

[43] Et le pouvoir de déterminer si une ordonnance constitue une réclamation prouvable ne signifie pas que le tribunal jugera nécessairement que l'ordonnance sera soumise au processus de réorganisation. En fait, le tribunal en l'espèce a reconnu que les ordonnances environnementales pouvaient être ou ne pas être considérées comme des réclamations prouvables. Il n'a rendu une ordonnance de suspension qu'à l'égard des ordonnances de nature pécuniaire.

[44] The Province also argues that courts have in the past held that environmental orders cannot be interpreted as claims when the regulatory body has not yet exercised its power to assert a claim framed in monetary terms. The Province relies in particular on *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), and its progeny. In *Panamericana*, the Alberta Court of Appeal held that a receiver was personally liable for work under a remediation order and that the order was not a claim in insolvency proceedings. The court found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim.

[44] La province plaide aussi que selon la jurisprudence, les ordonnances environnementales ne peuvent pas être assimilées à des réclamations lorsque l'organisme administratif n'a pas encore exercé son pouvoir de faire valoir une réclamation formulée en termes pécuniaires. La province s'appuie particulièrement sur l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), et les jugements rendus dans sa foulée. Dans l'arrêt *Panamericana*, la Cour d'appel de l'Alberta a tenu le séquestre personnellement responsable de l'exécution des travaux ordonnés et a statué que l'ordonnance ne constituait pas une réclamation visée par les procédures en insolvabilité. La cour a conclu que l'obligation d'entreprendre les travaux de décontamination est due au public en général jusqu'à ce que l'organisme administratif exerce son pouvoir de faire valoir une réclamation pécuniaire.

[45] The first answer to the Province's argument is that courts have never shied away from putting substance ahead of form. They can determine whether the order is in substance monetary.

[45] La première réponse à cet argument de la province est que les tribunaux n'ont jamais hésité à privilégier le fond à la forme. Les tribunaux peuvent déterminer si, en substance, l'ordonnance est de nature pécuniaire.

[46] The second answer is that the provisions relating to the assessment of claims, particularly those governing contingent claims, contemplate instances in which the quantum is not yet established when the claims are filed. Whether, in the

[46] La seconde réponse est que les dispositions concernant l'évaluation des réclamations, en particulier celles régissant les réclamations éventuelles, n'exigent pas que la valeur pécuniaire soit établie au moment où elles sont produites. Un

regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (new ed. 2001); D. N. MacCormick, "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (1977), 189). However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged. Rather, the question is whether it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim.

certain nombre d'auteurs ont examiné la question de savoir si, dans un contexte réglementaire, l'existence d'une obligation implique toujours en corrélation celle d'un droit. Diverses théories relatives aux droits ont été avancées (voir W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (nouvelle éd. 2001); D. N. MacCormick, « Rights in Legislation », dans P. M. S. Hacker et J. Raz, dir., *Law, Morality, and Society : Essays in Honour of H. L. A. Hart* (1977), 189). Toutefois, comme en l'espèce la province a prononcé les ordonnances, elle serait reconnue comme créancière d'un droit en vertu de l'une ou l'autre de ces théories. Par conséquent, malgré l'intérêt que peut susciter ce débat, il n'est pas nécessaire de déterminer la théorie qui prévaut. La véritable question n'est pas de savoir à qui est due l'obligation, puisque la loi y répond en indiquant qui peut en exiger l'exécution. La question est plutôt de savoir s'il est suffisamment certain que l'organisme administratif effectuera les travaux de décontamination et pourra ainsi faire valoir une réclamation pécuniaire.

[47] The third answer to the Province's argument is that insolvency legislation has evolved considerably over the two decades since *Panamericana*. At the time of *Panamericana*, none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in *Panamericana* (*An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9, amending s. 14 of the *BIA*). The 1997 amendments provided additional protection to trustees and monitors (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12). The 2007 amendments made it clear that a *CCAA* court has the power to determine that a regulatory order may be a claim and also provided criteria for staying regulatory orders (s. 65, amending the *CCAA* to include the current version of s. 11.1). The purpose of these amendments was to balance the creditor's

[47] La troisième réponse à l'argument soulevé par la province est que la législation en matière d'insolvabilité a considérablement évolué au cours des deux décennies écoulées depuis l'arrêt *Panamericana*. À l'époque où l'arrêt *Panamericana* a été prononcé, aucune des dispositions concernant les obligations liées à l'environnement n'était en vigueur. Certaines des dispositions ont été adoptées très peu de temps après cette décision et, semble-t-il, en réponse à celle-ci. En 1992, le législateur a permis aux syndics d'échapper à la responsabilité même que l'arrêt *Panamericana* avait retenue contre le séquestre (*Loi modifiant la Loi sur la faillite et la Loi de l'impôt sur le revenu en conséquence*, L.C. 1992, ch. 27, art. 9, modifiant l'art. 14 de la *LFI*). Une protection additionnelle a été accordée au syndic et au contrôleur avec les modifications adoptées en 1997 (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu*, L.C. 1997, ch. 12). Les modifications apportées en 2007 ont précisé que le tribunal chargé d'appliquer la *LACC* a

need for fairness against the debtor's need to make a fresh start.

le pouvoir de décider qu'une ordonnance d'un organisme administratif peut constituer une réclamation; ces modifications ont de plus établi des critères applicables à la suspension de ces ordonnances (art. 65, modifiant la *LACC* par l'ajout de l'art. 11.1). Ces modifications visaient à établir un équilibre entre le besoin de traiter les créanciers de façon équitable et celui de permettre au débiteur de prendre un nouveau départ.

[48] Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, 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.

[48] La détermination qu'une ordonnance d'un organisme administratif constitue une réclamation éventuelle doit être fondée sur les faits de chaque affaire. La législation en matière d'environnement accorde généralement à un organisme administratif un pouvoir discrétionnaire de décider de la meilleure façon d'assurer le respect des obligations découlant de la réglementation. Quoique le tribunal doive se garder de s'ingérer dans l'exercice du pouvoir discrétionnaire de ces organismes, les mesures qu'ils prennent peuvent néanmoins faire l'objet d'un examen dans le cadre de procédures engagées sous le régime fédéral de l'insolvabilité.

V. Application

[49] I now turn to the application of the principles discussed above to the case at bar. This case does not turn on whether the Province is the creditor of an obligation or whether damage had occurred as of the relevant date. Those requirements are easily satisfied, since the Province had identified itself as a creditor by resorting to *EPA* enforcement mechanisms and since the damage had occurred before the time of the *CCAA* proceedings. Rather, the issue centres on the third requirement: that the orders meet the criterion for admission as a pecuniary claim. The claim was contingent to the extent that the Province had not yet formally exercised its power to ask for the payment of money. The question is whether it was sufficiently certain that the orders would eventually result in a monetary claim. To the *CCAA* judge, there was no doubt that the answer was yes.

V. Application

[49] J'aborde maintenant l'application des principes énoncés ci-dessus à l'affaire dont notre Cour est saisie. En l'espèce, le débat n'est pas centré sur la question de savoir si la province est créancière d'une obligation ou si des dommages étaient survenus à la date pertinente. Il est facile de répondre à ces questions étant donné que la province s'est elle-même présentée comme créancière en ayant recours aux mécanismes d'application de l'*EPA* et que les dommages sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Le débat porte plutôt sur la troisième condition, celle qui consiste à savoir si les ordonnances satisfont au critère d'admissibilité à titre de réclamation pécuniaire. La réclamation était éventuelle dans la mesure où la province n'avait pas formellement exercé son pouvoir de demander paiement d'une somme d'argent. La question est de savoir s'il était suffisamment certain que l'ordonnance mènerait éventuellement à la production d'une réclamation pécuniaire. Pour le juge de première instance, une réponse affirmative ne faisait pas de doute.

[50] The Province's exercise of its legislative powers in enacting the *Abitibi Act* created a unique set of facts that led to the orders being issued. The seizure of Abitibi's assets by the Province, the cancellation of all outstanding water and hydroelectric contracts between Abitibi and the Province, the cancellation of pending legal proceedings by Abitibi in which it sought the reimbursement of several hundreds of thousands of dollars, and the denial of any compensation for the seized assets and of legal redress are inescapable background facts in the judge's review of the *EPA* Orders.

[50] En adoptant l'*Abitibi Act*, ayant ainsi recours à son pouvoir législatif, la province mettait en place un contexte factuel unique qui menait à l'émission des ordonnances. La saisie par la province des actifs d'Abitibi, l'annulation de tous les contrats d'approvisionnement en eau et d'hydroélectricité conclus entre Abitibi et la province, l'annulation des recours intentés par Abitibi pour obtenir le remboursement de plusieurs centaines de milliers de dollars et le refus de toute indemnité et de tous recours en justice à l'égard des actifs saisis tissent un contexte factuel dont le juge ne peut faire abstraction dans son examen des ordonnances *EPA*.

[51] The *CCAA* judge did not elaborate on whether it was sufficiently certain that the Minister would perform the remediation work and therefore make a monetary claim. However, most of his findings clearly rest on a positive answer to this question. For example, his finding that "[i]n all likelihood, the pith and substance of the EPA Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAFTA claims for compensation" (para. 178), is necessarily based on the premise that the Province would most likely perform the remediation work. Indeed, since monetary claims must, both at common law and in civil law, be mutual for set-off or compensation to operate, the Province had to have incurred costs in doing the work in order to have a claim that could be set off against Abitibi's claims.

[51] Le juge de première instance n'a pas fait une analyse distincte du critère suivant lequel le tribunal doit être suffisamment certain que le ministre exécuterait les travaux de décontamination et ferait, par conséquent, valoir une réclamation pécuniaire. Cependant, la plupart de ses conclusions reposent manifestement sur un constat positif à cet égard. Par exemple, le constat que [TRADUCTION] « [s]elon toute vraisemblance, le caractère véritable des ordonnances *EPA* [consiste] pour la province à tenter de jeter les bases de réclamations pécuniaires contre Abitibi, dans le but de les utiliser tout probablement à titre compensatoire au regard des demandes d'indemnisation d'Abitibi fondées sur l'ALÉNA » (par. 178) repose nécessairement sur la prémisse que la province allait fort probablement exécuter les travaux de décontamination. En effet, puisque les réclamations pécuniaires, en common law comme en droit civil, doivent être réciproques pour opérer compensation, la province devait avoir engagé des dépenses en exécutant des travaux, ce qui établissait la base de la réclamation qu'elle ferait valoir pour compenser celle d'Abitibi.

[52] That the judge relied on an implicit finding that the Province would most likely perform the work and make a claim to offset its costs is also shown by the confirmation he found in the declaration by the Premier that the Province was attempting to assess the cost of doing remediation work Abitibi had allegedly left undone and that in the Province's assessment, "at this point in

[52] Un autre fait illustre que le juge de première instance a implicitement conclu que la province allait fort probablement exécuter les travaux et produire une réclamation pour compenser ses coûts est qu'il en a trouvé une confirmation dans la déclaration du premier ministre selon laquelle la province tentait d'évaluer ce qu'il en coûterait pour réaliser les travaux de décontamination qu'Abitibi n'aurait

time, there would not be a net payment to Abitibi" (para. 181).

[53] The *CCAA* judge's reasons not only rest on an implicit finding that the Province would most likely perform the work, but refer explicitly to facts that support this finding. To reach his conclusion that the *EPA* Orders were monetary in nature, the *CCAA* judge relied on the fact that Abitibi's operations were funded through debtor-in-possession financing and its access to funds was limited to ongoing operations. Given that the *EPA* Orders targeted sites that were, for the most part, no longer in Abitibi's possession, this meant that Abitibi had no means to perform the remediation work during the reorganization process.

[54] In addition, because Abitibi lacked funds and no longer controlled the properties, the timetable set by the Province in the *EPA* Orders suggested that the Province never truly intended that Abitibi was to perform the remediation work required by the orders. The timetable was also unrealistic. For example, the orders were issued on November 12, 2009 and set a deadline of January 15, 2010 to perform a particular act, but the evidence revealed that compliance with this requirement would have taken close to a year.

[55] Furthermore, the judge relied on the fact that Abitibi was not simply designated a "person responsible" under the *EPA*, but was intentionally targeted by the Province. The finding that the Province had targeted Abitibi was drawn not only from the timing of the *EPA* Orders, but also from the fact that Abitibi was the only person designated in them, whereas others also appeared to be responsible — in some cases, primarily responsible — for the contamination. For example, Abitibi was ordered to do remediation work on a site it had surrendered more than 50 years before the orders were issued; the expert report upon which the orders were based made no distinction between Abitibi's activities on the property, on which its source of power had been horse power, and subsequent activities by others who had used fuel-powered vehicles

pas exécutés, et que selon l'estimation de la province, [TRADUCTION] « à l'heure actuelle, aucun paiement net ne serait versé à Abitibi » (par. 181).

[53] Les motifs du juge de première instance reposent non seulement sur une constatation implicite que la province exécuterait fort probablement les travaux, mais ils renvoient expressément aux faits qui appuient cette constatation. Pour conclure que les ordonnances *EPA* étaient de nature pécuniaire, le juge s'est fondé sur le fait qu'Abitibi pouvait mener ses opérations grâce à un financement de débiteur-exploitant et qu'elle n'avait accès à ces fonds que pour ses activités courantes. Étant donné que les ordonnances visaient des sites que, pour la plupart, Abitibi ne possédait plus, cela signifiait qu'Abitibi ne disposait d'aucune ressource pour exécuter les travaux pendant la réorganisation.

[54] De plus, parce qu'Abitibi ne disposait pas des fonds et n'exerçait plus aucun contrôle sur les biens, l'échéancier fixé par la province dans les ordonnances *EPA* était non seulement irréaliste, mais suggérait que la province n'avait jamais vraiment eu l'intention qu'Abitibi exécute les travaux qu'elle lui ordonnait de faire. Par exemple, les ordonnances en date du 12 novembre 2009 exigeaient que certains travaux particuliers soient terminés le 15 janvier 2010 alors que la preuve démontre qu'il aurait fallu presque un an pour exécuter ces travaux.

[55] En outre, le juge s'est appuyé sur le fait qu'Abitibi n'était pas simplement désignée comme [TRADUCTION] « personne responsable » aux termes de l'*EPA*, mais qu'elle était intentionnellement visée par la province. Il a fait cette constatation non seulement en raison du choix du moment où les ordonnances ont été prononcées, mais aussi parce qu'Abitibi y était la seule personne désignée alors que d'autres semblaient également responsables — et en certains cas, principalement responsables — de la contamination. Par exemple, la province a ordonné à Abitibi d'effectuer des travaux de décontamination d'un site qu'elle avait abandonné plus de 50 ans avant le prononcé des ordonnances alors que le rapport d'expert sur lequel les ordonnances étaient fondées ne distinguait aucunement les activités d'Abitibi, qui avait utilisé des chevaux,

there. In the judge's opinion, this finding of fact went to the Province's intent to establish a basis for performing the work itself and asserting a claim against Abitibi.

[56] These reasons — and others — led the *CCAA* judge to conclude that the Province had not expected Abitibi to perform the remediation work and that the "intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (para. 211). He found that the Province appeared to have in fact taken some steps to liquidate the claims arising out of the *EPA* Orders.

[57] In the end, the judge found that there was definitely a claim that "might" be filed, and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" (para. 227). In his words, the situation did not involve a "detached regulator or public enforcer issuing [an] order for the public good" (para. 175), and it was "the hat of a creditor that best fi[t] the Province, not that of a disinterested regulator" (para. 176).

[58] In sum, although the analytical framework used by Gascon J. was driven by the facts of the case, he reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. He did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. Earmarking money may be a strong indicator that a province will perform remediation work, and actually commencing the work is the first step towards the creation of a debt, but these are not the

et les activités subséquentes d'autres personnes qui y avaient utilisé des véhicules alimentés au mazout. Ce fait, pour le juge, illustrait l'intention de la province d'établir un fondement pour exécuter elle-même les travaux et présenter une réclamation contre Abitibi.

[56] Ces motifs — et d'autres — ont amené le juge de première instance à conclure que la province ne s'attendait pas à ce qu'Abitibi exécute les travaux de décontamination et que [TRADUCTION] « les ordonnances *EPA* avaient pour effet voulu, pratique et réaliste de jeter les bases qui permettraient à la province de recouvrer les sommes d'argent devant éventuellement être employées pour la décontamination des terrains en question » (par. 211). Il a conclu que la province semblait avoir en fait pris des mesures en vue de liquider les réclamations découlant des ordonnances *EPA*.

[57] En fin de compte, le juge a conclu qu'il existait véritablement une réclamation qui « pourrait » être présentée, et qu'on ne pouvait laisser au bon vouloir du créancier [TRADUCTION] « le choix subjectif de la garder en réserve pour des raisons tactiques » (par. 227). Pour reprendre ses propres mots, il ne s'agissait pas d'un cas où « un organisme de réglementation ou d'application de la loi a émis de manière objective une ordonnance dans l'intérêt public » (par. 175), mais que « la province a agi plus comme un créancier que comme un organisme administratif désintéressé » (par. 176).

[58] En somme, bien que le cadre analytique utilisé par le juge Gascon a été dicté par les faits de l'affaire, il a examiné tous les principes juridiques et les faits qu'il était tenu de prendre en compte pour statuer sur la question qui se posait. À l'occasion, il s'est appuyé sur des indicateurs singuliers qui ne figurent pas dans le cadre analytique que j'ai déjà proposé, mais cela s'explique par les faits exceptionnels en l'espèce. Or, s'il avait formulé la question comme je l'ai posée, sa conclusion, appuyée sur ses constatations de fait objectives, aurait été la même. Le fait de prévoir un budget peut constituer un indicateur clair qu'une province exécutera des travaux de décontamination, et le fait que ces travaux soient entrepris constitue la première étape de

only considerations that can lead to a finding that a creditor has a monetary claim. The *CCAA* judge's assessment of the facts, particularly his finding that the *EPA* Orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

la constitution d'une dette, mais ces considérations ne sont pas les seules qui permettent de conclure qu'un créancier fait valoir une réclamation pécuniaire. L'appréciation des faits par le juge de première instance, plus particulièrement sa constatation que les ordonnances constituaient la première étape en vue de la décontamination des sites, ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire.

VI. Conclusion

[59] In sum, I agree with the Chief Justice that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor. Our difference of views lies mainly in the applicable threshold for including contingent claims and in our understanding of the *CCAA* judge's findings of fact.

[60] With respect to the law, the Chief Justice would craft a standard specific to the context of environmental orders by requiring a "likelihood approaching certainty" that the regulatory body will perform the remediation work. She finds that this threshold is justified because "remediation may cost a great deal of money" (para. 86). I acknowledge that remediating pollution is often costly, but I am of the view that Parliament has borne this consideration in mind in enacting provisions specific to environmental claims. Moreover, I recall that in this case, the Premier announced that the remediation work would be performed at no net cost to the Province. It was clear to him that the *Abitibi Act* would make it possible to offset all the related costs.

VI. Conclusion

[59] En somme, je suis d'accord avec la Juge en chef pour dire qu'en règle générale, une ordonnance environnementale d'un organisme administratif peut être traitée comme une réclamation éventuelle et qu'une telle réclamation peut être incluse au processus de réclamation s'il est suffisamment certain que l'organisme administratif fera valoir une réclamation pécuniaire contre le débiteur. Nos divergences de vues portent principalement sur le critère applicable pour que les réclamations éventuelles soient incluses et sur la façon dont nous interprétons les constatations de fait tirées par le juge de première instance.

[60] En ce qui concerne le droit, la Juge en chef établirait une norme propre au contexte des ordonnances environnementales qui exigerait une « probabilité proche de la certitude » que l'organisme administratif réalisera les travaux de restauration. Elle estime que ce critère s'impose parce que « les travaux de restauration peuvent être très coûteux » (par. 86). Je reconnais que les travaux de décontamination sont souvent coûteux, mais je crois que cette considération a été prise en compte par le législateur fédéral lors de l'adoption des dispositions particulières visant les réclamations en matière environnementale. De plus, je rappelle qu'en l'instance, le premier ministre a annoncé que les travaux de décontamination seraient réalisés sans coût net pour la province. Il était évident pour lui que l'adoption de l'*Abitibi Act* permettrait de compenser tous les coûts afférents.

[61] Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under this approach, the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position to assert a monetary claim.

[62] Finally, the Chief Justice would review the *CCAA* court's findings of fact. I would instead defer to them. On those findings, applying any legal standard, be it the one proposed by the Chief Justice or the one I propose, the Province's claim is monetary in nature and its motion for a declaration exempting the *EPA* Orders from the claims procedure order was properly dismissed.

[63] For these reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

THE CHIEF JUSTICE (dissenting) —

1. Overview

[64] The issue in this case is whether orders made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"), by the Newfoundland and Labrador Minister of Environment and Conservation ("Minister") requiring a polluter to clean up sites (the "*EPA* Orders") are monetary claims that can be compromised in corporate restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). If they are not claims that can be compromised in restructuring, the Abitibi respondents ("Abitibi") will still have a legal obligation to clean up the sites following their emergence from restructuring. If they are such claims, Abitibi will have emerged from restructuring free of the obligation, able to recommence business without remediating the

[61] Par conséquent, je préfère retenir la méthode généralement suivie en matière de réclamations éventuelles. À mon avis, le tribunal chargé de l'application de la *LACC* peut prendre en compte l'ensemble des faits pertinents en vue de rendre la décision appropriée. Suivant cette approche, l'éventualité qu'il faut évaluer dans une affaire comme celle-ci est de savoir s'il est suffisamment certain que l'organisme administratif exécutera les travaux de décontamination et sera en mesure de faire valoir une réclamation pécuniaire.

[62] Enfin, la Juge en chef réviserait les conclusions de fait du juge de première instance. Pour ma part, je m'en remets à ces conclusions. Quelle que soit la norme juridique appliquée, soit celle proposée par la Juge en chef ou celle que je propose, au vu de ces conclusions, la réclamation de la province est de nature pécuniaire et sa requête demandant de déclarer que les ordonnances *EPA* n'étaient pas assujetties à l'ordonnance relative à la procédure de réclamations a été à juste titre rejetée.

[63] Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens

Version française des motifs rendus par

LA JUGE EN CHEF (dissidente) —

1. Aperçu

[64] Il s'agit en l'espèce de savoir si des ordonnances du ministre de l'Environnement et de la Conservation (le « ministre ») de Terre-Neuve-et-Labrador, émises en vertu de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2 (« *EPA* »), obligeant un pollueur à décontaminer des sites (les « ordonnances *EPA* ») constituent des réclamations pécuniaires qui peuvent faire l'objet d'une transaction dans le cadre d'une restructuration d'entreprise engagée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Si elles ne constituent pas des réclamations pécuniaires pouvant faire l'objet d'une transaction, les intimées du groupe Abitibi (« Abitibi ») auront encore l'obligation légale de décontaminer les sites lorsque leur

properties it polluted, the cost of which will fall on the Newfoundland and Labrador public.

restructuration sera terminée. Dans le cas contraire, Abitibi sera dégagée de cette obligation; elle pourra reprendre ses activités à l'issue de la restructuration sans avoir à décontaminer les sites qu'elle a pollués et la population de Terre-Neuve-et-Labrador devra supporter le coût de la décontamination.

[65] Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They are not monetary claims. In narrow circumstances, specified by the *CCAA*, these ongoing regulatory obligations may be reduced to monetary claims, which can be compromised under *CCAA* proceedings. This occurs where a province has done the work, or where it is "sufficiently certain" that it will do the work. In these circumstances, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the *CCAA* proceedings. Otherwise, the regulatory obligation survives the restructuring.

[65] Les ordonnances exigeant la décontamination émises aux termes d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. Ces ordonnances ne constituent pas des réclamations pécuniaires. En certaines circonstances particulières prévues par la *LACC*, ces exigences réglementaires continues peuvent être converties en réclamations pécuniaires, lesquelles peuvent faire l'objet de transactions dans le cadre de procédures engagées aux termes de la *LACC*. Cette situation se produit lorsqu'une province a exécuté les travaux, ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux. Dans ces circonstances, l'exigence réglementaire serait éteinte et la province pourrait produire, dans le cadre de procédures engagées sous le régime de la *LACC*, une réclamation pécuniaire couvrant le coût des travaux de décontamination. Autrement, l'exigence réglementaire subsiste après la restructuration.

[66] In my view, the orders for remediation in this case, with a minor exception, are not claims that can be compromised in restructuring. On one of the properties, the Minister did emergency remedial work and put other work out to tender. These costs can be claimed in the *CCAA* proceedings. However, with respect to the other properties, on the evidence before us, the Minister has neither done the clean-up work, nor is it sufficiently certain that he or she will do so. The Province of Newfoundland and Labrador ("Province") retained a number of options, including requiring Abitibi to perform the remediation if it successfully emerged from the *CCAA* restructuring.

[66] À mon avis, les ordonnances exigeant la décontamination en l'espèce, à une exception près, ne constituent pas des réclamations pouvant faire l'objet de transactions dans le cadre d'une restructuration. Dans un des sites, la ministre de l'époque a effectué d'urgence la décontamination et a lancé un appel d'offres pour d'autres travaux. Le coût de ces travaux peut faire l'objet d'une réclamation dans les procédures engagées sous le régime de la *LACC*. Toutefois, en ce qui concerne les autres sites, selon les éléments de preuve dont nous disposons, le ministre en poste n'a pas effectué les travaux de décontamination et il n'est pas suffisamment certain qu'il le fera. La province de Terre-Neuve-et-Labrador (« province ») a conservé un certain nombre de solutions, dont celle d'obliger Abitibi à décontaminer les sites si elle réussit sa restructuration engagée sous le régime de la *LACC*.

[67] I would therefore allow the appeal and grant the Province the declaration it seeks that Abitibi is still subject to its obligations under the *EPA* following its emergence from restructuring, except for work done or tendered for on the Buchans site.

[67] Je suis par conséquent d'avis d'accueillir le pourvoi et d'accorder à la province le jugement déclaratoire sollicité portant qu'Abitibi reste assujettie à ses obligations en vertu de l'*EPA* au terme de cette période de restructuration, à l'exception des travaux sur le site de Buchans déjà exécutés ou à l'égard desquels des appels d'offres ont été lancés.

2. The Proceedings Below

2. Les décisions des juridictions inférieures

[68] The *CCAA* judge took the view that the Province issued the *EPA* Orders, not in order to make Abitibi remediate, but as part of a money grab. He therefore concluded that the orders were monetary and financial in nature and should be considered claims that could be compromised under the *CCAA* (2010 QCCS 1261, 68 C.B.R. (5th) 1). The Quebec Court of Appeal denied leave to appeal on the ground that this "factual" conclusion could not be disturbed (2010 QCCA 965, 68 C.B.R. (5th) 57).

[68] Le juge de première instance a adopté le point de vue selon lequel la province avait émis les ordonnances *EPA*, non pas pour obliger Abitibi à réparer les dommages causés, mais pour lui soutirer de l'argent. Il a donc conclu que les ordonnances étaient de nature pécuniaire et financière, et qu'elles devraient être considérées comme des réclamations pouvant faire l'objet de transactions sous le régime de la *LACC* (2010 QCCS 1261, 68 C.B.R. (5th) 1). La Cour d'appel du Québec a refusé l'autorisation d'interjeter appel de cette décision au motif que rien ne permettait de modifier cette conclusion « de fait » (2010 QCCA 965, 68 C.B.R. (5th) 57).

[69] The *CCAA* judge's stark view that an *EPA* obligation can be considered a monetary claim capable of being compromised simply because (as he saw it) the Province's motive was money, is no longer pressed. Whether an *EPA* order is a claim under the *CCAA* depends on whether it meets the requirements for a claim under that statute. That is the only issue to be resolved. Insofar as this determination touches on the division of powers, I am in substantial agreement with my colleague Deschamps J., at paras. 18-19.

[69] Le point de vue peu nuancé du juge de première instance, selon lequel une obligation découlant de l'*EPA* peut être considérée comme une réclamation pécuniaire susceptible de faire l'objet d'une transaction du simple fait (à son avis) que la province n'était motivée que par l'argent, n'est plus en cause. Pour répondre à la question de savoir si une ordonnance émise sous le régime de l'*EPA* constitue une réclamation au sens de la *LACC*, il faut déterminer si elle satisfait aux conditions d'existence d'une réclamation établies par cette loi. Il s'agit de la seule question à trancher. Dans la mesure où la décision sur ce point touche le partage des pouvoirs, je souscris pour l'essentiel à l'opinion exprimée par ma collègue la juge Deschamps aux par. 18-19.

3. The Distinction Between Regulatory Obligations and Claims Under the *CCAA*

3. La distinction entre une exigence réglementaire et une réclamation au titre de la *LACC*

[70] Orders to clean up polluted property under provincial environmental protection legislation are regulatory orders. They remain in effect until the

[70] Les ordonnances exigeant la décontamination des sites pollués émises en vertu des lois provinciales sur l'environnement sont des ordonnances

property has been cleaned up or the matter otherwise resolved.

[71] It is not unusual for corporations seeking to restructure under the *CCAA* to be subject to a variety of ongoing regulatory orders arising from statutory schemes governing matters like employment, energy conservation and the environment. The corporation remains subject to these obligations as it continues to carry on business during the restructuring period, and remains subject to them when it emerges from restructuring unless they have been compromised or liquidated.

[72] The *CCAA*, like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.

[73] This distinction is also recognized in the jurisprudence, which has held that regulatory duties owed to the public are not "claims" under the *BIA*, nor, by extension, under the *CCAA*. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements. Writing for the court, Laycraft C.J.A. said the question was whether the *Bankruptcy Act* "requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety . . . as a charge to the public" (para. 29). He answered the question in the negative:

The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the

de nature réglementaire. Elles demeurent en vigueur jusqu'à ce que le site ait été décontaminé ou que l'affaire soit réglée d'une autre façon.

[71] Il n'est pas inhabituel pour les sociétés qui cherchent à se restructurer sous le régime de la *LACC* d'être assujetties à diverses ordonnances réglementaires continues découlant de régimes législatifs régissant des domaines tels que l'emploi, la conservation de l'énergie et l'environnement. La société demeure assujettie à ces exigences alors qu'elle continue d'exercer ses activités pendant la période de restructuration, et elle y demeure assujettie au terme de cette période de restructuration, à moins que ces exigences n'aient fait l'objet d'une transaction ou qu'elles n'aient été liquidées.

[72] La *LACC*, à l'instar de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), établit une distinction fondamentale entre les exigences réglementaires continues établies en faveur du public, lesquelles continuent de s'appliquer après la restructuration, et les réclamations pécuniaires qui peuvent faire l'objet d'une transaction.

[73] Cette distinction est aussi reconnue dans la jurisprudence, selon laquelle les obligations réglementaires établies en faveur du public ne sont pas des « réclamations » aux termes de la *LFI* ni, par extension, aux termes de la *LACC*. Dans l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, la Cour d'appel de l'Alberta a statué qu'un séquestre doit se conformer à une ordonnance de l'Energy Resources Conservation Board lui enjoignant de respecter des exigences en matière d'abandon de puits. Le juge en chef Laycraft, au nom de la cour, a affirmé que la question à trancher était de savoir si la *Loi sur la faillite* [TRADUCTION] « exige que les actifs se trouvant dans le patrimoine d'un titulaire de permis de puits soient distribués aux créanciers en laissant à la charge du public les obligations en matière de sécurité environnementale » (par. 29). Il a répondu par la négative :

[TRADUCTION] L'obligation est établie comme une obligation à caractère public qui doit être respectée par citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed. [Emphasis added; para. 33.]

[74] The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (B.C.S.C.); *Shirley (Re)* (1995), 129 D.L.R. (4th) 105 (Ont. Ct. (Gen. Div.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 146, *per* Iacobucci J. (dissenting). As Farley J. succinctly put it in *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J.), at para. 18: "Once [the company] emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

[75] Recent amendments to the *CCAA* confirm this distinction. Section 11.1(2) now explicitly provides that, except to the extent a regulator is enforcing a payment obligation, a general stay does not affect a regulatory body's authority in relation to a corporation going through restructuring. The *CCAA* court may only stay specific actions or suits brought by a regulatory body, and only if such action is necessary for a viable compromise to be reached and it would not be contrary to the public interest to make such an order (s. 11.1(3)).

l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application d'une loi générale. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation. [Je souligne; par. 33.]

[74] La distinction entre les exigences réglementaires découlant d'une loi d'application générale visant la protection du public, d'une part, et les réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration engagée sous le régime de la *LACC* ou en matière de faillite, d'autre part, constitue un élément important du droit canadien des sociétés. Cette distinction a maintes fois été reconnue : *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (C.S.C.-B.); *Shirley (Re)* (1995), 129 D.L.R. (4th) 105 (C. Ont. (Div. gén.)), p. 109; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 146, le juge Iacobucci (dissident). Comme l'a dit succinctement le juge Farley dans *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52 (C.S.J. Ont.), par. 18 : [TRADUCTION] « À l'issue des procédures engagées en vertu de la LACC — souhaitons qu'elles soient couronnées de succès — [la société] aura alors à régler chacun des dossiers non résolus [en matière réglementaire]. »

[75] Des modifications apportées récemment à la *LACC* confirment cette distinction. Le paragraphe 11.1(2) prévoit maintenant expressément que, sauf dans la mesure où un organisme de réglementation fait respecter une obligation de paiement, une suspension générale ne porte aucunement atteinte aux pouvoirs de celui-ci à l'égard d'une société en restructuration. Le tribunal chargé d'appliquer la *LACC* ne peut ordonner une suspension qu'à l'égard de certaines actions ou poursuites intentées par un organisme administratif, et seulement si cette mesure est nécessaire à la conclusion d'une transaction viable et si une telle ordonnance ne serait pas contraire à l'intérêt public (par. 11.1(3)).

[76] Abitibi argues that another amendment to the *CCAA*, s. 11.8(9), treats ongoing regulatory duties owed to the public as claims, and erases the distinction between the two types of obligation: see *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385, *per* Goudge J.A., relying on s. 14.06(8) of the *BIA* (the equivalent of s. 11.8(9) of the *CCAA*). With respect, this reads too much into the provision. Section 11.8(9) of the *CCAA* refers only to the situation where a government has performed remediation, and provides that the *costs of the remediation* become a claim in the restructuring process even where the environmental damage arose after *CCAA* proceedings have begun. As stated in *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, *per* Burrows J., the section "does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it" (para. 42).

[76] Abitibi plaide qu'en vertu d'une autre modification apportée à la *LACC*, le par. 11.8(9), les exigences réglementaires continues établies en faveur du public sont considérées comme des réclamations, et que cette modification élimine la distinction entre les deux types d'obligations : voir *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385, le juge Goudge, citant le par. 14.06(8) de la *LFI* (la disposition équivalente au par. 11.8(9) de la *LACC*). Avec égards, cette interprétation de la disposition est trop large. Le paragraphe 11.8(9) de la *LACC* vise uniquement la situation où un gouvernement a exécuté des travaux de réparation du dommage, et prévoit que les *frais de réparation* constituent une réclamation dans le cadre du processus de restructuration, même si les dommages ont été causés à l'environnement après l'introduction des procédures au titre de la *LACC*. Comme l'a déclaré le juge Burrows dans *Strathcona (County) c. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, la disposition [TRADUCTION] « ne convertit pas une exigence imposée par la loi et établie en faveur du public en général en une dette envers l'organisme public chargé d'appliquer la loi » (par. 42).

4. When Does a Regulatory Obligation Become a Claim Under the *CCAA*?

4. Quand une exigence réglementaire devient-elle une réclamation au titre de la *LACC*?

[77] This brings us to the heart of the question before us: When does a regulatory obligation imposed on a corporation under environmental protection legislation become a "claim" provable and compromisable under the *CCAA*?

[77] Ceci nous amène au cœur de la question dont nous sommes saisis : quand une exigence réglementaire imposée à une société en vertu d'une loi sur la protection de l'environnement devient-elle une « réclamation » prouvable et pouvant faire l'objet d'une transaction aux termes de la *LACC*?

[78] Regulatory obligations are, as a general proposition, not compromisable claims. Only financial or monetary claims provable by a "creditor" fall within the definition of "claim" under the *CCAA*. A "creditor" is defined as "a person having a claim": s. 2, *BIA*. Thus, the identification of a "creditor" hangs on the existence of a "claim". Section 12(1) of the *CCAA* defines "claim" as "any indebtedness, liability or obligation . . . that . . . would be a debt provable in bankruptcy", which is

[78] En règle générale, les exigences réglementaires ne sont pas des réclamations pouvant faire l'objet d'une transaction. Seules les réclamations financières ou pécuniaires prouvables par un « créancier » correspondent à la définition de « réclamation » au sens de la *LACC*. Un « créancier » est défini comme étant une « [p]ersonne ayant une réclamation » : art. 2, *LFI*. Ainsi, l'identification d'un « créancier » repose sur l'existence d'une « réclamation ». Le paragraphe 12(1) de la *LACC* définit une « réclamation »

accepted as confined to obligations of a financial or monetary nature.

comme étant « toute dette, tout engagement ou toute obligation [. . .] qui [. . .] constituerait une dette prouvable en matière de faillite », une définition dont la portée reconnue se limite aux obligations de nature financière ou pécuniaire.

[79] The *CCAA* does not depart from the proposition that a claim must be financial or monetary. However, it contains a scheme to deal with disputes over whether an obligation is a monetary obligation as opposed to some other kind of obligation.

[79] La *LACC* ne s'écarte pas du principe selon lequel une réclamation doit être financière ou pécuniaire. Elle prévoit cependant un régime permettant de régler les différends portant sur la question de savoir si une obligation est de nature pécuniaire, par opposition à une obligation d'une autre nature.

[80] Such a dispute may arise with respect to environmental obligations of the corporation. The *CCAA* recognizes three situations that may arise when a corporation enters restructuring.

[80] Les obligations environnementales qui incombent à une personne morale peuvent engendrer un tel différend. La *LACC* reconnaît trois situations susceptibles de se présenter lorsqu'une personne morale s'engage dans un processus de restructuration.

[81] The first situation is where the remedial work has not been done (and there is no "sufficient certainty" that the work will be done, unlike the third situation described below). In this situation, the government cannot claim the cost of remediation: see s. 102(3) of the *EPA*. The obligation of compliance falls in principle on the monitor who takes over the corporation's assets and operations. If the monitor remediates the property, he can claim the costs as costs of administration. If he does not wish to do so, he may obtain a court order staying the remediation obligation or abandon the property: s. 11.8(5) *CCAA* (in which case costs of remediation shall not rank as costs of administration: s. 11.8(7)). In this situation, the obligation cannot be compromised.

[81] La première situation est celle où les travaux de restauration du site n'ont pas été exécutés (et il n'est pas « suffisamment certain » que les travaux seront exécutés, contrairement à la troisième situation exposée ci-après). En pareil cas, le gouvernement ne peut réclamer le coût de la restauration : voir le par. 102(3) de l'*EPA*. En principe, l'obligation de se conformer à la loi incombe au contrôleur qui prend en charge l'actif et les activités de la société. Si le contrôleur exécute les travaux de restauration du site, il peut réclamer les frais en tant que frais d'administration. S'il ne désire pas le faire, il peut obtenir de la cour une ordonnance suspendant l'exigence de restauration ou il peut abandonner l'immeuble : par. 11.8(5) de la *LACC* (dans ce cas, les frais de restauration ne font pas partie des frais d'administration : par. 11.8(7)). En pareil cas, l'obligation ne peut faire l'objet d'une transaction.

[82] The second situation is where the government that has issued the environmental protection order moves to clean up the pollution, as the legislation entitles it to do. In this situation, the government has a claim for the cost of remediation that is compromisable in the *CCAA* proceedings. This is because the government, by moving to clean up the pollution, has changed the outstanding regulatory

[82] La deuxième situation est celle où le gouvernement qui a émis l'ordonnance environnementale prend des mesures de décontamination, ce que la législation l'autorise à faire. En pareil cas, le gouvernement peut produire, pour le coût de la décontamination, une réclamation qui pourra faire l'objet d'une transaction dans le cadre des procédures engagées sous le régime de la *LACC*. Il en est ainsi

obligation owed to the public into a financial or monetary obligation owed by the corporation to the government. Section 11.8(9), already discussed, makes it clear that this applies to damage after the *CCAA* proceedings commenced, which might otherwise not be claimable as a matter of timing.

parce que le gouvernement, en prenant des mesures pour décontaminer le site, a transformé l'exigence réglementaire non exécutée établie en faveur du public en une obligation financière ou pécuniaire à laquelle la société est tenue envers le gouvernement. Le paragraphe 11.8(9), examiné précédemment, prévoit clairement que cette situation s'applique aux dommages survenus après que les procédures ont été engagées au titre de la *LACC*; en l'absence d'une telle précision, ces dommages ne pourraient faire l'objet d'une réclamation compte tenu du moment choisi pour agir.

[83] A third situation may arise: the government has not yet performed the remediation at the time of restructuring, but there is "sufficient certainty" that it will do so. This situation is regulated by the provisions of the *CCAA* for contingent or future claims. Under the *CCAA*, a debt or liability that is contingent on a future event may be compromised.

[83] Une troisième situation peut se présenter : le gouvernement n'a pas encore exécuté des travaux de restauration au moment de la restructuration, mais il est « suffisamment certain » qu'il le fera. Cette situation est prévue par les dispositions de la *LACC* relatives aux réclamations éventuelles ou futures. Aux termes de la *LACC*, une dette ou un engagement qui dépend d'un événement futur peut faire l'objet d'une transaction.

[84] It is clear that a mere possibility that work will be done does not suffice to make a regulatory obligation a contingent claim under the *CCAA*. Rather, there must be "sufficient certainty" that the obligation will be converted into a financial or monetary claim to permit this. The impact of the obligation on the insolvency process is irrelevant to the analysis of contingency. The future liabilities must not be "so remote and speculative in nature that they could not properly be considered contingent claims": *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, at para. 4.

[84] Il est évident qu'une simple possibilité que les travaux soient exécutés ne suffit pas pour transformer une exigence réglementaire en une réclamation éventuelle au titre de la *LACC*. Pour en arriver à ce résultat, il faut plutôt qu'il soit « suffisamment certain » que l'exigence sera convertie en une réclamation financière ou pécuniaire. L'incidence de l'exigence sur le processus d'insolvabilité n'est pas pertinente pour l'analyse du caractère éventuel de la réclamation. Les engagements futurs ne doivent pas être [TRADUCTION] « si lointains et hypothétiques qu'ils ne puissent être considérés à bon droit comme des réclamations éventuelles » : *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, par. 4.

[85] Where environmental obligations are concerned, courts to date have relied on a high degree of probability verging on certainty that the government will in fact step in and remediate the property. In *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), Farley J. concluded that a contingent claim was established where the money had already been earmarked in the budget for the remediation project. He observed that

[85] Lorsque des exigences environnementales sont en cause, les tribunaux se sont jusqu'à ce jour fondés sur un haut degré de probabilité, proche de la certitude, que le gouvernement prendra réellement des mesures et exécutera les travaux de restauration. Dans *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (C.S.J. Ont.), le juge Farley a conclu que la preuve d'une réclamation éventuelle était établie parce que les fonds avaient

"there appears to be <u>every likelihood to a certainty</u> that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent" (para. 15 (emphasis added)). Similarly, in *Shirley (Re)*, Kennedy J. relied on the fact that the Ontario Minister of the Environment had already entered the property at issue and commenced remediation activities to conclude that "[a]ny doubt about the resolve of the [Ministry's] intent to realize upon its authority ended when it began to incur expense from operations" (p. 110).

déjà été dédiés au projet de restauration dans le budget. Il a fait remarquer qu'[TRADUCTION] « il semble <u>fortement probable et presque certain</u> que chaque dollar dédié aux réclamations figurant au budget établi pour l'année se terminant le 31 mars 2002 sera dépensé » (par. 15 (je souligne)). De même, dans *Shirley (Re)*, le juge Kennedy s'est fondé sur le fait que les employés du ministère de l'Environnement de l'Ontario se trouvaient déjà sur le terrain en cause et avaient commencé les travaux de restauration pour conclure que [TRADUCTION] « [t]ous doutes quant à la détermination du [ministère] d'exercer son droit se sont estompés lorsque l'opération a commencé à lui occasionner des dépenses » (p. 110).

[86] There is good reason why "sufficient certainty" should be interpreted as requiring "likelihood approaching certainty" when the issue is whether ongoing environmental obligations owed to the public should be converted to contingent claims that can be expunged or compromised in the restructuring process. Courts should not overlook the obstacles governments may encounter in deciding to remediate environmental damage a corporation has caused. To begin with, the government's decision is discretionary and may be influenced by any number of competing political and social considerations. Furthermore, remediation may cost a great deal of money. For example, in this case, the *CCAA* court found that at a minimum the remediation would cost in the "mid-to-high eight figures", and could indeed cost several times that (para. 81). In concrete terms, the remediation at issue in this case may be expected to meet or exceed the entire budget of the Minister ($65 million) for 2009. Not only would this be a massive expenditure, but it would also likely require the specific approval of the legislature and thereby be subject to political uncertainties. To assess these factors and determine whether all this will occur would embroil the *CCAA* judge in social, economic and political considerations — matters which are not normally subject to judicial consideration: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 74. It is small wonder, then, that courts assessing whether it is "sufficiently certain" that a government will clean up pollution created

[86] Une bonne raison explique pourquoi il convient d'interpréter l'expression « suffisamment certain » comme exigeant une « probabilité proche de la certitude » lorsqu'il s'agit de déterminer si des exigences environnementales continues établies en faveur du public devraient être converties en réclamations éventuelles qui peuvent être rayées ou faire l'objet d'une transaction dans le cadre du processus de restructuration. Les tribunaux ne devraient pas oublier les obstacles auxquels les gouvernements peuvent se heurter lorsqu'ils décident de réparer les dommages environnementaux causés par une société. D'abord, la décision du gouvernement est discrétionnaire, et elle peut être influencée par nombre de considérations politiques et sociales concurrentes. En outre, les travaux de restauration peuvent être très coûteux. En l'espèce, par exemple, le juge de première instance a conclu que ces travaux pourraient coûter au minimum [TRADUCTION] « entre cinquante et cent millions de dollars », et même plusieurs fois cette somme (par. 81). En termes concrets, le coût des travaux en cause en l'espèce pourrait atteindre ou dépasser le budget total du ministre (65 millions de dollars) pour l'exercice 2009. Il s'agirait non seulement d'une dépense énorme, mais il faudrait probablement aussi l'approbation explicite de l'assemblée législative, avec les incertitudes politiques que cela comporte. L'évaluation de ces facteurs et l'appréciation de la possibilité que tout ce qui précède se produise entraîneraient le juge chargé d'appliquer la *LACC* dans des considérations d'ordre

by a corporation have insisted on proof of likelihood approaching certainty.

social, économique et politique — des questions normalement soustraites à l'examen judiciaire : *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45, par. 74. Il n'est donc pas étonnant que les tribunaux, lorsqu'il s'agit d'apprécier s'il est « suffisamment certain » qu'un gouvernement procédera à la décontamination causée par une société, s'en soient tenus à la preuve d'une probabilité proche de la certitude.

[87] In this case, as will be seen, apart from the Buchans property, the record is devoid of any evidence capable of establishing that it is "sufficiently certain" that the Province will itself remediate the properties. Even on a more relaxed standard than the one adopted in similar cases to date, the evidence in this case would fail to establish that remediation is "sufficiently certain".

[87] En l'espèce, comme nous le verrons, à l'exclusion du site de Buchans, le dossier est dénué d'éléments de preuve susceptibles d'établir qu'il est « suffisamment certain » que la province exécutera elle-même les travaux de décontamination. Même si l'on applique une norme plus souple que celle retenue jusqu'à ce jour dans des affaires semblables, la preuve en l'espèce n'établirait pas qu'il est « suffisamment certain » que les sites seront décontaminés.

5. <u>The Result in This Case</u>

5. <u>L'issue du présent pourvoi</u>

[88] Five different sites are at issue in this case. The question in each case is whether the Minister has already remediated the property (making it to that extent an actual claim), or if not, whether it is "sufficiently certain" that he or she will remediate the property, permitting it to be considered a contingent claim.

[88] En l'espèce, cinq sites différents sont en cause. La question dans chaque cas est de savoir si le ministre a déjà décontaminé les sites — il aurait alors une réclamation — ou, si tel n'est pas le cas, s'il est « suffisamment certain » qu'il exécutera les travaux de restauration, ce qui permettrait de considérer le coût de la décontamination comme une réclamation éventuelle.

[89] The Buchans site posed immediate risks to human health as a consequence of high levels of lead and other contaminants in the soil, groundwater, surface water and sediment. There was a risk that the wind would disperse the contamination, posing a threat to the surrounding population. Lead has been found in residential areas of Buchans and adults tested in the town had elevated levels of lead in their blood. In addition, a structurally unsound dam at the Buchans site raised the risk of contaminating silt entering the Exploits and Buchans rivers.

[89] Le site de Buchans posait un risque immédiat à la santé pour les humains en raison de la forte concentration de plomb et d'autres contaminants présente dans le sol, l'eau souterraine et de surface ainsi que dans des sédiments. Il y avait un risque que le vent disperse la contamination, ce qui aurait représenté une menace pour la population environnante. On a trouvé du plomb dans des zones résidentielles de Buchans et les tests de sang ont révélé chez des adultes résidant dans la ville des concentrations élevées de plomb. De plus, un barrage en mauvais état situé sur le site de Buchans augmentait le risque de contamination du limon se déversant dans les rivières Exploits et Buchans.

[90] The Minister quickly moved to address the immediate concern of the unsound dam and put

[90] La ministre de l'époque a rapidement pris des mesures pour régler le problème immédiat du

out a request for tenders for other measures that required immediate action at the Buchans site. Money expended is clearly a claim under the *CCAA*. I am also of the view that the work for which the request for tenders was put out meets the "sufficiently certain" standard and constitutes a contingent claim.

barrage en mauvais état et a lancé un appel d'offres relatif aux autres mesures nécessitant une intervention immédiate sur le site de Buchans. Il est clair que les sommes d'argent dépensées constituent une réclamation au sens de la *LACC*. J'estime également que les travaux à l'égard desquels des appels d'offres ont été lancés satisfont à la norme de ce qui est « suffisamment certain » et qu'ils constituent une réclamation éventuelle.

[91] Beyond this, it has not been shown that it is "sufficiently certain" that the Province will do the remediation work to permit Abitibi's ongoing regulatory obligations under the *EPA* Orders to be considered contingent debts. The same applies to the other properties, on which no work has been done and no requests for tender to do the work initiated.

[91] Quant au reste, on n'a pas établi qu'il soit « suffisamment certain » que la province exécutera les travaux de décontamination de façon à pouvoir considérer comme des dettes éventuelles les exigences réglementaires continues que les ordonnances *EPA* ont imposées à Abitibi. La même conclusion s'applique à l'égard des autres sites, où aucun travail n'a été réalisé et pour lesquels aucun appel d'offres n'a été lancé pour l'exécution des travaux.

[92] Far from being "sufficiently certain", there is simply nothing on the record to support the view that the Province will move to remediate the remaining properties. It has not been shown that the contamination poses immediate health risks, which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. Abitibi relies on a statement by the then-Premier in discussing the possibility that the Province would be obliged to compensate Abitibi for expropriation of some of the properties, to the effect that "there would not be a net payment to Abitibi": R.F., at para. 12. Apart from the fact that the Premier was not purporting to state government policy, the statement simply does not say that the Province would do the remediation. The Premier may have simply been suggesting that outstanding environmental liabilities made the properties worth little or nothing, obviating any net payment to Abitibi.

[92] Il n'est pas « suffisamment certain » que la province entreprenne la décontamination des autres sites : aucune preuve au dossier ne laisse entrevoir cette possibilité. Il n'a pas été démontré que la contamination pose pour la santé des risques immédiats exigeant la prise de mesures dans les plus brefs délais. Il n'a pas été démontré que la province a pris quelque mesure que ce soit pour réaliser des travaux. Et il n'a pas été démontré que la province a prévu des sommes d'argent pour ces travaux ou qu'elle a même songé à en prévoir. Abitibi se fonde sur une déclaration du premier ministre de l'époque, qui examinait la possibilité que la province soit tenue de verser à Abitibi une indemnité pour l'expropriation de certains terrains, selon laquelle [TRADUCTION] « aucun montant net ne serait versé à Abitibi » : m.i., par. 12. Mis à part le fait que le premier ministre ne prétendait pas établir une politique gouvernementale, sa déclaration n'indique aucunement que la province exécuterait la décontamination. Le premier ministre indiquait peut-être simplement qu'en raison des exigences environnementales non respectées, les terrains ne valaient plus rien ou presque et qu'il serait inutile de verser quoi que ce soit à Abitibi.

[93] My colleague Deschamps J. concludes that the findings of the *CCAA* court establish that it was

[93] Ma collègue la juge Deschamps conclut que les constatations du juge de première instance

"sufficiently certain" that the Province would remediate the land, converting Abitibi's regulatory obligations under the *EPA* Orders to contingent claims that can be compromised under the *CCAA*. With respect, I find myself unable to agree.

[94] The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. Essentially, he proceeded on the basis that the *EPA* Orders had not been put forward in a sincere effort to obtain remediation, but were simply a money grab. The *CCAA* judge buttressed his view that the Province's regulatory orders were not sincere by opining that the orders were unenforceable (which if true would not prevent new *EPA* orders) and by suggesting that the Province did not want to assert a contingent claim, since this might attract a counterclaim by Abitibi for the expropriation of the properties (something that may be impossible due to Abitibi's decision to take the expropriation issue to NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2), excluding Canadian courts). In any event, it is clear that the *CCAA* judge, on the reasoning he adopted, never considered the question of whether it was "sufficiently certain" that the Province would remediate the properties. It follows that the *CCAA* judge's conclusions cannot support the view that the outstanding obligations are contingent claims under the *CCAA*.

[95] My colleague concludes:

[The *CCAA* judge] did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. <u>Yet, had he formulated the</u>

établissent qu'il est « suffisamment certain » que la province décontaminerait les terrains, transformant ainsi les exigences réglementaires que les ordonnances *EPA* imposent à Abitibi en réclamations éventuelles pouvant faire l'objet d'une transaction sous le régime de la *LACC*. Avec égards, je ne puis souscrire à cette conclusion.

[94] Le juge de première instance ne s'est jamais posé la question cruciale de savoir s'il était « suffisamment certain » que la province exécuterait elle-même les travaux. Essentiellement, il a tenu pour acquis que les ordonnances *EPA* n'avaient pas été émises avec l'intention sincère d'obtenir la décontamination des sites, mais qu'il s'agissait simplement d'une manœuvre pour soutirer de l'argent. Le juge a renforcé son point de vue selon lequel les ordonnances réglementaires émises par la province étaient dépourvues de sincérité en exprimant l'avis qu'elles n'étaient pas susceptibles d'exécution (ce qui, si cela s'avérait exact, n'empêcherait pas que de nouvelles ordonnances soient émises). Le juge a également laissé entendre que la province ne voulait pas produire une réclamation éventuelle, ce qui aurait pu provoquer le dépôt d'une demande reconventionnelle d'Abitibi pour l'expropriation des propriétés (un résultat qui peut s'avérer impossible étant donné la décision d'Abitibi de soumettre la question de l'expropriation à l'ALÉNA (*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis d'Amérique et le gouvernement des États-Unis du Mexique*, R.T. Can. 1994 n° 2), en écartant la juridiction des tribunaux canadiens). Quoi qu'il en soit, il est évident que dans son raisonnement, le juge de première instance n'a jamais examiné la question de savoir s'il était « suffisamment certain » que la province décontaminerait les sites. Il s'ensuit que les conclusions du juge ne peuvent soutenir le point de vue selon lequel les obligations non exécutées constituent des réclamations éventuelles au sens de la *LACC*.

[95] Ma collègue conclut comme suit :

À l'occasion, [le juge] s'est appuyé sur des indicateurs singuliers qui ne figurent pas dans le cadre analytique que j'ai déjà proposé, mais cela s'explique par les faits exceptionnels en l'espèce. <u>Or, s'il avait formulé la question</u>

question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. . . . The *CCAA* judge's assessment of the facts . . . leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim. [Emphasis added; para. 58.]

[96] I must respectfully confess to a less sanguine view. First, I find myself unable to decide the case on what I think the *CCAA* judge would have done had he gotten the law right and considered the central question. In my view, his failure to consider that question requires this Court to answer it in his stead on the record before us: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 35. But more to the point, I see no objective facts that support, much less compel, the conclusion that it is "sufficiently certain" that the Province will move to itself remediate any or all of the pollution Abitibi caused. The mood of the regulator in issuing remediation orders, be it disinterested or otherwise, has no bearing on the likelihood that the Province will undertake such a massive project itself. The Province has options. It could, to be sure, opt to do the work. Or it could await the result of Abitibi's restructuring and call on it to remediate once it resumed operations. It could even choose to leave the sites contaminated. There is nothing in the record that makes the first option more probable than the others, much less establishes "sufficient certainty" that the Province will itself clean up the pollution, converting it to a debt.

[97] I would allow the appeal and issue a declaration that Abitibi's remediation obligations under the *EPA* Orders do not constitute claims compromisable under the *CCAA*, except for work done or tendered for on the Buchans site.

comme je l'ai posée, sa conclusion, appuyée sur ses constatations de fait objectives, aurait été la même. [. . .] L'appréciation des faits par le juge [. . .] ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire. [Je souligne; par. 58.]

[96] Avec égards, je dois avouer que je ne partage pas la certitude de ma collègue à ce titre. Premièrement, j'estime ne pas pouvoir trancher le pourvoi en me fondant sur ce que je crois qu'aurait fait le juge de première instance s'il avait alors saisi correctement le droit et examiné la question réellement en jeu. À mon avis, le fait qu'il n'ait pas examiné cette question oblige notre Cour à y répondre à sa place au vu du dossier : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 35. Mais, plus précisément, je ne vois pas de faits objectifs qui appuient, et encore moins qui imposent, la conclusion selon laquelle il est « suffisamment certain » que la province entreprendra elle-même de décontaminer un site ou tous les sites pollués par Abitibi. L'humeur de l'organisme de réglementation qui ordonne la décontamination, qu'il soit ou non désintéressé, n'a aucune incidence sur la probabilité que la province entreprenne elle-même un projet d'une telle ampleur. Des choix s'offrent à la province. Elle pourrait certes choisir d'exécuter les travaux. Ou elle pourrait attendre le résultat de la restructuration d'Abitibi et lui demander d'exécuter les travaux d'assainissement une fois qu'elle aura repris ses activités. Elle pourrait même choisir de laisser les sites contaminés. Rien au dossier n'indique que le premier choix est plus susceptible d'être retenu que les autres, et encore moins qui établisse qu'il est « suffisamment certain » que la province exécutera elle-même la décontamination, convertissant ainsi l'opération en une créance.

[97] Je suis d'avis d'accueillir le pourvoi et de déclarer que les obligations de décontaminer les sites qui incombent à Abitibi aux termes des ordonnances *EPA* ne constituent pas des réclamations pouvant faire l'objet d'une transaction aux termes de la *LACC*, à l'exception des travaux exécutés sur le site de Buchans ou à l'égard desquels des appels d'offres ont été lancés.

The following are the reasons delivered by

[98] LEBEL J. (dissenting) — I have read the reasons of the Chief Justice and Deschamps J. They agree that a court overseeing a proposed arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), cannot relieve debtors of their regulatory obligations. The only regulatory orders that can be subject to compromise are those which are monetary in nature. My colleagues also accept that contingent environmental claims can be liquidated and compromised if it is established that the regulatory body would remediate the environmental contamination itself, and hence turn the regulatory order into a monetary claim.

[99] At this point, my colleagues disagree on the proper evidentiary test with respect to whether the government would remediate the contamination. In the Chief Justice's opinion, the evidence must show that there is a "likelihood approaching certainty" that the province would remediate the contamination itself (para. 86). In my respectful opinion, this is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J., which does not look very different from the general civil standard of probability, better reflects how both the common law and the civil law view and deal with contingent claims. On the basis of the test Deschamps J. proposes, I must agree with the Chief Justice and would allow the appeal.

[100] First, no matter how I read the *CCAA* court's judgment (2010 QCCS 1261, 68 C.B.R. (5th) 1), I find no support for a conclusion that it is consistent with the principle that the *CCAA* does not apply to purely regulatory obligations, or that the court had evidence that would satisfy the test of "sufficient certainty" that the province of Newfoundland and

Version française des motifs rendus par

[98] LE JUGE LEBEL (dissident) — J'ai pris connaissance des motifs de la Juge en chef et de la juge Deschamps. Elles s'entendent pour affirmer qu'un tribunal qui supervise un arrangement proposé aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), ne peut soustraire les débiteurs aux exigences réglementaires qui leurs sont imposées. Seules peuvent faire l'objet d'une transaction les ordonnances réglementaires de nature pécuniaire. Mes collègues reconnaissent également que les réclamations environnementales éventuelles peuvent être liquidées ou faire l'objet d'une transaction s'il est établi que l'organisme administratif se chargerait de la décontamination, transformant ainsi l'ordonnance réglementaire en une réclamation pécuniaire.

[99] Sur ce, mes collègues diffèrent d'opinion quant au critère de preuve applicable pour déterminer si le gouvernement entend effectuer la décontamination. De l'avis de la Juge en chef, la preuve doit démontrer une « probabilité proche de la certitude » que la province se chargerait de la décontamination (par. 86). À mon humble avis, il ne s'agit pas du critère établi pour déterminer si, et de quelle façon, une réclamation éventuelle peut être liquidée en droit de la faillite et de l'insolvabilité. Le critère de ce qui est « suffisamment certain » qu'énonce la juge Deschamps ne semble pas différer beaucoup de la norme générale de probabilité en matière civile et reflète mieux la façon dont la common law et le droit civil envisagent et traitent les réclamations éventuelles. Cependant, en appliquant le critère que propose la juge Deschamps, je dois souscrire aux motifs de la Juge en chef et je suis d'avis d'accueillir le pourvoi.

[100] Tout d'abord, sans égard à la façon d'envisager le jugement du tribunal chargé d'appliquer la *LACC* (2010 QCCS 1261, 68 C.B.R. (5th) 1), rien à mon sens ne permet de conclure qu'il soit conforme au principe selon lequel la *LACC* ne s'applique pas aux exigences purement réglementaires, ou que la preuve faite devant le tribunal respecterait le critère

Labrador ("Province") would perform the remedial work itself.

voulant qu'il soit « suffisamment certain » que la province de Terre-Neuve-et-Labrador (« province ») exécuterait elle-même les travaux de décontamination.

[101] In my view, the *CCAA* court was concerned that the arrangement would fail if the Abitibi respondents ("Abitibi") were not released from their regulatory obligations in respect of pollution. The *CCAA* court wanted to eliminate the uncertainty that would have clouded the reorganized corporations' future. Moreover, its decision appears to have been driven by an opinion that the Province had acted in bad faith in its dealings with Abitibi both during and after the termination of its operations in the Province. I agree with the Chief Justice that there is no evidence that the Province intends to perform the remedial work itself. In the absence of any other evidence, an offhand comment made in the legislature by a member of the government hardly satisfies the "sufficient certainty" test. Even if the evidentiary test proposed by my colleague Deschamps J. is applied, this Court can legitimately disregard the *CCAA* court's finding as the Chief Justice proposes, since it did not rest on a sufficient factual foundation.

[101] À mon avis, le tribunal de première instance craignait un échec de l'arrangement si les sociétés du groupe Abitibi intimées (« Abitibi ») ne pouvaient se libérer des exigences réglementaires relatives à la pollution. Le tribunal voulait écarter l'incertitude qui aurait assombri l'avenir de ces sociétés après leur réorganisation. De plus, sa décision semble motivée par l'opinion suivant laquelle la province avait traité de mauvaise foi avec Abitibi dès que cette dernière eût cessé ses activités dans cette province. Je suis d'accord avec la Juge en chef pour conclure qu'aucune preuve ne confirme l'intention de la province d'exécuter elle-même les travaux de décontamination. En l'absence de tout autre élément de preuve, une remarque faite en passant par un ministre devant l'assemblée législative peut difficilement satisfaire au critère de ce qui est « suffisamment certain ». Même si l'on applique le critère de preuve que propose ma collègue la juge Deschamps, notre Cour peut légitimement écarter les conclusions du tribunal de première instance comme le propose la Juge en chef car elles ne reposent sur aucun fondement factuel suffisant.

[102] For these reasons, I would concur with the disposition proposed by the Chief Justice.

[102] Pour ces motifs, je suis d'avis de souscrire au dispositif que propose la Juge en chef.

Appeal dismissed with costs, MCLACHLIN C.J. *and* LEBEL J. *dissenting.*

Pourvoi rejeté avec dépens, la juge en chef MCLACHLIN *et le juge* LEBEL *sont dissidents.*

Solicitors for the appellant: WeirFoulds, Toronto; Attorney General of Newfoundland and Labrador, St. John's.

Procureurs de l'appelante : WeirFoulds, Toronto; procureur général de Terre-Neuve-et-Labrador, St. John's.

Solicitors for the respondents AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc.: Stikeman Elliott, Toronto.

Procureurs des intimées AbitibiBowater Inc., Abitibi-Consolidated Inc. et Bowater Canadian Holdings Inc. : Stikeman Elliott, Toronto.

Solicitors for the respondent the Ad Hoc Committee of Bondholders: Goodmans, Toronto.

Procureurs de l'intimé le comité ad hoc des créanciers obligataires : Goodmans, Toronto.

Solicitors for the respondents the Ad Hoc Committee of Senior Secured Noteholders and the U.S. Bank National Association (Indenture Trustee

Procureurs des intimés le comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire *for the Senior Secured Noteholders): Borden Ladner Gervais, Toronto.*

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the interveners the Attorney General of British Columbia and Her Majesty The Queen in Right of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener Ernst & Young Inc., as Monitor: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Friends of the Earth Canada: Ecojustice, University of Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.

désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) : Borden Ladner Gervais, Toronto.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur des intervenants le procureur général de la Colombie-Britannique et Sa Majesté la Reine du chef de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante Ernst & Young Inc., en sa qualité de contrôleur : Thornton Grout Finnigan, Toronto.

Procureurs de l'intervenante Les Ami(e)s de la Terre Canada : Ecojustice, Université d'Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.

TAB 8

COURT OF APPEAL FOR ONTARIO

CITATION: Nortel Networks Corporation (Re), 2016 ONCA 332
DATE: 20160503
DOCKET: M45307, M45309, M45310
M45311, M45312, M45313

Hoy A.C.J.O, and Blair and Pepall JJ.A.

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

Sheila Block, Scott A. Bomhof, Andrew Gray, Adam M. Slavens and Jeremy Opolsky, for the moving parties, the U.S. Debtors[1]

Richard B. Swan, S. Richard Orzy and Gavin H. Finlayson, for the moving party, the Ad Hoc Group of Bondholders

David R. Byers and Daniel S. Murdoch, for the moving party, the Conflicts Administrator of Nortel Networks S.A.

Shayne Kukulowicz, Michael Wunder, Ryan Jacobs, Geoffrey Shaw and Jane Dietrich, for the moving party, the Official Committee of Unsecured Creditors of Nortel Networks Inc. *et al.*

Andrew Kent, Brett Harrison and Laura Brazil, for the moving party, The Bank of New York Mellon as Indenture Trustee

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[1] The U.S. Debtors are Nortel Networks Inc. (formerly Northern Telecom International), Nortel Networks Capital Corporation, Nortel Altsystems Inc., Nortel Altsystems International Inc., Xros, Inc., Sonoma Systems, Qtera Corporation, CoreTek, Inc., Nortel Networks Applications Management Solutions Inc., Nortel Networks Optical Components Inc., Nortel Networks HPOCS Inc., Architel Systems (U.S.) Corporation, Nortel Networks International Inc., Northern Telecom International Inc., Nortel Networks Cable Solutions Inc. and Nortel Networks (CALA) Inc.

Steven L. Graff, Ian Aversa and Miranda Spence, for the moving party, the Nortel Trade Claims Consortium

Michael E. Barrack, D.J. Miller, John L. Finnigan, Michael S. Shakra and Andrea McEwan, for the responding parties, the Board of the Pension Protection Fund and Nortel Networks U.K. Pension Trust Ltd.

Benjamin Zarnett, Jessica Kimmel, Peter Ruby and Peter Kolla, for the responding party, the Monitor, Ernst & Young Inc.

Kenneth Kraft and John Salmas, for the responding party, Wilmington Trust, National Association

Derrick Tay and Jennifer Stam, for the responding parties, the Canadian Debtors[2]

Kenneth Rosenberg, Lily Harmer and Massimo Starnino, for the responding party, the Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund

Mark Zigler and Ari Kaplan, for the responding parties, the Former Employees of Nortel and LTD Beneficiaries

Arthur O. Jacques, Paul Steep and Byron Shaw, for the responding party, the Canadian Creditors' Committee

Barry E. Wadsworth, for the responding party, CAW-Canada

Matthew P. Gottlieb and Matthew Milne-Smith, for the responding parties, the Joint Administrators of the EMEA Debtors[3] other than Nortel Networks S.A.

Heard: In Writing

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[2] The Canadian Debtors are Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks Global Corporation, and Nortel Networks International Corporation.

[3] The EMEA Debtors are Nortel Networks UK Limited, Nortel Networks S.A., Nortel Networks (Ireland) Limited, Nortel GmbH, Nortel Networks (Austria) GmbH, Nortel Networks AB, Nortel Networks BV, Nortel Networks Engineering Service Kft, Nortel Networks France S.A.S., Nortel Networks Hispania, S.A., Nortel Networks International Finance & Holding BV, Nortel Networks NV, Nortel Networks OY, Nortel Networks Polska Sp. z.o.o., Nortel Networks Portugal SA, Nortel Networks Romania SRL, Nortel Networks SpA, Nortel Networks Slovensko, s.r.o., and Nortel Networks, s.r.o.

Motions for leave to appeal from the judgment of Justice Frank J.C. Newbould of the Superior Court of Justice, dated May 12, 2015 and July 6, 2015, with reasons reported at 2015 ONSC 2987, 27 C.B.R. (6th) 175, and 2015 ONSC 4170, 27 C.B.R. (6th) 51.

BY THE COURT:

A. INTRODUCTION

[1] January 14, 2009 was not a good day. At that time, Nortel Networks Corp. ("NNC") and the other Nortel Canadian Debtors filed for insolvency protection under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). That same day, Nortel Networks Inc. ("NNI") and other U.S. Debtors filed voluntary petitions for relief under Chapter 11 of the U.S. *Bankruptcy Code*, 11 U.S.C. §§1101 – 1174, and other Nortel entities incorporated in Europe, the Middle East and Africa ("EMEA") were placed under administration in England by the High Court of England and Wales under the U.K. *Insolvency Act 1986*, c. 45. Shortly afterwards, courts in Canada and the United States approved a cross-border, court-to-court protocol that established procedures for the co-ordination of cross-border proceedings in Canada and the U.S.

[2] More than seven years later, many Januarys have come and gone and these insolvency proceedings continue. During that time:

- more than 6,800 Nortel former employees or pensioners have died;
- well in excess of $1 billion has been incurred in costs; and

- Nortel's assets have been sold and some $7.3 billion[4] in sale proceeds have been placed in escrow (the "Lockbox Funds").

[3] The leave motions now before this court arise from the joint trial dealing with the allocation of the Lockbox Funds. Newbould J. (the "trial judge) of Ontario's Superior Court of Justice (Commercial List) and Judge Gross of the U.S. Bankruptcy Court for the District of Delaware presided over the joint trial.[5] It was held over the course of six weeks. Each judge rendered separate decisions on May 12, 2015. Each concluded that the Lockbox Funds should be allocated on a *pro rata* basis among the various Nortel debtor estates. Although their analysis differed somewhat, the outcome was the same.

[4] Appeal proceedings were initiated in Canada and the U.S. The moving parties were authorized to file their leave materials in the absence of an issued judgment on the basis that counsel would subsequently file the formal judgment. The formal judgment was issued on April 26, 2016 and filed with this court on April 27, 2016.

[5] Before this court, the six moving parties, led by the U.S. Debtors, seek leave to appeal the trial judge's judgment pursuant to s. 13 of the *CCAA*. They submit that the trial judge made fundamental errors and that the proposed appeal

[4] All references to dollars are to U.S. dollars, unless otherwise specified.
[5] Judge Gross's reasons are reported at 532 B.R. 494 (2015).

is of significance to the practice of insolvency and to the parties, and will not delay the completion of the *CCAA* proceedings.

[6] The responding parties, led by the Board of the Pension Protection Fund and Nortel Networks UK Pension Trust Limited ("UKPC"), submit that the record supports the trial judge's factual findings, which were integral to his analysis, including his findings that Nortel's assets were jointly created, that the Nortel group of companies operated on a fully-integrated global basis and that Nortel did not operate separate businesses in separate countries. In their submission, the proposed appeal is not *prima facie* meritorious. In addition, the remaining elements of the test for leave to appeal under the *CCAA* have not all been met.

[7] After consideration of each of the factums[6] and other materials filed on the leave motions, we agree with the responding parties that the test for leave has not been met. For the reasons that follow, we dismiss the moving parties' motions for leave to appeal.

B. GENESIS OF DISPUTE

[8] NNC was a publicly-traded Canadian corporation at the helm of a global networking solutions and telecommunications business, and the direct or indirect

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[6] In accordance with the directions of the Court of Appeal case management judge, there was one main factum filed on behalf of the moving parties by the U.S. Debtors and one main factum filed on behalf of the responding parties by the UKPC. Six supplementary factums and one reply factum were also filed.

parent of more than 130 subsidiaries located in more than 100 countries. These companies were collectively referred to as the “Nortel Group” or “Nortel”.

[9] NNC was the successor to a long line of companies, headquartered in Canada, that date back to the founding of the Bell Telephone Company of Canada in 1883. NNC’s principal, direct operating subsidiary was Nortel Networks Limited (“NNL”), also a Canadian company. NNL was the direct or indirect parent of operating companies located around the world. It owned 100 percent of the equity of each of the following entities: NNI, Nortel’s operating company in the United States; Nortel Networks UK Ltd. (“NNUK”), Nortel’s operating company in the United Kingdom; and, Nortel Networks (Ireland) Ltd. (“NN Ireland”), Nortel’s operating company in Ireland. It also owned 91.17 per cent of the equity of Nortel Networks S.A. (“NNSA”), Nortel’s operating company in France.

[10] Following the insolvency filings, Nortel’s initial plan was to downsize and carry on portions of the telecommunications business. However, by June 2009, the decision was made to liquidate Nortel’s assets.

[11] On June 29, 2009, an Interim Funding and Settlement Agreement (“IFSA”) was approved by both the Canadian and American courts. Among other things, it addressed interim funding for NNL and the anticipated sales of Nortel’s business lines and residual intellectual property (“IP”). The parties, consisting of

the Canadian Debtors, the U.S. Debtors[7], and the EMEA Debtors[8], agreed to cooperate with the sales process and also agreed that the proceeds of sale would be held in escrow. The issue of allocation was deferred.

[12] Under the IFSA, there would be no distribution out of escrow without "either (i) agreement of all of the Selling Debtors[9] or (ii) … determination by the relevant dispute resolver(s) under the terms of the Protocol … applicable to the Sale Proceeds". The parties were then to negotiate and attempt to reach agreement "on a protocol for resolving disputes concerning the allocation of Sale Proceeds from Sale Transactions (the "Interim Sales Protocol")". Despite numerous attempts at resolution, agreement on both an Interim Sales Protocol and allocation proved to be elusive.

[13] Meanwhile, over $7 billion was generated from various asset sales and other realizations. From mid-2009 until March 2011, proceeds of $3.285 billion were generated from the sale of Nortel's various business lines, including some patents. Of that amount, $2.85 billion is available for allocation. In June 2011, proceeds of approximately $4.5 billion were generated from the sale of Nortel's residual intellectual property, consisting of approximately 7,000 patents and

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[7] With the exception of Nortel Networks (CALA) Inc.
[8] The Joint Administrators were also party to the IFSA but only for the purposes of Section 17 (No Personal Liability of the Joint Administrators).
[9] A description of "Selling Debtor" is found in s.12 (a) of the IFSA: "Each Debtor hereby agrees that its execution of definitive documentation with a purchaser (or, in the case of any auction, the successful bidder in any such auction) of, or closing of any sale of, material assets of any of the Debtors to which such Debtor (a "Selling Debtor") is proposed to be a party…"

patent applications, to the Rockstar consortium. In total, approximately $7.3 billion is currently held in escrow.

[14] By orders dated January 21, 2010, the Canadian and U.S. courts approved a "Final Canadian Funding and Settlement Agreement". The Agreement addressed a number of issues and allowed NNI a $2 billion claim against NNL in NNL's *CCAA* proceeding, which claim is not subject to offset or counterclaims.

[15] The parties still could not agree on an Interim Sales Protocol or on allocation. In the spring of 2013, the Canadian court and the U.S. bankruptcy court granted orders approving an "Allocation Protocol". The purpose of this Protocol was to set out "binding procedures for determining the allocation of the Sale Proceeds among the Selling Debtors"[10]. It provided for a joint hearing to determine allocation before the Canadian court and the U.S. bankruptcy court.[11] Any party in interest was at liberty to advance any theory on allocation. Leave to appeal that order was denied by this court on June 20, 2013.

[16] The issue of allocation of the Lockbox Funds then proceeded to trial.

[10] Selling Debtors was defined in the Allocation Protocol as the "Canadian Debtors, U.S. Debtors, EMEA Debtors and Nortel Networks Optical Components Ltd., Nortel Networks AS, Nortel Networks AG, Nortel Networks South Africa (Pty) Limited, and Nortel Networks (Northern Ireland) Limited."

[11] The EMEA Debtors were held to have attorned to the jurisdiction of the Canadian court and the U.S. bankruptcy court.

C. TRIAL JUDGE'S DECISION

(1) Trial Decision

[17] The trial judge's reasons may be summarized. He commenced by reviewing the history of the Nortel Group. He described the operations and the four main product groups or lines of business. Before turning to his analysis of the legal issues, he made a number of important findings about the Nortel Group's structure. He found, and repeatedly reiterated, that the Nortel Group operated as a highly-integrated multinational enterprise. For instance, he stated:

> [16] The Nortel Group operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world. Each entity, such as NNL, NNI, NNUK, NN Ireland and NNSA, was integrated into regional and product line management structures to share information and perform research and development ("R&D"), sales and other common functions across geographic boundaries and across legal entities. The matrix structure was designed to enable Nortel to function more efficiently, drawing on employees from different functional disciplines worldwide, allowing them to work together to develop products and attract and provide service to customers, fulfilling their demands globally.
>
> [17] As a result of Nortel's matrix structure, no single Nortel entity, either NNL or any of the other Canadian debtors in Canada, NNI or any of the other US debtors in the United States or NNUK or any of the other EMEA debtors, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. While Nortel ensured that all corporate entities complied with local laws regarding

> corporate governance, no corporate entity carried on business on its own.

[18] The trial judge also found that R&D, which was performed at labs around the world, was the primary driver of Nortel's value and profit.

[19] After reviewing the necessary background, the trial judge turned to the legal issues before him, starting with the interpretation of the Master Research and Development Agreement ("MRDA"). The MRDA dealt with transfer-pricing arrangements, effective from 2001 onwards, among NNL, NNI, NNUK, NNSA and NN Ireland, who were parties to the agreement.[12]

[20] The parties took differing and competing positions on the meaning and application of the MRDA:

- The Monitor (on behalf of the Canadian Debtors), supported by the Canadian Creditors' Committee ("CCC"), took the position that under the MRDA, NNL owned the IP whereas other participants to the MRDA were simply licensees. They argued that the proceeds derived from the sale of the residual IP belonged exclusively to NNL.
- The U.S. Debtors and other U.S. interests, including the Bondholders, argued that NNI and the other licensees held all of the rights and value in the IP in their respective exclusive territories as defined in the MRDA.
- The EMEA Debtors asserted that parties to the MRDA jointly owned all of the IP in proportion to their financial contributions to R&D and that all

[12] Nortel Networks Australia was also a party to the agreement. It ceased being a Residual Profit Entity on December 31, 2007.

should share in the sale proceeds attributable to IP in those same proportions. The joint ownership arose independent of, but was recognized in, the MRDA.

- The UKPC took the position that the MRDA should not govern allocation and that a *pro rata* allocation based on a *pari passu* distribution should be used. The CCC also adopted this as its alternative position.

[21] The trial judge found that, by its terms, the MRDA was to be construed in accordance with, and governed by, Ontario law. He reviewed the applicable principles of contractual interpretation, including the law on factual matrix (surrounding circumstances), commercial reasonableness, and recitals. In reviewing the law, he considered the recent authority from the Supreme Court of Canada on contractual interpretation, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, which was released during the course of the trial. He considered in detail the parties' positions, the language of the MRDA and evidence on factual matrix.

[22] He concluded that the MRDA was an operating agreement and was not intended to, nor did it, deal with the disposal of all of Nortel's assets in a situation in which no revenue was being earned and no profits or losses were occurring. Rather, he found that the MRDA was developed for, and driven by, transfer-pricing concepts for tax purposes and did not govern allocation after Nortel ceased operations:

> [177] I accept that the MRDA was a transfer pricing document created for tax purposes. The licenses were a part of it. The licenses granted under it were never dealt with separately from the MRDA. Their only purpose was to support the intended tax treatment resulting from the MRDA.
>
> …
>
> [185] I conclude that the circumstances surrounding the creation of the MRDA lead to no other result but that the construct of legal title to the NN Technology being in NNL in return for NNL granting exclusive licenses to the Licensed Participants was only for the purpose of supporting the proposed method to split profits or losses on a tax efficient basis while Nortel operated as a going concern business. The agreement in its application was intended to apply only to Nortel while it operated and not to deal with rights after Nortel and its subsidiaries stopped operating its businesses.

[23] Thus, he rejected the primary positions of the Monitor, the CCC, the U.S. Debtors and other U.S. interests, as well as the EMEA Debtors' joint ownership theory.

[24] Having found that the MRDA did not govern allocation on Nortel's insolvency and having rejected the joint ownership theory, the trial judge turned to the metric to be used to allocate the Lockbox Funds. He found that the intangible assets that were sold were not separately located or owned in any one jurisdiction. Rather, they were created by all of the so-called "Residual Profit Entities" or "RPEs" (namely, NNL, NNI, NNUK, NNSA and NN Ireland), which were located in different jurisdictions. In addition, the matrix structure allowed

Nortel to draw on employees from different functional disciplines worldwide, regardless of region or country, according to need.

[25] He held that NNL was not entitled to the proceeds of sale simply because the patents were in its name:

> [197] This was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise with all RPEs doing R&D that led to patents being granted. It was R&D that drove Nortel's business. R&D and the intellectual property created from it was the primary driver of Nortel's value and profits. All parties agree on that. It would unjustly enrich NNL to deprive all of the other RPEs of the work that they did in creating the IP just because the patents were registered in NNL's name.

[26] He determined that he had wide powers under the *CCAA* to do what was just in the circumstances. Section 11 of the *CCAA*, which reflected prior jurisprudence, expressly provides that a court may make any order it considers appropriate in the circumstances, subject to the provisions of the Act. He wrote:

> [208] In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation. The costs have well exceeded $1 billion. A global solution in this unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation. Our courts have such jurisdiction. [Footnote omitted.]

[27] He observed that it is a fundamental tenet of insolvency law that all debts be paid *pari passu* and that all unsecured creditors receive equal treatment. In his view, a *pro rata* allocation could be achieved by directing an allocation of the Lockbox Funds to each Debtor Estate based on the percentage that the claims against that Estate bore to the total claims against all of the Debtor Estates.

[28] In reaching this conclusion, the trial judge dealt with the argument that a *pro rata* allocation would amount to substantive consolidation. He concluded that a *pro rata* allocation would not constitute substantive consolidation in the unique circumstances of this case. In any event, even if it were substantive consolidation, there was precedent that justified substantive consolidation in this case: *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Re PSINet Ltd.* (2002), 33 C.B.R. 4th 284 (Ont. S.C.J.); *Re Northland Properties Ltd.* (1988), 29 B.C.L.R. (2d) 257 (S.C.).

[29] Ultimately, he concluded that the Lockbox Funds were to be allocated on a *pro rata* basis in accordance with certain governing principles, which are outlined below.

[30] After his reasons were released, the U.S. Debtors supported by the Official Committee, the Ad Hoc Group of Bondholders and the Law Debenture Trust Company of New York filed motions for clarification, reconsideration or amendment in Canada and the U.S. and a number of points were clarified.

[31] In the end result, the judgment that was signed, issued and entered on April 26, 2016 provided that the allocation proceed on a *pro rata* basis in accordance with the following principles:

> (a) Each Debtor Estate[13] is to be allocated that percentage of the Lockbox Funds that the total allowed pre-filing claims against that Debtor Estate bear to the total allowed pre-filing claims against all Debtor Estates.
>
> (b) In determining what the claims are against the Debtor Estates, pre-filing claims of the kind provable under the *Companies' Creditors Arrangement Act* that have received court approval and which have been paid may be taken into account to the extent that they have been paid under the settlement.
>
> (c) In determining what the pre-filing claims are against each Debtor Estate, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once.
>
> i. Claims on bonds are to be made on the Debtor Estate of the issuer and shall be included in that Debtor Estate's total allowed claims for the purpose of determining its allocation. A claim can be recognized by the Debtor Estate that guaranteed the bond, but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.
>
> ii. If the UK Pension Claimants make a claim for the approximately £2.2 billion deficit in the NNUK pension plan against NNUK and also against other EMEA Debtors or the EMEA Non-Filed

[13] The order defines "Debtor Estate" as "each of the individual legal entities" set out in Schedule B. Schedule B lists the 45 entities, including the Canadian Debtors, the U.S. Debtors, the EMEA Debtors and five "EMEA Non-Filed Entities" who have not commenced insolvency proceedings. See also the similar definition given to Selling Debtors under the Allocation Protocol.

> Entities, the claim against NNUK will be taken into account in determining claims against the Debtor Estates for allocation purposes but the additional claims against the EMEA Debtors or the EMEA Non-Filed Entities will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.
>
> (d) Subject to the general proviso in (c), above, in respect of claims that can be made against more than one Debtor Estate, pre-filing intercompany claims against a Debtor Estate shall be included in the determination of the claims against that Debtor Estate for purposes of its allocation.
>
> (e) The following specific pre-filing claims shall be included in the determination of the allowed claims against NNL for purposes of determining its allocation:
>
> i. the US$2.0627 billion claim of NNI against NNL that was approved by this Court and the U.S. Court;
>
> ii. the claims of NNUK and Nortel Networks SpA against NNL pursuant to the Agreement Settling EMEA Canadian Claims and Related Claims dated July 9, 2014; and
>
> iii. the claim of the UK Pension Claimants against NNL recognized in this Court's judgment of December 9, 2014, as such claim is finally determined.
>
> (f) Cash on hand in any Debtor Estate will not be taken into account in determining its allocation. Each Debtor Estate with cash on hand will continue to hold that cash and deal with it in accordance with its administration.

D. ANALYSIS

[32] Six moving parties now seek leave to appeal from the trial judge's allocation decision: the U.S. Debtors, the Ad Hoc Group of Bondholders, the

Conflicts Administrator of Nortel Networks S.A., the Official Committee of Unsecured Creditors of NNI and others, the Bank of New York Mellon as Indenture Trustee, and the Nortel Trade Claims Consortium.

[33] We will commence our analysis by discussing the test for leave to appeal under the *CCAA* and then address the moving parties' positions in relation to that test.

(1) Test for Leave to Appeal

[34] Section 13 of the *CCAA* provides that any person dissatisfied with an order or a decision made under the Act may appeal from the order or decision with leave. Leave to appeal is granted sparingly in *CCAA* proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider whether:

> (a) the proposed appeal is *prima facie* meritorious or frivolous;
>
> (b) the points on the proposed appeal are of significance to the practice;
>
> (c) the points on the proposed appeal are of significance to the action; and
>
> (d) whether the proposed appeal will unduly hinder the progress of the action.

See, for e.g.: *Re Stelco Inc.* (2005), 75 O.R. (3d) 5 (C.A.), at para. 24; *Re Timminco Ltd.*, 2012 ONCA 552, 2 C.B.R. (6th) 332, at para. 2; and *Re Nortel Networks Corp.*, 2013 ONCA 427, 5 C.B.R. (6th) 254, at para. 3.

(a) Whether Appeal is *Prima Facie* Meritorious

[35] The moving parties take the position that leave should be granted because the appeal is *prima facie* meritorious. In making that argument, they raise three main issues – substantive consolidation, the interpretation of the MRDA, and questions of fairness. We will deal with each issue in turn.

(i) Substantive consolidation

Position of the Moving Parties

[36] First, the moving parties submit that the trial judge erred in not recognizing that the allocation ordered departed from "corporate separateness" and was a form of substantive consolidation.

[37] Secondly, it is alleged that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation.

[38] In its supplementary factum, the Bank of New York Mellon, as Indenture Trustee, makes a related argument. It submits that since the Nortel proceeding no longer involves a restructuring, the *CCAA*'s purpose is spent and the proceeds should thereafter be distributed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), or at least in a manner consistent with the *BIA*

scheme. It says the *BIA* does not contemplate consolidation but rather distribution on an entity-by-entity basis.

[39] Finally, the Ad Hoc Group of Bondholders makes a related argument. It submits that the allocation decision takes property interests that belong to certain debtor estates and gives them to others. They argue that, even though the authority provided under s. 11 is broad, the *CCAA* does not permit a court to redistribute property in this way.

Analysis

[40] The moving parties' arguments on substantive consolidation are not *prima facie* meritorious.

[41] Professor Janis Sarra, a leading expert on insolvency law in Canada, describes substantive consolidation in her article "Corporate Group Insolvencies: Seeing the Forest and the Trees" (2008) 24 B.F.L.R. 63, at pp. 80 - 81:

> Substantive consolidation essentially treats member entities of a corporate group as one entity. In the context of liquidation, it creates a common pool of assets to meet creditors' claims. In the context of restructuring, it may create the opportunity for creditors to share in the future upside potential of a restructured entity or entities by centralizing and negotiating an arrangement in respect of their claims. Canadian courts have recognized substantive consolidation under both the *BIA* and the *CCAA* where there is evidence of intertwined assets and liabilities; integrated administrative functioning and operations; a perception by creditors that they are dealing with an integrated entity; common control and governance structures;

> where it would be impracticable to separate the affairs of related entities; where it is more cost effective and beneficial to creditors to have the proceedings administered as a single estate; and where it would result in an expeditious and administratively efficient administration of the proceeding.

[42] As we have noted, the trial judge concluded that *pro rata* allocation was appropriate, that it did not amount to substantive consolidation, and that even if it could be said that a *pro rata* allocation involved substantive consolidation, it was not precluded by law in the unique circumstances of the case.

[43] In reaching those conclusions, he made numerous factual findings, in addition to those already mentioned, including the following:

- "Nortel (a) had fully integrated and interdependent operations; (b) had intercompany guarantees for its primary indebtedness; (c) operated a consolidated treasury system in which generated cash was used throughout the Nortel Group as required; (d) disseminated consolidated financial information throughout its entire history, save for the year before its bankruptcy; and (e) created IP through integrated R&D activities that were global in scope": para. 223.

- "[N]o one entity or region was able to provide the full line of Nortel products and services": para. 202.

- "Nortel's matrix structure also allowed Nortel to draw on employees from different functional disciplines worldwide … regardless of region or country according to need": para. 203.

- "R&D was organized around a particular project, not particular geographical locations or legal entities, and was managed on a global basis": para. 202.

- "The fact that Nortel ensured that legal entities were properly created and advised in the various countries in which it operated in order to meet local legal requirements [did] not mean that Nortel operated a separate business in each country. It did not": para. 202.

- "The intangible assets that were sold, being by far the largest type of asset sold, were not separately located in any one jurisdiction or owned separately in different jurisdictions": para. 202.

- The assets are "so intertwined that it is difficult to separate them for purposes of dealing with different entities": para. 222.

- There is "no recognized measurable right in any one of the selling Debtor Estates to all or a fixed portion of the proceeds of sale": para 224.

- "Nortel has had significant difficulty in determining the ownership of its princip[al] assets, namely the $7.3 billion representing the proceeds of the sales of the lines of business and the residual patent portfolio", which "constitutes more than 80 per cent of the total assets of all Nortel entities": para. 222.

[44] In addition to his factual findings supporting the *pro rata* order, the trial judge explained why the allocation in this case did not constitute substantive consolidation, either actual or deemed:

- The Lockbox Funds were largely due to the sale of IP and no one Debtor Estate had any right to the funds. They did not belong in whole or in part to any one Estate or combination of Estates.

- The various entities and the various Estates were not being treated as one entity and the creditors of each entity would not become creditors of a single entity. Each entity remained separate and with its own creditors.

- Each entity would maintain its own cash on hand and would be administered separately.

- The inter-company claims would not be eliminated.

[45] Similarly, Judge Gross explained at p. 554 of his reasons that the *pro rata* allocation, which was not a distribution, "both recognizes the integrity of the corporate separateness and the integrated synergistic operations of Nortel." Furthermore, he noted that a "pro rata allocation does not merge the Nortel Debtors into a single survivor and does not erase intercompany claims": p. 554.

[46] In our view, there is no *prima facie* merit to the argument that we should interfere with the trial judge's conclusion that the allocation decision did not amount to substantive consolidation. His conclusion was based on the nature and effect of his allocation decision and his factual findings. He made the findings having heard from 36 witnesses and having received and reviewed thousands of exhibits and dozens of deposition transcripts over the course of a six-week trial. Those factual findings were central to the result. Absent palpable and overriding error, those factual findings are afforded deference by this court: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10.

[47] The moving parties also allege that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation in finding that, even if the allocation did constitute substantive consolidation, it was permissible. They point to *Northland* as the leading authority on substantive consolidation but say that it is time to revisit that decision in Canada.

[48] The trial judge correctly observed that while the *CCAA* does not expressly address the issue of substantive consolidation, jurisprudence in Canada has recognized substantive consolidation as being appropriate in certain exceptional circumstances: see, for e.g., *Re Lehndorff General Partner Ltd.*, *Re PSINet Ltd.*, and *Re Northland Properties Ltd.*

[49] He also correctly observed that the court has jurisdiction to make any order that it considers appropriate in the circumstances under s. 11 of the *CCAA*. Although that section came into effect after the Nortel filing under the *CCAA*, it reflects past jurisprudence: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60**,** [2010] 3 S.C.R. 379, at para. 68. Specifically, s. 11 states:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[50] That said, since there is no *prima facie* merit to the argument that the *pro rata* allocation constitutes substantive consolidation, there is no need to re-visit the jurisprudence governing substantive consolidation in Canada or to consider whether the threshold for substantive consolidation should be changed.

[51] Furthermore, we see no merit in the argument raised by the Bank of New York Mellon that the trial judge erred by failing to allocate the Lockbox Funds in a

manner consistent with the *BIA* scheme, which contemplates distribution on an entity-by-entity basis. Under the *CCAA* allocation decision, distribution to creditors will be done on an entity-by-entity basis.

[52] Finally, the argument raised by the Ad Hoc Group of Bondholders and the Official Committee also lacks merit. It presumes that the various Nortel companies had distinct and separable property rights in Nortel's IP. The trial judge repeatedly rejected that proposition. As we explain in the following sections, we see no merit in the argument that the trial judge erred in failing to recognize such distinct property rights. As such, we see no merit in the argument that he exercised his authority in a way that ignored such rights.

[53] This ground of appeal is not *prima facie* meritorious.

(ii) The Interpretation of the MRDA

Position of Moving Parties

[54] The moving parties take the position that the trial judge erred in concluding that the MRDA has no application to the allocation of the Lockbox Funds. On their reading, the MRDA provides NNI and other "Integrated Entities" with valuable rights to Nortel's IP in their respective exclusive jurisdictions. They note that the trial judge and Judge Gross diverged on the issue of IP rights under the MRDA.

[55] The thrust of their contractual argument is two-fold: (1) the trial judge misinterpreted the MRDA by disregarding the words of the agreement; and (2) he failed to apply the Supreme Court of Canada's decision in *Sattva* by taking an impermissibly narrow view of the scope of factual matrix evidence. In particular, they submit that the trial judge failed to take into account evidence relating to, and explaining, the tax-driven nature of the MRDA and the purposes the parties were trying to achieve through the agreement.

Analysis

[56] We reject the moving parties' submissions on the interpretation of the MRDA.

[57] On August 1, 2014, the Supreme Court of Canada released *Sattva*. The essence of that decision is best captured by excerpts from the reasons of the court written by Rothstein J.:

- "Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law": para. 43.

- "[T]he historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": para. 50.

- "[T]his Court in *Housen* [*v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235] found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings …. These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law": para. 52.

- "[I]t may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law …. Legal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'": para. 53.
- "However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation": para. 54.
- "The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare": para. 55.

[58] Justice Rothstein also discussed the need to consider the surrounding circumstances, or factual matrix of a contract, when interpreting a written agreement. The goal of contractual interpretation is to ascertain the objective intentions of the parties. In doing so, "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of

formation of the contract": para. 47. Recognizing that words do not have an immutable meaning, the court should consider the contract's commercial purpose, taking into account its genesis, background, context, and the market in which the parties are operating.

[59] In this case, the moving parties suggest that the trial judge erred in his interpretation of the MRDA and failed to pay heed to *Sattva*. In our view, the moving parties' arguments are not *prima facie* meritorious.

[60] We are not persuaded that there is any reason to interfere with the trial judge's interpretation of the agreement on the basis of palpable and overriding error. Nor, in our view, have the moving parties pointed to any extricable legal error warranting intervention by this court.

[61] As mentioned, although *Sattva* was released during the course of the allocation trial, the trial judge nonetheless considered and applied *Sattva* in interpreting the MRDA. In over 40 paragraphs, he addressed the relevant law on, and evidence of, factual matrix: see paras. 55 – 57, 117 – 157. He properly rejected evidence of subjective intention as being inadmissible.

[62] We would also observe that, as noted by the Monitor and the Canadian Debtors, to be fully successful on their appeal, the U.S. Debtors would have to persuade the court that the trial judge should have: (i) concluded that the MRDA controlled allocation of Nortel's assets in the event of insolvency; (ii) adopted the

interpretation of the MRDA advanced by the U.S. Debtors; and (iii) accepted the expert valuation evidence tendered by the U.S. Debtors.

[63] The trial judge did none of these things. All of his conclusions to the contrary engage questions of fact or mixed fact and law that are well within his province.

[64] For instance, the trial judge rejected the U.S. Debtors' valuation evidence as unreliable and the moving parties' factums are silent on how this finding could be overcome. The acceptance or rejection of the evidence of a witness is squarely within the fact-finding arena of the trial judge. The moving parties have suggested no reason why the trial judge's findings on valuation would be reversed.

[65] In conclusion, this ground of appeal does not warrant granting leave to appeal.

(iii) Fairness to the Parties and Related Arguments

Position of Moving Parties

[66] Next, the moving parties submit that they were denied procedural fairness in various respects and that the allocation decision is, among other things, arbitrary, and inequitable. In this regard, we do not propose to address every argument in the multitude of factums filed. The principal submissions on fairness and related arguments that merit comment are as follows.

[67] The moving parties say they were given no notice or opportunity to make submissions on the remedy granted. Moreover, there was no record before the court on the full spectrum of claims asserted against the Selling Debtors and no one proposed the specific remedy granted.

[68] The U.S. Debtors also submit that the remedy did not respond to the question before the court, which they say was the allocation of the Sale Proceeds (i.e. the proceeds from a particular Sale Transaction) among the Selling Debtors (i.e. the Nortel parties to a particular Sale Transaction). In their view, the trial judge did not answer that question but instead allocated the Sale Proceeds to Nortel entities that did not transfer assets in a particular Sale Transaction and were, thus, not entitled to any Sale Proceeds.

[69] The Ad Hoc Group of Bondholders similarly submits that the trial judge answered the wrong question. For instance, it says that the only question properly before the court was to determine the relative value of the assets, rights and interests that each Selling Debtor sold or relinquished, which generated the Sale Proceeds. Moreover, they say that the decision disregards their legitimate expectations.

[70] The U.S. Debtors further submit that the allocation is arbitrary since there is no logical connection between what will be or will not be counted for allocation purposes. In particular, they point to the fact the allocation excludes $4 billion in

bondholder guarantee claims from the U.S. Debtors' allocation. They say that, as a result, the U.S. Debtors will receive no allocation of funds on account of approximately two-thirds of their claims.

[71] Similarly, the Ad Hoc Group of Bondholders submits the allocation is arbitrary as it produces a redistribution of assets among debtors that violates the rule that equity holders get paid after creditors.

[72] The Conflicts Administrator of NNSA also takes issue with the fairness of the allocation decision. It says that NNSA is prejudiced by the decision because of the relatively small quantum of its creditors' claims in comparison with those of other debtor estates.

[73] Finally, the Official Committee, which represents all general unsecured creditors of the U.S. Debtors, complains that the trial judge exercised his discretion in an unprincipled way and strayed into improper "commercial judicial moralism".

Analysis

[74] We are not satisfied that there is *prima facie* merit to the moving parties' submissions.

[75] As explained, the trial judge was required to "determine the allocation of the Sale Proceeds among the Selling Debtors" under the Allocation Protocol.

[76] Given the trial judge's conclusion that the MRDA did not govern allocation and his rejection of the EMEA Debtors' joint ownership theory, the trial judge had to determine what other metric should be used to allocate the Lockbox Funds among the U.S., Canadian and EMEA Debtor Estates.

[77] The Allocation Protocol permitted submissions on "any theory of allocation". At trial, the UKPC and the CCC, in the alternative, sought a *pro rata* distribution of the funds held in escrow and each submitted expert reports that supported a *pro rata* result. Moreover, the U.S. Debtors, the Official Committee and the Ad Hoc Group of Bondholders all made submissions before the trial judge opposing a *pro rata* allocation and had an opportunity to test the evidence. They submitted a motion to strike the *pro rata* allocation evidence, attacked the reliability of the expert reports and cross-examined the experts.

[78] Thus, all parties knew that a *pro rata* allocation was in play. The fact that the specifics of the allocation ordered by the trial judge were not identical to those advanced by any of the parties does not, in our view, create unfairness to the parties. This is not a situation where the trial judge addressed an issue that was not before him, failed to grapple with the arguments or evidence, or came up with a new theory of the case.

[79] The two judges were not required to determine value but allocation. The IFSA provided for a right to receive an allocation of the Sale Proceeds without

restricting the basis upon which that allocation might be determined by the two courts. In particular, we note that the trial judges were given authority to decide the issue of allocation. In addition to the terms of the Allocation Protocol, we note s.10(a) of the IFSA:

> [T]his Agreement is not, and shall not be deemed to be, an acknowledgement by any Party of the assumption, ratification, adoption or rejection of the Transfer Pricing Agreements or any other Transfer Pricing methodology employed by the Nortel Group or its individual members for any purpose <u>nor shall it be determinative of, or have any impact whatsoever on, the allocation of proceeds to any Debtor from any sale of assets of the Nortel Group</u>; [Emphasis added.]

[80] We also observe that the trial judge turned his mind to expectations and found that there was no evidence to support the Bondholders' argument that their legitimate expectations would be disregarded by a *pro rata* allocation.

[81] Furthermore, we see no basis for the assertion that the allocation framework is arbitrary and unfair since it excludes $4 billion in Bondholder guarantee claims from the U.S. Debtors' allocation. Under the allocation decision, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once for allocation purposes. This principle is applicable to all claims. The allocation decision also specifies that claims on bonds are to be made on the Debtor Estate of the issuer. Claims on those bonds may also be made on the Debtor Estate of the guarantor but those claims will not

be taken into account in determining the claims against the Debtor Estates for allocation purposes.

[82] On the reconsideration motion, it was argued that the trial judge's decision should be changed to provide that the claims by the bondholders on the guaranteed bonds against the issuer and guarantor Debtor Estates should be included in the claims for allocation purposes. It was contended that, without such a change, there would be a manifest injustice, especially to the creditors of the U.S. Debtors other than the bondholders.

[83] The trial judge rejected that argument, noting that the $2 billion admitted claim against NNL endures. Further, cash on hand in the U.S. Debtors' Estates would be available to their creditors. He also noted that the issue of the treatment of the guaranteed bonds, and whether they should be counted once or twice in a *pro rata* allocation, was a live issue in evidence at trial, which was open to the U.S. Debtors to explore. He found, at para. 16, that "any lack of briefing by the U.S. Debtors and the [Official Committee] was a deliberate tactic taken by them in attacking the pro rata allocation method proposed at trial". He concluded that, even if he were to reconsider the double-counting issue, he would not change his mind:

> I see no injustice in the result…. There must also be considered other claims that could be made against more than one Debtor Estate, including the pension claim by the UKPC against NNUK that could be made

> against other EMEA Debtors and claims that could be made on bonds issued by NNL and guaranteed by NNC. The allocation decision precludes the double counting of any such claims for allocation purposes. The U.S. Debtors and [Official Committee] do not suggest that any of these other claims should be permitted to be claimed twice for allocation purposes. I see no basis to treat the guaranteed bonds any differently for allocation purposes. The principles that govern allocation should be applied consistently to each debtor.

[84] We are not persuaded that there is *prima facie* merit to the argument that the allocation is arbitrary. The trial judge was clearly alive to the fairness concerns and gave reasons for adopting the approach he did after careful consideration of the evidence and argument at trial.

[85] We would also observe that there was no other clear answer to the question of who was entitled to receive the sale proceeds. As Judge Gross noted at p. 500 of his reasons, the parties “submitted widely varying approaches for deciding the issue leaving virtually no middle ground.” The U.S. Debtors and Bondholders argued that in excess of $5 billion belonged to the U.S. Estate and that the Canadian Estate should receive only $0.77 billion. The Canadian Debtors and the Monitor, in sharp contrast, argued that in excess of $6 billion belonged to the Canadian Estate and that the U.S. Estate should receive just over $1 billion. The highly integrated nature of the Nortel business operations and the nature of the assets sold defied either outcome.

[86] Judge Gross's comments in his reasons on the allocation trial, at pp. 532-533, accurately sum up the context in which the two courts came to adopt the *pro rata* allocation approach:

> The Court is convinced that where, as here, operating entities in an integrated, multi-national enterprise developed assets in common and there is nothing in the law or facts giving any of those entities certain and calculable claims to the proceeds from the liquidation of those assets in an enterprise-wide insolvency, adopting a pro rata allocation approach, which recognizes inter-company and settlement related claims and cash in hand, yields the most acceptable result.
>
> There is nothing in the law or facts of this case which weighs in favour of adopting one of the wide ranging approaches of the Debtors. There is no uniform code or international treaty or binding agreement which governs how Nortel is to allocate the Sales Proceeds between the various insolvency estates or subsidiaries spread across the globe.

[87] Nor are we satisfied that there is *prima facie* merit to the Official Committee's argument that the trial judge exercised his discretion in an unprincipled way by straying into improper "commercial judicial moralism". To the extent the Official Committee is suggesting that it amounts to judicial moralism when a judge takes into account fairness concerns, we reject that argument. The trial judge considered the evidence before him in considerable detail and worked with the facts presented to him. Based on those facts, he concluded that a *pro rata* order constituted the answer to the allocation issue. The fact that the answer is also fair should not detract from the force of his conclusion.

[88] Finally, we are not persuaded that there is any merit to the argument that the allocation violates the rule that equity holders get paid after creditors. The Ad Hoc Group of Bondholders submits that the trial judge's decision results in NNL (NNI's parent company) receiving allocation proceeds from the sale of NNI's assets and rights that ought to have been allocated to the NNI estate for the benefit of NNI's creditors. This argument is premised on NNI having a right to the particular proceeds as a result of the MRDA interpretation advanced by the U.S. Debtors and Bondholders. As we have discussed above, the trial judge rejected that argument.

[89] For these reasons, we conclude that none of the fairness and related arguments put forward by the moving parties are *prima facie* meritorious.

(b) Significance of Issues to the Practice

Position of Moving Parties

[90] The moving parties submit that the trial judge's decision presents important issues of first impression in the cross-border insolvency context. They submit that, without appellate intervention, there is a risk substantive consolidation will become far more widely available. In addition, they say that it creates significant uncertainty on the separation of subsidiaries within a corporate group and on the consequences of an insolvency proceeding on the rights of stakeholders, including creditors. In their submission, an appeal would permit this court to

clarify these issues. Furthermore, the appeal would allow this court to clarify the proper interpretation and effect of *Sattva* on commercial agreements.

Analysis

[91] As discussed above, the moving parties have raised three main issues they say warrant leave – namely, substantive consolidation, the interpretation of the MRDA, and fairness. Of the three issues, the moving parties submit that the first two raise issues of significant interest to the practice.

[92] We disagree.

[93] The facts of this case are unique and exceptional. As we have already discussed, substantive consolidation is not engaged and so this case would not provide an opportunity for this court to provide guidance on that question. Nor does this case engage any issues that require any clarification on the application of *Sattva*. In short, granting leave would not provide an opportunity for this court to provide guidance on legal issues of significance to the practice.

(c) Significance of Issues to the Action

Position of Moving Parties

[94] The moving parties state that the allocation of the Lockbox Funds is the overriding issue in the *CCAA* proceedings.

Analysis

[95] We accept that the allocation of the Lockbox Funds is a significant issue in this *CCAA* proceeding. That said, we are of the view that, standing alone, this factor is insufficient to warrant granting leave to appeal. To perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action.

(d) Progress of Proceedings

Position of Moving Parties

[96] The moving parties submit that the proposed appeal will not unduly hinder the progress of Nortel's *CCAA* proceeding. They state that many steps and issues remain before creditor distributions can be made, including the determination of claims. In addition, the allocation decisions of the Canadian court and the U.S. court must both be final orders in their respective jurisdictions before funds can be released from escrow. It is argued that this court should grant leave to ensure that it maintains the ability to address any issues should Judge Gross's decision be varied or overturned on appeal.

[97] The moving parties also make the point that there are no operating businesses that are in the process of restructuring because the Nortel businesses and assets have been liquidated and the joint trial was a "stand-alone component" of the *CCAA* proceeding. Thus, it is argued that the traditional

concerns leading courts to "sparingly" grant leave to appeal in *CCAA* proceedings are not applicable here. In fact, the Official Committee submits that where an appeal would have existed as of right under the *BIA*, it is nonsensical to deny leave here simply because Nortel's liquidation proceeded under the *CCAA*.

Analysis

[98] This brings us to the final consideration: progress. Repeatedly, the parties have been encouraged to resolve their differences, but without success. For instance, in a 2011 decision, *In re Nortel Networks, Inc.*, 669 F.3d 128, the Third Circuit Court of Appeals admonished the parties at p. 143:

> We are concerned that the attorneys representing the respective sparring parties may be focusing on some of the technical differences governing bankruptcy in the various jurisdictions without considering that there are real live individuals who will ultimately be affected by the decisions being made in the courtrooms. It appears that the largest claimants are pension funds in the U.K. and the United States, representing pensioners who are undoubtedly dependent, or who will become dependent, on their pensions. They are the Pawns in the moves being made by the Knights and the Rooks.
>
> Mediation, or continuation of whatever mediation is ongoing, by the parties in good faith is needed to resolve the differences. [Footnote omitted.]

[99] Former Chief Justice Winkler also encouraged the parties to find a way to resolve this matter. In April 2012, he warned about the "prospect of additional delays and the potential for conflicting decisions" if the parties failed to reach a negotiated settlement.

[100] Numerous mediations have been ordered but have failed.

[101] In the Annual Review of Insolvency, Kevin P. McElcheran described *Nortel* as a case that has become “an emblem of waste and dysfunction in a system intended to foster consensus based solutions to commercial insolvency”, noting that it has “eclipsed all previous Canadian cases in both duration and expense”: 2014 Ann. Rev. Insolv. L. 24 at p. 24. And that was in 2014.

[102] Consistent allocation decisions have been issued by the Canadian and U.S. courts. A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries. There are asymmetric appeal routes in Canada and the U.S. However, we do not accept that the separate appeal proceedings in the U.S. somehow diminish the need to bring these proceedings in Canada to a conclusion. In our view, any additional step is a barrier to progress.

[103] Furthermore, the fact that this case is a liquidation and not a restructuring does not render delay immaterial, where so many individuals and businesses continue to await a resolution of this proceeding. The potential of an interim distribution, remote or otherwise, does not alter this reality. In addition, the parties acceded to a liquidation under the *CCAA*. They cannot now reject the parameters of that statute, which requires leave to appeal, and where the jurisprudence on the applicable test is settled and long-standing.

E. STANDING ISSUE

[104] There is the additional issue of the standing of the Nortel Trade Claims Consortium that needs to be addressed. It represents a group of creditors that collectively holds over $130 million in unsecured claims against NNI and certain of its U.S. affiliates. It includes institutional investors and former Nortel employees. Unlike other U.S. creditors, the Consortium's sole recourse is against the U.S. Debtors' estates.

[105] At trial, the Consortium was represented by the Official Committee. It says that, given the trial decision, its interests may diverge from those of the rest of the Official Committee. It submits that the Consortium should have standing to seek leave to appeal. It relies on the court's jurisdiction to grant leave to appeal, pursuant to s. 13 of the *CCAA*, to "any person dissatisfied with an order or a decision made under [the] Act". It argues that the trial judge exceeded his jurisdiction by deciding matters that are properly for the U.S. court to decide.

[106] It is unnecessary to decide the standing issue. Even if the Consortium had standing, we would dismiss its leave motion for the same reasons we have dismissed the other leave motions. In any event, we see no merit in its argument that the trial judge exceeded his jurisdiction.

F. DISPOSITION

[107] In conclusion, we are not persuaded that the test for leave to appeal has been met. For these reasons, we dismiss all of the motions for leave to appeal.

Released:

“AH”
“MAY -3 2016”

“Alexandra Hoy A.C.J.O.”
“R.A. Blair J.A.”
“S.E. Pepall J.A.”

TAB 9

In the Court of Appeal of Alberta

Citation: Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act), 2007 ABCA 266

Date: 20070817
Docket: 0701-0222-AC
0701-0223-AC
Registry: Calgary

In the matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And in the matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited and 3094479 Nova Scotia Company
(the "CCAA Applicants")

Between:

Calpine Power L.P.

Appellant/Applicant (Creditor)

\- and -

The CCAA Applicants and Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership

Respondents (Applicants)

And Between:

Calpine Canada Natural Gas Partnership

Respondent (Applicant/ CCAA Party)

\- and -

Calpine Energy Services Canada Partnership and Lisa Winslow, Trustee of Calpine Greenfield Commercial Trust

Respondents (CCAA Applicant and Interested Parties)

- and -

Calpine Power L.P.

Appellant/Applicant (Creditor in CCAA Proceedings)

Reasons for Decision of
The Honourable Mr. Justice Clifton O'Brien
In Chambers

Application for Leave to Appeal and
Stay Pending Appeal of the Orders granted by
The Honourable Madam Justice B. E. Romaine
Dated the 24th day of July, 2007
Filed on the 27th day of July, 2007
(Dockets: 0501-17864; 0601-14198)

Reasons for Decision of
The Honourable Mr. Justice Clifton O'Brien
In Chambers

Introduction

[1] Calpine Power L.P. (CLP) applies for a stay pending appeal and leave to appeal three orders granted on July 24, 2007 in a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (CCAA). At the request of counsel, the applications have been dealt with on an expedited basis. Oral submissions were heard on August 15, at the close of which I undertook to deliver judgment by the end of the week. I do so now.

Background facts

[2] In December 2005, Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (CCAA Applicants) sought and obtain protection under the CCAA. At the same time, the parties referred to as the US Debtors sought and obtained similar protection under Chapter 11 of the U. S. Bankruptcy Code.

[3] A monitor, Ernst & Young Inc., was appointed under the CCAA proceedings and a stay of proceedings was ordered against the CCAA Applicants and against Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership. The latter three parties collectively are referred to as the CCAA Parties and those parties together with the CCAA Applicants as the CCAA Debtors.

[4] This insolvency is extremely complex, involving many related corporations and partnerships, and highly intertwined legal and financial obligations. The goal of restructuring and realizing maximum value for assets has been made more difficult by a number of cross-border issues.

[5] As described in the Monitor's 23rd Report, dated June 28, 2007, the CCAA Debtors and the US Debtors concluded that the most appropriate way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the material cross-border issues between them. The parties negotiated a global settlement agreement (GSA) subject to the approval of both Canadian and U. S. courts, execution of the GSA and the sale by Calpine Canada Resources Company of its holdings of Calpine Canada Energy Finance ULC (ULC1) Notes in the face amount of US$359,770,000 (the CCRC ULC1 Notes). Counsel at the oral hearing informed me that the Notes were sold on August 14, 2007, yielding a net amount of approximately US $403 million, an amount exceeding the face amount.

[6] On July 24, 2007, the CCAA Applicants sought and obtained three orders. First, an order approving the terms of the GSA and directing the various parties to execute such documents and

implement the transactions necessary to give effect to the GSA. Second, an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, an extension of the stay contemplated by the initial CCAA order to December 20, 2007. No objection was taken to the latter two orders and both were granted. The supervising judge also, in brief oral reasons, approved the GSA with written reasons to follow. Written Reasons for Judgment were subsequently filed on July 31, 2007: *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABQB 504. The reasons are careful and detailed. They fully set out the relevant facts and canvas the applicable law and as I see no need to repeat the facts and authorities, the reasons should be read in conjunction with these relatively short reasons dealing with the applications arising therefrom.

[7] The applications to the supervising judge were made concurrently with applications by the US Debtors to the US Bankruptcy Court in New York state, the applications proceeding simultaneously by video conference. The applications to the US Court, including an application for approval of the GSA, were also granted.

[8] The applicant, CLP, the Calpine Canada Energy Finance II ULC (ULC2) Indenture Trustee and a group referring to itself as the "Ad Hoc Committee of Creditors of Calpine Canada Resources Company" opposed the approval of the GSA. CPL is the only party seeking leave to appeal.

[9] CLP submits that the supervising judge erred in concluding that the GSA was not a compromise or plan of arrangement and therefore, sections 4 and 5 of the CCAA did not apply and no vote by creditors was necessary.

[10] Sections 4 and 5 of the CCAA provide:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[11] CLP further submits that the jurisdiction of the supervising judge to approve the GSA is governed by section 6 of the CCAA. Section 6 provides:

> Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

[12] The supervising judge found that the GSA is not linked to or subject to a plan of arrangement and does not compromise the rights of creditors that are not parties to it or have not consented to it, and it does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. She concluded that the GSA was not a compromise or arrangement for the purposes of section 4 of the CCAA. In the course of her reasons she cites a number of cases for support that the court has jurisdiction to review and approve transactions and settlement agreements during the stay period of a CCAA proceedings if an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

Test for leave to appeal

[13] This Court has repeatedly stated, for example in *Re Liberty Oil & Gas Ltd.*, 2003 ABCA 158, 44 C.B.R. (4th) 96 at paras. 15-16, that the test for leave under the CCAA involves a single criterion that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

> (1) Whether the point on appeal is of significance to the practice;
> (2) Whether the point raised is of significance to the action itself;
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> (4) Whether the appeal will unduly hinder the progress of the action.

[14] In assessing these factors, consideration should also be given to the applicable standard of review: *Re Canadian Airlines Corp.*, 2000 ABCA 149, 261 A.R. 120. Having regard to the commercial nature of the proceedings which often require quick decisions, and to the intimate

knowledge acquired by a supervising judge in overseeing a CCAA proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: *Re Smoky River Coal Ltd.*, 1999 ABCA 252, 237 A.R. 326 at para. 61.

Analysis

[15] The standard of review plays a significant, if not decisive, role in the outcome of this application for leave to appeal. The supervising judge, on the record of evidence before her, found that the GSA was "not a plan of compromise or arrangement with creditors" (Reasons, para. 51). This was a finding of fact, or at most, a finding of mixed law and fact. The applicant has identified no extricable error of law so the applicable standard is palpable or overriding error.

[16] The statute itself contains no definition of a compromise or arrangement. Moreover, it does not appear that a compromise or an arrangement has been *proposed* between a debtor company and either its unsecured or secured creditors, or any class of them within the scope of sections 4 or 5 of the CCAA. Neither the company, a creditor, nor anyone made application to convene a meeting under those sections.

[17] Rather, the GSA settles certain intercorporate claims between certain Canadian Calpine entities and certain US Calpine entities subject to certain conditions, including the approvals both of the Court of Queen's Bench of Alberta and of the US Bankruptcy Court.

[18] This is not to minimize the magnitude, significance and complexity of the issues dealt with in the intercorporate settlement which, by definition, was not between arm's length companies. The material cross-border issues are identified in the 23rd Report of the monitor and listed by the supervising judge (Reasons, para. 5).

[19] It is implicit in her reasons, if not express, that the supervising judge accepted the analysis of the monitor, and found that the GSA would likely ultimately result in payment in full of all Canadian creditors, including CLP. CLP does not challenge this finding, but points out that payment is not assured, and rightly relies upon its status as a creditor to challenge the approval in the meantime until such time as it has been paid.

[20] The supervising judge further found that the GSA "does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA" (Reasons, para. 51). CPL challenges this finding. In order to succeed in its proposed appeal, CPL must also demonstrate palpable and overriding error in these further findings of the supervising judge which once again, involve findings of fact or of mixed law and fact.

Application in this case

[21] CPL submits that the "fundamental problem" with the approval granted by the supervising judge is that the GSA is in reality a plan of arrangement because it settles virtually all matters in dispute in the Canadian CCAA estate and therefore, entitles the applicant to a vote. CPL argues that the GSA must be an arrangement or compromise within the meaning of sections 4, 5 and 6 of the CCAA because, in its view, the GSA requires non party creditors to make concessions, re-orders the priorities of creditors and distributes assets of the estate.

[22] The supervising judge acknowledged at the outset of her analysis that if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary (Reasons, para. 41). However, she was satisfied that the GSA did not constitute a plan of arrangement with creditors.

[23] The applicant conceded that a CCAA supervising judge has jurisdiction to approve transactions, including settlements in the course of overseeing proceedings during a stay period and prior to any plan of arrangement being proposed to creditors. This concession was proper having regard to case authority recognizing such jurisdiction and cited in the reasons of the supervising judge, including *Re Air Canada* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.), *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.), *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 289 (Ont. S.C.) and *Re Stelco Inc.* (2005), 78 O.R. (3d) 254 (C.A.).

[24] The power to approve such transactions during the stay is not spelled out in the CCAA. As has often been observed, the statute is skeletal. The approval power in such instances is usually said to be found either in the broad powers under section 11(4) to make orders other than on an initial application to effectuate the stay, or in the court's inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of the debtor until it can present a plan: *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 at para. 8 (Ont. Gen. Div.).

[25] Hunt, J.A. in delivering the judgment of this Court in *Smoky River Coal* considered the history of the legislation and its objectives in allowing the company to take steps to promote a successful eventual arrangement. She concluded at para. 53:

> These statements about the goals and operation of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

and further at para. 60:

> To summarize, the language of s. 11(4) is very broad. The CCAA must be interpreted in a remedial fashion.

[26] In my view, there is no serious issue as to the jurisdiction of a supervising judge to approve a settlement agreement between consenting parties prior to consideration of a plan of arrangement pursuant to section 6 of the CCAA. The fact that the GSA is not a simple agreement between two

parties, but rather resolves a number of complex issues between a number of parties, does not affect the jurisdiction of the court to approve the agreement if it is for the general benefit of all parties and otherwise meets the tests identified in the reasons of the supervising judge.

[27] CPL urges that the legal issue for determination by this Court is where the line is to be drawn to say when a settlement becomes a compromise or arrangement, thus requiring a vote under section 6 before the court can grant approval. It suggests that it would be useful to this practice area for the court to set out the criteria to be considered in this regard.

[28] An element of compromise is inherent in a settlement as there is invariably some give and take by the parties in reaching their agreement. The parties to the GSA made concessions for the purpose of gaining benefits. It is obvious that something more than compromise between consenting parties within a settlement agreement is required to constitute an arrangement or compromise for purposes of the CCAA as if that were not so, no settlement agreement could be approved without a vote of the creditors. As noted, that is contrary to case authority accepted by all parties to these applications.

[29] The CCAA deals with compromises or arrangements sought to be imposed upon creditors generally, or classes of creditors, and a vote is a necessary mechanism to determine whether the appropriate majority of the creditors proposed to be affected support the proposed compromise or arrangement.

[30] As pointed out by the supervising judge, a settlement will almost always have an impact on the financial circumstances of a debtor. A settlement will invariably have an effect on the size of the estate available for other claimants (Reasons, para. 62).

[31] Whether or not a settlement constitutes a plan of arrangement requiring a vote will be dependent upon the factual circumstances of each case. Here, the supervising judge carefully reviewed the circumstances and concluded, on the basis of a number of the fact findings, that there was no plan of arrangement within the meaning of the CCAA, and that the settlement merited approval. She recognized the peculiar circumstances which distinguishes this case, and observed at para. 76 of her Reasons:

> The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

[32] At the time of granting her approval, the supervising judge had been overseeing the conduct of these CCAA proceedings since their inception – some 18 months earlier. She had the benefit of

the many reports of the monitor and was familiar with the record of the proceedings. Her determination of this issue is entitled to deference in the absence of legal error or palpable and overriding error of fact.

[33] CPL submits that the GSA compromises its rights and claims, and thus, challenges the express finding of the supervising judge that the settlement neither compromises the rights of creditors before it, nor deprives them of their existing contractual rights. The applicant relies upon the following effects of the GSA in making this submission:

(i) a priority payment of $75 million out of the proceeds of the sale of bonds owned by Calpine Canada Resources Company;
(ii) the release of a potential claim against Calpine Canada Energy Limited, the parent of Calpine Canada Resources Company, which is a partner of Calpine Energy Services Canada Ltd., against which CPL has a claim;
(iii) the dismissal of a claim by Calpine Canada Energy Limited against Quintana Canada Holdings LLC, thereby depleting Calpine Canada Energy Limited of a potential asset which that company could use to satisfy any potential claim by CPL for any shortfall, were it not for the release of claims against Calpine Canada Energy Limited (see (ii) above); and
(iv) the dismissal of the Greenfield Action brought by another CCAA Debtor against Calpine Energy Services Canada Ltd. for an alleged fraudulent conversion of its interest in Greenfield LP which was developing a 1005 Megawatt generation plant.

[34] For purposes of the CCAA proceedings, the applicant is a creditor of Calpine Energy Services Canada Ltd., Calpine Canada Power Ltd. and perhaps, also, Calpine Canada Resources Company. The GSA does not change its status as a creditor of those companies, nor does it bar the applicant from any existing claims against those companies.

[35] In my view, the submission of the applicant does not show any palpable and overriding error in the findings of the supervising judge that the right of creditors not parties to the GSA have not been compromised or taken away. Firstly, there is no compromise of debt if such indebtedness, as ultimately found due to the applicant, is paid in full, which is the likely result as found by the supervising judge, albeit she acknowledged that this result was not guaranteed (Reasons, para. 81). Secondly, and in any event, the fact that the GSA impacts upon the assets of the debtor companies, against which the applicant may ultimately have a claim for any shortfall experienced by it, is a common feature of any settlement agreement and as earlier explained, does not automatically result in a vote by the creditors. The further fact that one of the affected assets of the debtor companies is a cause of action, or perhaps, more correctly, a possible cause of action, does not abrogate the rights of a creditor albeit there may be less monies to be realized at the end of the day.

[36] The GSA does not usurp the right of the creditors to vote on a plan of arrangement if it becomes necessary to propose such a plan to the creditors. As explained by the supervising judge,

the settlement between the CCAA Debtors and the US Debtors unlocked the Canadian proceedings to meaningful progress in asset realization and claims resolution, and provided the mechanisms for resolving the remaining issues and significant creditor claims, and the clarification of priorities.

[37] It is correct, of course, that if the claims of CPL are paid in full in the course of the CCAA proceedings, it will never be necessary for it to vote on a plan of arrangement. The applicant should have no complaint with that result. On the other hand, if the claims are not satisfied, it seems likely a plan of arrangement will ultimately be proposed to the applicant, who will then have its right to vote on any such plan.

[38] CPL argues that the supervising judge was not entitled to assess the merits of the GSA *vis-à-vis* the creditors as this was a matter for the exclusive business judgment of the creditors and to be exercised by their vote. As became apparent during the course of its submissions, if a vote were required, from the perspective of the CPL, this would give it veto power over the GSA. Unless clearly mandated by the statute, this is a result to be avoided. While it is understandable that an individual creditor seeks to obtain as much leverage as possible in order to enhance its negotiating position, the objectives and purposes of the CCAA could easily be frustrated in such circumstances by the self interest of a single creditor. Court approval requires, as a primary consideration, the determination that an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally. As the supervising judge noted, court approval of settlements and major transaction can and often is given over the objections of one or more parties because the court must act for the greater good consistent with the purpose and spirit and within the confines of the legislation.

[39] I am not persuaded that the applicant has demonstrated any reasonably arguable error of law in the reasons of the supervising judge or any palpable and overriding errors in her findings of fact or findings of mixed fact and law. In the absence of any such error, it follows that she had discretion to approve the GSA, which she exercised based upon her assessment of the merits and reasonableness of the settlement, and other factors in accordance with the principles set out in the authorities, cited in her reasons, governing the approval of transactions, including settlements, during the stay period prior to a plan of arrangement being submitted to the creditors.

Conclusion

[40] CPL has failed to establish serious and arguable grounds for granting leave. In particular, two of the factors used to assess whether this criterion is present have not been met. It has not been demonstrated that the point on appeal is of significance to the parties having regard to the fact dependent nature of whether a plan of arrangement has been proposed to creditors. More importantly, having regard to the standard of review and the findings of the supervising judge, the applicant has not demonstrated that the appeal for which leave is sought is *prima facie* meritorious.

[41] The application for leave is dismissed. It follows that the application for a stay likewise fails and is dismissed.

[42] Finally, I would be remiss if I did not acknowledge the excellent quality of the submissions, both written and oral, of counsel on these applications. The submissions were of great assistance in permitting the application to be dealt with in an abbreviated time frame.

Application heard on August 15, 2007

Reasons filed at Calgary, Alberta
this 17th day of August, 2007

O'Brien J.A.

Appearances:

P.T. Linder, Q.C.
R. Van Dorp
for the Applicant, CPL

L.B. Robinson, Q.C.
S.F. Collins
J.A. Carfagnini
for the CCAA Applicants and the CCAA Parties (Respondents)

H.A. Gorman
for the Ad Hoc ULC1 Noteholders Committee

P.H. Griffin
U. Sheikh
for the Calpine Corporation and other US Debtors

F.R. Dearlove
for HSBC

P. McCarthy, Q.C.
J. Kruger
for Ernst & Young Inc., the Monitor

N.S. Rabinovitch
for the Lien Debtholders

R. De Waal
for the Unsecured Creditors Committee

TAB 10

CANADA
PROVINCE OF NOVA SCOTIA
COURT NO: 19853

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY

IN THE MATTER OF THE PROPOSAL OF
LASERWORKS COMPUTER SERVICES INC.

DECISION

HEARD BEFORE:	Tim Hill, Registrar in Bankruptcy
DATES HEARD:	March 24, 1997, and April 11, 1997
DECISION RENDERED:	April 14, 1997
COUNSEL:	Roy F. Redgrave and Cynthia Isenor representing Laserworks Computer Services Inc. A. James Musgrave representing 3004876 Nova Scotia Limited D. Bruce Clarke representing the Trustee, McCuaig & Company Inc.

This application came on for hearing on Friday last. At the close of the hearing I indicated to counsel that I would reflect over the weekend and give a decision today, as the proposal is currently in limbo awaiting the result.

The application raises an issue with the potential to have some real impact on commercial entities seeking to make proposals under Part III of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended (the "B.I.A."). It calls into question the efficacy of the proposal process. The circumstances demand an immediate response from this Court, both to resolve this controversy and to give guidance to parties that might be inclined to similar activity in the future. I begin with a short review of the facts.

THE FACTS

On December 4, 1996, Laserworks Computer Services Inc. ("Laserworks") gave notice of its intention to file a proposal under the provisions of section 50 of the B.I.A. The proposal was filed on January 3, 1997. The first meeting of creditors convened on January 24, 1997, and was adjourned. On February 12, 1997, Laserworks filed an amended proposal. The meeting of creditors was reconvened on March 3, 1997, to consider the amended proposal.

Mr. Victor Goldberg, a solicitor, attended at the meeting and presented eighteen proxies whereby creditors had given their proxy to either Mr. Goldberg or Mr. James Enman, an associate of Mr. Goldberg. The principals of Laserworks took objection to the eighteen claims represented by Mr. Goldberg's proxies. It was alleged that Mr. Goldberg was acting on behalf of a competitor purchasing claims and soliciting proxies.

The chairperson of the meeting put certain questions to Mr. Goldberg. The minutes of the meeting are in evidence before me, and it is interesting to refer to those minutes which if nothing else give some appreciation of the flavour of the meeting:

> The chairperson asked Mr. Goldberg if he had paid any creditors for their proxies. Mr. Goldberg replied that there was nothing wrong with this practice. The chairperson again posed the same question to Mr. Goldberg. Mr. Goldberg replied that this practice was acceptable if there has been an agreement to assign claims. The chairperson was not aware of any assignment of claims. Mr. Goldberg advised that there may have been assignments. The chairperson advised Mr. Goldberg that there were no assignments of claims of which she was aware. Mr. Goldberg pointed out that he had never said there were not any assignments of claims. The chairperson asked Mr. Goldberg if he had made payments for any proxies. Mr. Goldberg replied that he had not. The chairperson advised that an assignment of claims may very well affect the number of claims able to vote, and asked Mr. Goldberg if any claims had been assigned. Mr. Goldberg responded that it may be that claims had been assigned, but none had been accepted.
>
> Bruce Clarke, counsel for the trustee, asked Mr. Goldberg if any money had been paid to the creditors. Mr. Goldberg replied that payment had been made "only on some". Mr. Clarke asked Mr. Goldberg if the numbered company referred to in the assignment document was obligated to make payment to certain of the creditors. Mr. Goldberg asked Mr. Clarke what difference this would make. The chairperson replied that this may be a significant issue as it may be indicative of an execution of an assignment of claims.

It is not unfair to say that Mr. Goldberg was obtuse to a very great degree. While this does not necessarily confirm suspicion as to the motives of his client, it does explain the concern expressed by the principals of Laserworks.

Mr. Goldberg objected to the claims of four creditors. As I have noted, the claims of the eighteen creditors represented by Mr. Goldberg's proxies were also objected to. The chairperson of the meeting proceeded pursuant to section 108(3) of the B.I.A. and marked the claims objected to, but allowed the creditors to vote subject to their votes being declared invalid in the event this court should sustain the objections.

Upon the vote being taken, fourteen creditors with a total claim value of $206,531.65 voted in favour of the proposal. Twenty creditors with a total claim of $140,370.00 voted against the proposal. Thus 41% of creditors representing 59.5% of the claims voted pro, and 59% of the creditors with 40.5% of the claims voted con. The proposal was defeated, subject to the resolution of the objections before the court today.

It is common ground that should the objection against the votes of those eighteen creditors for whom Mr. Goldberg held the proxy be sustained, the proposal would be approved. This would be the case even if the objection of Mr. Goldberg to the four additional creditors' claims were sustained.

The meeting of creditors now stands adjourned pending the disposition of this application.

Prior to the hearing of this application, Mr. Goldberg was examined by counsel for Laserworks pursuant to section 163(2) of the B.I.A. This examination was by consent.

Upon the examination Mr. Goldberg testified that he had sent faxes to some of the creditors of Laserworks (but not all) seeking to purchase their claims on behalf of 3004876 Nova Scotia Limited (the "numbered company"). Each of these faxes was similar, but not all were the same. In most cases a telephone call preceded the fax. Mr. Goldberg agreed to provide a summary detailing the offers made and this was produced prior to the hearing of this application.

It would appear from the summary that the offers made to creditors varied in some degree, with those creditors with smaller claims generally being offered a higher percentage of their claim. Eighteen creditors delivered their proxy, and the vast majority also delivered an assignment agreement. The assignment agreements were not executed by the numbered company. It seems that this was an attempt to avoid a consolidation of the claims into one claim for the purpose of voting. The numbered company through Mr. Goldberg clearly wished to be able to vote both the value of the claims, and individually on behalf of each assigning creditor. In this regard, Mr. Goldberg testified that it was a condition of payment that the creditor both return the assignment and proxy, and that the claim be proven. The creditors were only to be paid on proven claims. Notwithstanding this it does appear from the summary provided that at least four creditors were paid on their claims.

Mr. Goldberg testified that he was acting for more than one client. Objection was taken to revealing who the client was on the basis of solicitor client privilege. This objection was withdrawn, and Mr. Goldberg revealed that the numbered company was a “shelf” company, and that his client was Datarite Inc. ("Datarite"). Mr. Goldberg's instructions came from Datarite. He testified that one of Datarite's divisions was a business competitor of Laserworks.

DECISION

Moving to the two applications before me, I will first deal with the four claims to which Mr. Goldberg objects.

The "Goldberg" Objections

There is no record of any notice being given to any of these four creditors of this application. It is trite to say that they are entitled to participate on the application insofar as the adjudication of their claims is concerned. This being the case, I decline to take the matter of this objection any further at this time. Mr. Goldberg's client shall have ten days from the date of this decision to make further application on notice to the affected creditors, failing which the chairperson should consider the objections withdrawn and proceed accordingly.

I now turn to the issue of the eighteen claims represented by Mr. Goldberg's proxies.

The "Laserworks" Objections

I am satisfied that the appropriate parties are before me on this application. Counsel for the numbered company was present and indeed provided an extensive written brief. The eighteen creditors have given their proxies to Mr. Goldberg (as solicitor for the numbered company) and essentially assigned their rights to the numbered company. The trustee had notice and was represented.

I am indebted to counsel for the numbered company, for Laserworks, and for the trustee, for their very well reasoned pre-hearing memoranda. It is useful to summarize those submissions.

Counsel for the numbered company concedes that the court has an inherent supervisory jurisdiction in bankruptcy. An example of this is the practice of the court to strike down secret agreements between a debtor and creditor. Another example is the ability of the court to interfere with decisions of inspectors. In the former case secret agreements are struck down as being essentially a fraud upon the general body of creditors. In the latter case, the supervisory function of the court arises from the position of inspectors as fiduciaries. Counsel argues that neither principle extends to agreements between creditors, who are not fiduciaries and who are entitled to act entirely in their own self interest.

Counsel for the numbered company goes on to argue that the motive of a creditor in voting is irrelevant so long as the creditor has satisfied the technical requirements in filing a proof of claim and otherwise complying with the provisions of the B.I.A. Counsel cites Re Bedard (1991), 20 C.B.R. (3d) 218, a case from the Quebec Court of Appeal, for the proposition that while a creditor may have a conflict of interest, such a conflict would not deny the creditor the ability to vote its claim. I would simply note that the circumstances in Bedard were entirely different to those in this case and the same result should not necessarily follow.

Counsel for Laserworks refers the court to the following extract from Houlden and Morawetz, Bankruptcy and Insolvency Law of Canada, at p. 2-144.3 (looseleaf):

> In deciding whether the proposal should be approved, the court must take the following interests into account: (a) the interests of the debtor in making a settlement with creditors; (b) the interests of creditors in procuring a settlement which is reasonable and which does not prejudice their rights; and (c) the interests of the public in the fashioning of a settlement which preserves the integrity of the bankruptcy process and complies with the requirements of commercial morality.

Counsel argues that while these considerations are germane to an application to approve a proposal, they should also be relevant in the circumstances present in this case. As a matter of public policy the court should not condone the activities of Datarite here.

To this I would say that it is only in rare cases that a court, and particularly the Registrar of the court, should succumb to the temptation to rest an otherwise just result simply on the coat hanger of public policy.

Counsel for the trustee offers support to counsel for Laserworks in this public policy submission. He says that just as secret dealings between a debtor and creditor should be frowned upon, so too should secret dealings between creditors in circumstances such as this. Counsel submits that the court has a general supervisory function in respect to the voting process, and while there is no law prohibiting a creditor voting in his or her own best interest absent abuse, where abuse is present the court may intervene.

Before turning to deal with these submissions, it is essential that I make some findings of fact. In large part the facts are uncontested. No affidavits were filed, but counsel agree that I may rely on the minutes of the meeting of creditors, the testimony of Mr. Goldberg upon the section 163(2) examination, and the list provided by Mr. Goldberg in compliance with his undertaking on the examination.

I find that Datarite through its solicitor approached some but not all of the creditors of Laserworks with the intention of obtaining an assignment of those creditors' claims and consequently rights to vote on the proposal. The claims were obtained and the votes utilized to defeat the proposal. This would have the effect under section 57(a) of the B.I.A. of placing Laserworks into bankruptcy by virtue of a deemed assignment.

I can only conclude that the purpose of Datarite was to effect the bankruptcy of Laserworks. It is a reasonable supposition that the purpose was to remove a competitor from the marketplace. I find that it was the intention of Datarite to place Laserworks in bankruptcy. I further find that the motive was to lessen competition.

In my view, Datarite was engaged throughout in an improper purpose not contemplated by the B.I.A., the purpose of which is far removed from the use to which Datarite put it.

Where the court is satisfied that a creditor is acting to place the debtor in bankruptcy for an improper purpose, does the court have the ability to prevent this abuse of the provisions of the B.I.A.? If it does, does this ability extend to the Registrar or is it confined to a Supreme Court Justice exercising his or her bankruptcy jurisdiction?

In this province the Supreme Court is vested with jurisdiction both at law and in equity so as to enable the court to exercise original, auxiliary and ancillary jurisdiction in bankruptcy: B.I.A., section 183(1).

> It is well established law that nothing shall be intended to be out of the jurisdiction of a Superior Court but what expressly appears to be so. The jurisdiction of the king's Superior Courts over matters cognizable by them can not be taken away but by express words or perhaps by necessary implication arising from the use of words absolutely inconsistent with the exercise of the jurisdiction, or to which effect can not be given except by exclusion of such jurisdiction. If a court has jurisdiction of the principle matter it has also jurisdiction over all matters incident thereto and may try them according to the course of their law so that it be not contrary to the common law. I realize that the Bankruptcy law is statutory mainly and a Court should not go beyond the provisions of the statute applicable. But, if the subject-matter is within the statute, the Court may draw on its inherent powers to give effect to the provisions of the statute...it seems

> quite clear to me that the absence of any specific rule should not render the Court incapable of exercising its jurisdiction.

Re Loxtave Buildings of Canada Limited et al (1943), 25 C.B.R. 22 (Sask.Q.B.), at p. 25.

Section 2 of the B.I.A. defines the "court" to include a Registrar when exercising the powers of the court conferred on a Registrar under the Act. Section 192(1)(h) gives the Registrar jurisdiction to hear and determine matters relating to proofs of claim, whether or not opposed. I conclude therefore that on this application I may exercise the jurisdiction of the court in its totality.

I agree with the submissions of counsel for all the parties that there are instances where the court acting under what might be described as its inherent jurisdiction may prescribe an activity on the part of an interested party to a bankruptcy notwithstanding the lack of a statutory prohibition. In this case counsel for Laserworks commends to the court the principles set out in cases such as McKewan v. Sanderson, (1873), L.R. 15 Eq. 229, Sadler Mfg. Co. Ltd. v. Golt (1954), 35 C.B.R. 67 (Que.S.C.), and Newlands Textiles Inc. v. Carrier (1983), 47 C.B.R.(N.S.) 148 (Ont. S.C.), dealing with the situation where by virtue of a secret agreement with the debtor a creditor obtains a benefit not available to the general body of creditors. Such secret agreements will not be enforced.

In my view it is a quantum leap from that principle to some general principle that secret agreements between creditors should not be enforced, and that further the court should actively intervene to substitute its perception of what is appropriate in any particular circumstance. This is a leap I am not prepared to take.

This, however, does not end the analysis.

It has long been held that the court will not grant a petition in bankruptcy where the petition is filed for an improper purpose: Re E. De La Hooke (1934), 15 C.B.R. 485 (Ont.S.C.), Re Pappy's Good Eats Limited (1985), 56 C.B.R. (N.S.) 304 (Ont.S.C.), Dimples Diapers Inc. v. Paperboard Industries Corporation (1992), 15 C.B.R. (3d) 204 (Ont.G.D.), Re Shepard (1996), 40 C.B.R. (3d) 145 (Man.Q.B.).

In Hooke the petitioner obtained an assignment of a judgment against the debtor for the sole purpose of filing a petition in bankruptcy and of removing the debtor as a business competitor. In that case, as is the situation in this case, there was no evidence that the debtor had any business dealings with the party seeking to place the debtor in bankruptcy. The petition was dismissed.

In Hooke the court made extensive reference to the decision of the House of Lords in King v. Henderson, [1898] A.C. 720. The comments of James, L. J., at p. 732, are particularly germane here:

> After what Lord Justice Cotton has said, in which I entirely agree, people will probably think twice before they buy debts for the purpose of taking bankruptcy proceedings.

Lord Justice Cotton had commented that the proceedings in bankruptcy were not taken to obtain payment of the debt, but rather the debt was purchased for the purpose of taking the proceedings. I would simply add that in light of the decision I make here persons should certainly think twice before they purchase debts in order to defeat a proposal.

It is my opinion that the eighteen creditors are tainted with the improper motive of Datarite. In Pappy's Good Eats the petition was filed by a creditor with a genuine claim. The creditor entered into an agreement with three franchisees of the debtor. This agreement provided that the creditor would prosecute the bankruptcy proceeding while the franchisees financed the proceeding in exchange for a share in the dividends. The motive of the franchisees was to bring about a bankruptcy so as to terminate the franchise agreements between them and the debtor.

The court found that there had been an improper use of the bankruptcy legislation. The effect of the agreement was to embroil the creditor in the improper objectives of the franchisees who were intermeddling in the proceeding. This tainted the whole proceeding. Clearly where the object of the intermeddling party is to bring about the bankruptcy of the debtor an improper purpose is present. The court will act to prevent such an abuse of the legislation.

The other cases I have referred to, Dimples Diapers Inc. and Shepard also deal with bankruptcy petitions instigated for an improper collateral purpose. In Dimples that purpose was to recover a trademark and a business opportunity. In Shepard that purpose was to obtain control of certain shares.

While this case does not involve a bankruptcy petition, it does involve the placing of Laserworks into bankruptcy. In my view, it would be wrong to allow Datarite to do in the proposal process what it could not do by petition. Datarite's intention was to place Laserworks in bankruptcy. The motive was to remove a competitor. That motive reveals an improper purpose. The court will not allow to be done by the back door what may not be done by the front.

By entering into this arrangement with the numbered company the eighteen creditors have tainted themselves and become embroiled in the improper purpose of Datarite. Their votes cannot stand. If Laserworks has the right to be free of this type of interference the Court must be able to fashion a remedy. This court does have the inherent jurisdiction to supervise the bankruptcy process and consequently the conduct of creditors where that conduct constitutes an abuse of the provisions of the B.I.A. While creditors can certainly vote in their own best interest, they may not collude with a third party to place a debtor in bankruptcy for an improper purpose. Such activity lacks commercial morality and offends the integrity of the bankruptcy process.

The objection to the votes of the eighteen creditors is sustained. The chairperson of the meeting is directed to tabulate the votes without regard to the votes of the eighteen creditors in question, and to proceed according to the result. As matters stand, this will apparently result in the approval of the proposal.

My decision here should not be taken as a denial of the rights of the eighteen creditors to share in the dividends payable under the proposal. They may do so.

Given my findings with respect to the intent and motive of Datarite, I find it unnecessary to consider whether Datarite should have exercised one vote or eighteen.

While the activities of Datarite were novel in respect to a proposal, it seems to me clear that Datarite could only be aware that its purpose was improper. Thus this is an appropriate case for costs. I award costs against Datarite in favour of Laserworks in the amount of $1,000.00, and in favour of the trustee in the amount of $1,000.00.

Dated at Halifax, Nova Scotia this 14th day of April, 1997.

Registrar in Bankruptcy

TAB 11

1997 **B19853**

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY

IN THE MATTER OF the Proposal of Laserworks Computer Services Inc.

- and -

IN THE MATTER OF Section 194(2) of *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3

- and -

IN THE MATTER OF an appeal by 3004876 Nova Scotia Limited

DECISION

HEARD: at Halifax, Nova Scotia, before the Honourable Justice Margaret J. Stewart on June 24, 1997

DECISION: August 13, 1997

COUNSEL: Michael S. Ryan, Q.C.
Counsel for the Appellant, 3004876 Nova Scotia Limited

Roy F. Redgrave
Counsel for the Laserworks Computer Services Limited

D. Bruce Clarke
Counsel for McCuaig & Company Inc., Trustee under Proposal

<u>Stewart, J.:</u>

The Appellant, 3004876 Nova Scotia Limited, (the Appellant numbered company) appeals from the decision of Registrar Hill dated April 14, 1997 and resulting order dated May 5, 1997, whereby the Registrar declared invalid the votes that 18 unsecured creditors of the insolvent, Laserworks Computer Services Inc. (Laserworks) cast, by proxy, against Laserworks' amended proposal.

1. On December 4, 1996, Laserworks gave notice of its intention to file a proposal under s. 50 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 as amended (the **Act**).

2. On January 3, 1997, the proposal was filed.

3. On January 24, 1997, the first meeting of the classes of creditors was adjourned.

4. On February 12, 1997, Laserworks filed an amended proposal.

5. On March 3, 1997, the amended proposal was considered by the meeting of the classes of creditors. Victor Goldberg, a solicitor for the Appellant numbered company, between himself and an associate, held and presented 18 proxies of unsecured creditors. These 18 claims were objected to by the principals of Laserworks. Upon the vote being taken, the proposal was defeated, subject to the Registrar's resolution of the objections. As noted by the Registrar in his decision, it was common ground the sustaining of the objection against the votes of the 18 creditors for whom Victor Goldberg held the proxies would result in the proposal being approved.

6. On March 24, 1997, Victor Goldberg by consent was examined by counsel for Laserworks pursuant to s. 163(2) of the **Act**. Victor Goldberg's testimony and/or written summary which detailed the offers to the 18 creditors revealed to the Registrar:

a) Victor Goldberg sought to purchase the claims of some of the creditors of Laserwork on behalf of the Appellant numbered company, being a "shelf' company, and his client was, in fact, Datarite Inc. ("Datarite"), a division of which was a business competitor of Laserworks;

b) Generally, the Appellant numbered company, offered a higher percentage of the claims to creditors with smaller claims;

c) Eighteen creditors delivered their proxy and a vast majority also delivered an assignment agreement; but, the agreement was not executed by the Appellant numbered company. This, the Registrar concluded, was an attempt to avoid a consolidation of the claims into one claim for the purposes of voting, as the Appellant numbered company "clearly wished to be able to vote both the value of the claims and individually on behalf of each assignee creditor". The return of the assignment and proxy, as well as the claim being proven, were conditions of payment, although at least 4 creditors were paid on their claim prior to the claims having been proven.

7. The Registrar in his decision of April 14, 1997 made the following findings of fact from the minutes of the creditors and from Victor Goldberg's testimony and/or written summary:

1) Datarite through its solicitor approached some but not all the creditors of Laserworks with the intention of obtaining an assignment of those creditors' claims and consequently the right to vote them on the

proposal. The claims were obtained and the votes utilized to defeat the proposal which would have the effect of placing Laserworks into bankruptcy by virtue of a deemed assignment provision of the **Act**.

2) Datarite's intended purpose was to effect the bankruptcy of Laserworks and to remove a competitor from the marketplace, in other words, the intention of Datarite was to place Laserworks in bankruptcy and the motive was to lessen competition by removing a competitor.

3) Datarite engaged throughout in an improper purpose not contemplated by the **Act**.

4) There is no general principle that secret agreements between creditors should not be enforced.

5) Where the court is satisfied that a creditor is acting to place the debtor in bankruptcy for an improper purpose, the court and, therefore, the Registrar has the jurisdiction to prevent this abuse of the provisions of the **Act**, notwithstanding the lack of any statutory prohibition.

6) Extrapolating from the case law dealing with petitioning into bankruptcy for an improper collateral purpose, the Registrar found where the object of the intermeddling party during the proposal process is to bring about the bankruptcy of the debtor, an improper purpose is present, thereby permitting the court to act to prevent such an abuse of the legislation.

7) It is wrong to allow Datarite to do in the proposal process (buying the claims of members of the class for the purpose of voting against the proposal) what the case law makes it clear it cannot do by Petition, (buying the claims of members of the class of unsecured creditors and using these claims to file a bankruptcy petition against Laserworks).

8) Persons should certainly think twice before they purchase debts for the sole purpose of defeating proposals.

9) By entering into the arrangement with the Appellant numbered company, the 18 creditors tainted themselves with and became embroiled in the improper purpose of Datarite.

The Registrar concluded the votes cast by the Appellant were not able to stand:

> If Laserworks has the right to be free of this type of interference the court must be able to fashion a remedy. This court does have the inherent jurisdiction to supervise the bankruptcy process and consequently the conduct of creditors where that conduct constitutes an abuse of the provisions of the B.I.A. While creditors can certainly vote in their own best interest, they may not collude with a third party to place a debtor in bankruptcy for an improper purpose. Such activity lacks commercial morality and offends the integrity of the bankruptcy process. The Registrar sustained Laserworks objection to the votes of the 18 creditors, noting the result was the approval of the proposal by the class of unsecured creditors.

Grounds of Appeal

The Appellant numbered company states the learned Registrar erred in law in sustaining Laserworks objection to the votes of the 18 creditors by:

1) failing to appreciate the evidence before him when he concluded that Datarite's purpose in acquiring and in voting the 18 claims was an improper one;

2) applying an incorrect legal test when he concluded that Datarite's purpose in acquiring and voting the claims was relevant to the case before him; and

3) applying an incorrect legal test when he concluded that the 18 creditors tainted themselves and became embroiled in the improper purpose of Datarite, which resulted in their claims being disallowed.

The Appellant numbered company seeks an order reversing the decision. The effect of allowing the eighteen votes cast against the proposal will result in Laserworks being deemed to have made an assignment in bankruptcy, pursuant to s. 57 of the **Act**.

Failing to Appreciate the Evidence

The Appellant submits the Registrar, in concluding that Datarite's intent and motive was to cause a bankruptcy and remove a competitor, failed to consider or simply forgot to consider the only evidence on point, being the uncontradicted evidence of Victor Goldberg who specifically stated:

> The purpose of the numbered company hopefully in buying the claim is that it'll buy the claims at a reduced price and get full payment one day.

And later:

> You asked what the ultimate goal was for the number company. And the whole purpose of it would be to hopefully get ultimately one day full payment. Just because a company were to go bankrupt, as we all know, a proposal ultimately could take the company out of bankruptcy.

Indeed the Registrar's lack of specific comment on the credibility of the "experienced" officer of the court when ignoring his testimony further supports, the Appellant submits, this void/failure to be one of forgetfulness rather than an attack on credibility without reasons. Counsel for the Appellant numbered company also notes the Registrar's lack of a transcript at the time of writing. There being no other evidence of a motive or intent, the Appellant says the Registrar's suppositions as to Datarite's motive or purpose lacked foundation. This wrong appreciation of the evidence leaves it open to the court to substitute its discretion for that of the Registrar. (Re: *Barrick* (1980), 36 C.B.R. (N.S.) 286 (B.C.C.A.); *Industrial Acceptance Corp v. Lalonde*, [1952] 2 S.C.R. 109.)

A review of the discovery transcript of Victor Golberg clearly reveals the Registrar, at that time, had a very accurate grasp of Goldberg's testimony, as the Registrar, in the context of a motion, succinctly reiterated the numbered company's stated purpose. I am satisfied some twenty days later, the Registrar did not forget this sated purpose and was conscious this explanation of purpose, if accepted, negated the inference he chose to draw from the proven facts as to the intentions of the numbered company in the circumstances. The unmistakable conclusion on reading his reasons is that he did not accept the evidence of Victor Goldberg that the purpose was to purchase the claims, at a discount, intending to profit by receiving a greater distribution from the insolvent company. In rejecting Victor Goldberg's evidence, he chose to draw the inference that the real objective was not to benefit the creditors of the insolvent, but rather, to remove it as a competitor in the market place. His decision, as a result, constituted a finding of a lack of credibility in respect to Victor Goldberg's evidence on this issue, and having regard to that finding, his inference from the facts, as he found them, was reasonable in the circumstances. As has often been said, the Registrar, having the advantage of being present during the evidence of Victor Goldberg, on March 24, 1997, is in a better position to make findings in respect to the credibility of witnesses than a court, on appeal, and thereby limited to the written transcript. Although this does not mean such a finding of credibility would never be reversed, I am not satisfied, in this instance, that the Registrar's finding, on the issue of credibility, ought to be reversed.

Motive as a state of mind is often not the subject of direct evidence but rather of reasonable inference to be drawn from proven facts. There was no evidence before the Registrar that the motive of the Appellant numbered company in voting as it did on behalf of the eighteen creditors was to remove the competition from the market place and thereby opening up a portion of the market share or goodwill of Laserworks. In fact, the only direct evidence was to the contrary. As noted, Victor Golberg testified that the purpose in voting as the Appellant did was to obtain better recovery. Clearly, the Registrar did not accept Victor Golberg evidence since he determined that the motive was to remove the insolvent company from the market place, by defeating its proposal and thereby causing Laserworks to be deemed a bankrupt pursuant to the **Act**. Clearly, the suggestion that Laserworks, even if bankrupt, could make a further proposal and perhaps even a better proposal for the creditors, did not dissuade the Registrar from concluding on the evidence before him that the real motive was the removal of competition in the interest of the numbered company and not in furtherance of the interest of the creditors as a whole.

I am satisfied there were sufficient facts before the Registrar, to permit him to draw the inference of improper purpose and in view of his finding on Victor Goldberg's credibility, it was the appropriate inference to be drawn; more specifically and without attempting to be all inclusive:

- Datarite a competitor of Laserworks, through a shelf company, in order not to reveal its activities, approached some but not all of the creditors of Laseworks about purchasing claims.

- Datarite provided instruction to counsel.

- Datarite had no contractual relationship with Laserworks and was not a pre-existing creditor of Laserworks, but rather made it its business to find out Laserworks' status and voluntarily and intentionally involved itself in the arrangements with creditors of Laserworks and in doing so acquired the right to vote against the proposal.

- The unusual, although not inappropriate, abusiveness of Victor Goldberg, at the reconvened meeting of creditors, with respect to providing information, created an air requiring further investigation.

- Datarite voted all eighteen claims it obtained against the Laserworks' proposal. There were sufficient numbers to defeat the proposal, admittedly including two that were apparently unrelated and unassociated with Datarite, and to cause Laserworks to be deemed to have made an assignment into bankruptcy with no member of the class of unsecured creditors being paid anything, when the proposal had been promoted by the trustee as beneficial.

After considering all the evidence, I am satisfied a reversal of the Registrar decision is not warranted. His finding of improper purpose is not perverse or unsupported by the evidence. He committed no palpable error as to credibility and his conclusions are drawn from inferences supported by proven facts.

Whether the Registrar erred in concluding Datarite's purpose in acquiring and voting claims is relevant?

The Registrar concluded that in a situation of abuse, where a competitor of an insolvent company has intentionally bought up votes for the purpose of defeating a proposal, thereby removing one of its competitors from the market place and placing the company into bankruptcy, the court has a supervisory jurisdiction to deal with the votes of the creditors under a proposal and, where necessary, to declare them invalid. He determined that since the Appellant, at the petition stage, could not have purchased the claims of creditors and then, as an assignee, petition Laserworks into bankruptcy, given the motivation in doing so was to put Laserworks out of business, the Appellant, who had no pre-existing debt with Laserworks and was a competitor should not, at the proposal stage, be able to vote arbitrarily, having purchased the proxies, so as to put Laserworks into bankruptcy and thereby indirectly accomplish by voting against a proposal what it couldn't do directly by way of a petition in bankruptcy.

Acknowledging the courts inherent jurisdiction to prevent abuse of its process, normally in fraudulent situations and acknowledging at the petition stage, the Act, clearly states the motive in bringing the petition is relevant and specifically provides the court with judicial discretion and a supervisory function and power to dismiss a petition for improper purpose (s. 43(7)), the Appellant submits the motive of a creditor in acquiring and voting the claims, at the proposal stage, is totally irrelevant and the court by Statute has no equatable supervisory role. The Appellant submits the Registrar has no business inquiring into the motive of the Appellant numbered company in voting as it did with respect to the proposal and erred in applying such an improper purpose test and in extending or extrapolating the very clear law dealing with the court's supervisory role at the petition stage to having the role continue at the proposal stage of the vote when there is no statutory authority.

Besides questioning there being any evidence to support the finding as to motive, the Appellant also questions what law supports the notion that the Registrar can take a look at motive at this stage and act in a supervisory role. The Appellant submits the concept of improper purpose is not applicable to proposals, as a proposal is an offer from the debtor to enter into a new contract with its creditors and the creditor, who owes no duty to the debtor or to other creditors in the class, is free to vote as it chooses, for any reason it chooses, and whether that reason be completely irrational/improper or not.

In determining he had inherent supervisory jurisdiction to prevent a competitor of Laserworks from placing it in bankruptcy by voting against the proposal, the Registrar, in the absence of specific statutory authority and not having the benefit, as I have had of case law dealing with principles of class voting, drew from the existing case law dealing with votes of unsecured creditors at a creditors meeting, where the court alluded to a general supervisory jurisdiction existing, even though no abuse was found (*NSC Diesel Power Incorporated Bankruptcy)*, extrapolated from the principles causing petitions to be disallowed and accepted counsels' submissions as to the court ensuring proceedings are conducted in accordance with public policy and philosophy and integrity of the legislation, given parliament's inability to contemplate every possibility, specifically the buying of votes by competitor for the purpose of voting down a proposal to cause the bankruptcy of the company.

In fight of my subsequent findings relating to class voting, there is no need to comment on the appropriateness of the Registrar's findings with respect to inherent supervisory jurisdiction in circumstances where Parliament has included jurisdiction in the legislation in respect to certain proceedings only. It would appear, in respect to reviewing the **Act** to determine the intention of the legislature that the argument is, on the one hand, the supervisory function and responsibility as to motivation in respect to petitions is an indication of an overall general supervisory jurisdiction, and on the other hand, the absence of such a function and responsibility in respect to proposals is an indication Parliament intended this to be left to the market place. The Registrar decided the former and the Appellant urges the latter.

In my view, it is unnecessary to resolve this question in this application. With Parliament being silent on this question, it is necessary to look to the common law and any inherent jurisdiction in the court to supervise commercial conduct by majorities of a class as against minorities in the same class or group.

Although stated in the context of voting by debenture holders when the majority had votes to modify the rights of the debenture holders in a clause, the statements of principle by Viscount Holdane of the Judicial Committee of the Privy Council in *British America Nickel Corporation v. M.J. O'Brien,* [1927] A.C. 369 at p. 371 are, no less, here applicable:

> To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s. 13 of the **English Companies Act** of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.

and later at p. 373, noting this to be a principle which does not depend on misappropriation or fraud stated:

> ... But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member.

The court, applying the principle stated by Viscount Holdane, should not sanction a scheme if it appears that the majority have not voted **bona fide** in the interests of the class as a whole.

Justice Quilliam in an unreported decision of the High Court of New Zealand, Re: *Farmers' Co-Operative Organization Society of New Zealand Limited* (M 12/97, 4 August 1987) in addressing the very issue of a company whose proposal had been defeated by the votes cast by some of its direct competitors, in circumstance where the majority had the right to bind the minority by statute relied on the principle enunciated in *British American Nickel Corp. Inc. v. O'Brien,* **supra**, during the objection to votes application before him. He concluded the votes should be discounted as their votes were cast out of self-interest and not in the interest of the class of creditors, as a whole, or of the company. Unlike the present case, he did not determine there was specific activity of an improper purpose other than recognizing the votes were cast by creditors in direct commercial competition with the company.

The Registrar, on his finding of facts, was not faced with a pre-existing creditor voting as it wished for whatever reason. He was faced with a unique set of circumstances where he found the Appellant shelf company and Datarite, a competitor of Laserworks, involved in a selective, secret arrangement with creditors against Laserworks, an arrangement that would hurt some creditors and favour other creditors, although as competitors rather than as creditors, given its purpose of removing Laserworks from the market place and diverting from it, its asset, the market share, so it could be available to Datarite, all of which would result in the balance of the creditors receiving little, if anything, and Laserworks having been deemed a bankrupt.

As noted by counsel for Laserworks, any consideration of the proposal process must include the provisions of the **Act**. The contract is not made in isolation. Without a proposal from the debtor, the creditors' rights are limited to commencing actions and hopefully proceeding to judgment; but, once the debtor enters into the proposal process, the creditors are given rights by the **Act** that they would not otherwise have. The parameters of the debtor-creditor relationship, and creditor-creditor relationship, at the proposal stage, are set by the provisions of the **Act** which

- contemplate the division of various creditors into classes (s. 50 (1.2));

- entitle creditors with proven claims to vote (s. 54 (2) (a));

- mandate voting by classes of creditors (s. 50 (1.2)) (s. 54 (2)(b));

- empower the majority of a class of creditors to bind the minority of that class (s.54(2)(d)).

As noted earlier, Registrar Hill, in reaching his determination to sustain Laserwork's objection and disallow the votes of the eighteen creditors, did not have the benefit of reviewing case law and hearing submissions as to established principles of class voting; more specifically, what principles, if any, apply in deciding whether the majority required to reject the proposal, pursuant to s. 54(2)(d) was obtained in circumstances where a direct competitor, for purposes of removing and placing the debtor in bankruptcy, casts a number of proxy votes against the proposal.

If the Appellant numbered company really voted on the basis of what it, as a creditor believes would be the best interest of the creditor class, then it is entitled to so vote; but, if the motive for voting is not to benefit the class of creditors but simply an ulterior motive <u>not</u> related to the interests of the creditor class of which it is a member but rather is related to its <u>own</u> personal interest, then such a vote does not conform to the interests of the class and is not properly exercised.

I can find no distinction between the voting discretion of a creditor, a shareholder or bond holder. Each acquires rights to vote because of their membership in a class and are, therefore, subject to the principle enunciated by Viscount Holdane. No logical basis for not extending this principle to voting by creditors on a proposal made under the **Act** has been postulated by any of the parties in the proceedings.

Even if this Appellant numbered company was wrong in its belief that by voting in this manner, it was achieving the best interest of itself and the creditors as a whole then it is entitled to so vote, even if that opinion is <u>not</u> shared by the minority or is in fact wrong. That is a right to which it is entitled, absent legislation to the contrary. But that is not the question here. The issue is whether Datarite through the numbered company for motives unrelated to the best interest of the creditor group and only pursuant to its own self interest in removing a potential competitor from the market place is entitled to use its votes to achieve this purpose without regard to the interests of the other members of its class namely, the other voting creditors? For reasons already stated, the answer is no. The principle enunciated by Viscount Holdane and elaborated by Justice Quilliam applies.

The Appellant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances principle of class voting. He did not err in concluding improper purpose is relevant.

Whether the Registrar erred when he concluded the eighteen creditors tainted themselves and become embroiled in the improper purpose of Datarite?

The Appellant submits there is no evidence of the eighteen creditors knowing of any connection between the Appellant and Datarite nor is there evidence that any of the creditors knew why Datarite was causing the Appellant to acquire their voting rights. There being no intent, the Registrar lacked foundation to conclude there was collusion between Datarite and any of the creditors. There was no true collusion as there was no evidence of any agreement between Datarite and any creditor to use the **Act** for an improper purpose and no shared interest to injure Laserworks. The intent of Datarite should not have any effect on the rights of the eighteen creditors to vote as directed by their proxy.

As noted by counsel for the Trustee, this ignores the fact the claims had been obtained by the Appellant and were certainly under the control of the Appellant. In addition the proxy holder, Victor Goldberg, was counsel for Datarite whose specific purpose was to defeat the proposal and remove a competitor.

Datarite purchased these claims to effect this purpose and it was reasonable in the circumstances for the Registrar to draw the inference Datarite directed or influenced the voting of these claims. The negative votes were the very key to accomplishing its intent and without this control, there would have been no agreement to purchase the claims.

The motion to reverse the Registrar's decision is denied and the appeal dismissed.

J.

TAB 12

Date: 19980213 Docket: CA 141313

NOVA SCOTIA COURT OF APPEAL

Freeman, Pugsley and Cromwell, JJ.A.

BETWEEN:

3004876 Nova Scotia Limited

Appellant

-and-

LASERWORKS COMPUTER SERVICES INC.

Respondent

James A. Musgrave for the Appellant

Roy F. Redgrave for the Respondent

D. Bruce Clarke and Pamela J. Clarke-Priddle for the Respondent - Trustee

Appeal Heard: December 9, 1997

Judgment Delivered: February 13, 1998

THE COURT: The appeal is dismissed, per reasons for judgment of Freeman, J.A.; Pugsley and Cromwell, JJ.A., concurring.

FREEMAN, J.A.:

The respondent LaserWorks Computer Services Inc., a dealer in supplies for laser printers, made a proposal to its creditors under the provisions of the **Bankruptcy and Insolvency Act,** R.S.C. 1985, c. B-3 (the **BIA**).

A competitor, Datarite, operating through the appellant 3004876 Nova Scotia Limited, acquired the claims of eighteen creditors and voted them over the objections of LaserWorks at the meeting of creditors, defeating the proposal. Only two of the remaining sixteen creditors opposed the proposal.

Acceptance required votes representing a majority in number and two-thirds in value of the class of unsecured creditors present in person or by proxy. The Registrar of Bankruptcy of the Supreme Court of Nova Scotia in Bankruptcy, Tim Hill, found:

> Upon the vote being taken, fourteen creditors with a total claim value of $206,531.65 voted in favour of the proposal. Twenty creditors with a total claim of $140, 370.00 voted against the proposal. Thus 41% of creditors representing 59% of the claims voted pro, and 59% of the creditors with 40.5% of the claims voted con. The proposal was defeated, subject to the resolution of the objections before the court today.

At the hearing into the objections the Registrar, after hearing evidence from the appellant's solicitor Victor Goldberg, who was not counsel on the appeal, disallowed the appellant's votes. He found the proposal had been accepted by the votes of the other creditors. His decision was upheld by Justice Stewart on an appeal to the Supreme Court of Nova Scotia in Bankruptcy.

<u>Issues and Standard of Review</u>

The overriding issue is whether the court's inherent supervisory jurisdiction should be invoked to interfere in a proposal to creditors under the **BIA** when it appears the statutory process is being used for purposes not contemplated by Parliament.

The appellant submits it was a true appeal before Justice Stewart, and not a hearing *de novo*, on the authority of **Re McCulloch Estate** (1992), 13 C.B.R. (3d) 201 Tr. Div.) and **Cockfield Brown Inc. (Trustee of) v. Reseau de Television TVA Inc.** (1988), 70 C.B.R. (N.S.) 59 (Que. C.A.) On further appeal to this court the grounds are whether Justice Stewart erred in:

1. Failing to reverse the Registrar's finding that 18 creditors of LaserWorks assigned their rights to the appellant;

2. Sustaining the Registrar's finding that Datarite engaged in an improper purpose in acquiring and voting the claims of the 18 creditors;

3. Sustaining the Registrar's finding that the Appellant's purpose in acquiring and voting the claims was relevant; and

4. Concluding that there was an abuse on a minority of a class of unsecured creditors and that a duty in this respect was owed by the appellant.

An appeal lies to this court under s. 193 of the **BIA** which reads in part:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
> ...
>
> (e) in any other case by leave of a judge of the court of appeal.

The appellants assert future rights are involved and no leave is necessary. The respondents take no issue with this. Neither is issue taken with the jurisdiction of the Registrar and Justice Stewart to deal with the matters in question pursuant to the **BIA**. The issue is whether they erred.

The appellant's submission with respect to the standard of review is that:

> . . . the Registrar's discretion will not be disturbed on appeal unless he failed to consider or misconstrued a material fact or violated a principle of law. If the Registrar did not appreciate the nature of the evidence before him, it was open to the Supreme Court to substitute its discretion for that of the Registrar. There is also authority that the Registrar's decision should not be disturbed unless it was clearly wrong: **Re Achilles** (1993), 23 C.B.R. (3d) 20 B.S.S.C.).

It cites **Industrial Acceptance Corp. v. Lalonde**, [1952] 2 S.C.R. 109 p. 120; **Re Gilmartin (a bankrupt),** [1989] 2 All E.R. 835 (Ch. D.) p. 838; and **Re Barrick** (1980), 36 C.B.R. (N.S.) 286 (B.C.C.A.) p. 290. In **Industrial Acceptance** Estey J., writing for the Supreme Court of Canada, held at page 120 that:

> A judgment rendered in the exercise of a judicial discretion under s. 142 ought not to be disturbed by an appellate court, unless the learned judge, in arriving at his conclusion, has omitted the consideration of or misconstrued some fact, or violated some principle of law.

The respondent LaserWorks urges that this court should only substitute its own discretion when the Registrar is clearly wrong. Apparent failure by the Registrar to appreciate the nature of the evidence before him is too low a threshold:

> The court in **Re Barrick** ((1980), 36 C.B.R. (N.S.) 286 (B.C.C.A.)) substituted its discretion for that of the trial judge only after ruling that he misapplied a legal test. Justice Taggert, at page 290, gives three reasons the Court of Appeal should substitute its discretion for that of the trial judge:
>
> > In these circumstances, it would seem to me that the learned judge has not applied the correct test, has not given the effect that ought to be given to the trustee's report and has not appreciated the nature of the evidence which was before him. In these circumstances, I think we are justified for substituting our discretion for that of the trial judge.

On that basis the respondent submits the first three grounds of appeal fail.

The Trustee under the Proposal submits that "the Appellant has not satisfied the onus upon it in this appeal to overturn the decision of the Honourable Justice Stewart to decline to substitute her discretion for that of the Registrar."

The respondent also referred to the principles stated by McLachlin, J., in **Toneguzzo-Norvel (Guardian Ad Litem of) v. Savein and Burnaby Hospital** (1994), 1 S.C.R. 114 at page 121, which this court has followed consistently:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see P. (D.) v. S. (C.), [1993] 4 S.C.R. 141, at pp. 188-89 (per L'Heureux-Dube J.), and all cases cited therein, as well as **Geffen v. Goodman Estate,** [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and **Stein v. The Ship "Kathy K",** [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

These principles apply in bankruptcy matters, and provide guidance when, as here, the Registrar's findings have been upheld by a judge of the Supreme Court.

<u>The Registrar's Decision</u>

The Registrar based his decision on the following findings:

> Before turning to deal with these submissions, it is essential that I make some findings of fact. In large part the facts are uncontested. No affidavits were filed, but counsel agree that I may rely on the minutes of the meeting of creditors, the testimony by Mr. Goldberg upon the section 163(2) examination, and the list provided by Mr. Goldberg in compliance with his undertaking on the examination.
>
> I find that Datarite through its solicitor approached some but not all of the creditors of Laserworks with the intention of obtaining an assignment of those creditors' claims and consequently rights to vote on the proposal. The claims were obtained and the votes utilized to defeat the proposal. This would have the effect under section 57(a) of the BIA of placing LaserWorks into bankruptcy by virtue of a deemed assignment.
>
> I can only conclude that the purpose of Datarite was to effect the bankruptcy of LaserWorks. It is a reasonable supposition that the purpose was to remove a competitor from the marketplace. I find that it was the intention of Datarite to put LaserWorks in bankruptcy.
>
> I further find that the motive was to lessen competition.

> In my view, Datarite was engaged throughout in an improper purpose not contemplated by the BIA, the purpose of which is far removed from the use to which Datarite put it.

It is apparent that the Registrar, in speaking of "purpose", included both motive or intent and the steps taken to give effect to that motive or intent. While the record is somewhat sparse, as counsel have remarked, there was evidence in support of these findings. I am not satisfied that the Registrar failed to appreciate the nature of the evidence before him or that he was clearly wrong, or alternatively that he omitted the consideration of or misconstrued some fact, or violated some principle of law. The questions before this court relate to the effect of these findings.

The Registrar disallowed the votes of the eighteen creditors represented by the appellant because he considered they had been cast for an improper purpose. In the absence of authority specific to proposals to creditors, he applied jurisprudence related to bankruptcy petitions, stating:

> It has long been held that the court will not grant a petition in bankruptcy where the petition is filed for an improper purpose: **Re E. De La Hooke** (1934), 15 C.B.R. 485 (Ont. S.C.); **Re Pappy's Good Eats Limited** (1985), 56 C.B.R. (N.S.) 304 (Ont. S.C.); **Dimples Diapers Inc. v. Paperboard Industries Corporation** (1992), 15 C.B.R. (3d) 204 (Ont. G.D.); **Re Shepard** (1996), 40 C.B.R. (3d) 145 (Man. Q.B.).
>
> In **Hooke** the petitioner obtained an assignment of a judgment against the debtor for the sole purpose of filing a petition in bankruptcy and of removing the debtor as a business competitor. In that case, as is the situation in this case, there was no evidence that the debtor had any business dealings with the party seeking to place the debtor in bankruptcy. The petition was dismissed.
>
> In **Hooke** the court made extensive reference to the decision of the House of Lords in **King v. Henderson**, [1898] A.C. 720. The comments of James, L.J., at p. 732 are particularly germane here:
>
>> After what Lord Justice Cotton has said, in which I entirely agree, people will probably think twice before they buy debts for the purpose of taking bankruptcy proceedings.
>
> Lord Justice Cotton had commented that the proceedings in bankruptcy were not taken to obtain payment of the debt, but rather the debt was purchased for the purpose of taking the proceedings. I would simply add that in tight of the decision I make here persons should certainly think twice before they purchase debts in order to defeat a proposal.
>
> It is my opinion that the eighteen creditors are tainted with the improper motive of Datarite. In **Pappy's Good Eats** the petition was filed by a creditor with a genuine claim. The creditor entered into an agreement with three franchisees of the debtor. This agreement provided that the creditor would prosecute the bankruptcy proceedings while the franchisees financed the proceeding in exchange for a share of the dividends. The motive of the franchisees was to bring about a bankruptcy so as to terminate the franchise agreements between them and the debtor.

> The court found that there had been an improper use of the bankruptcy legislation. The effect of the agreement was to embroil the creditor in the improper objectives of the franchisees who were intermeddling in the proceeding. This tainted the whole proceeding. Clearly where the object of the intermeddling party is to bring about the bankruptcy of the debtor an improper purpose is present. The court will act to prevent such an abuse of the legislation.
>
> The other cases I have referred to, **Dimples Diapers Inc.** and **Shepard** also deal with bankruptcy petitions instigated for an improper collateral purpose. In **Dimples** that purpose was to recover a trademark and a business opportunity. In **Shepard** that purpose was to obtain control of certain shares.
>
> While this case does not involve a bankruptcy petition, it does involve the placing of Laserworks into bankruptcy. In my view, it would be wrong to allow Datarite to do in the proposal process what it cannot do by petition. Datarite's intention was to place Laserworks in bankruptcy. The motive was to remove a competitor. That motive reveals an improper purpose. The court will not allow to be done by the back door what cannot be done by the front.
>
> By entering into this arrangement with the numbered company the eighteen creditors have tainted themselves and become embroiled in the improper purpose of Datarite. Their votes cannot stand. If Laserworks has the right to be free of this type of interference the Court must be able to fashion a remedy. This court does have the inherent jurisdiction to supervise the bankruptcy process and consequently the conduct of creditors where that conduct constitutes an abuse of the provisions of the BIA. While creditors can certainly vote in their own best interest, they may not collude with a third party to place a debtor in bankruptcy for an improper purpose. Such activity lacks commercial morality and offends the integrity of the bankruptcy process.

While Datarite was not permitted to vote the claims it had acquired, they remained debts of the insolvent debtor.

<u>Justice Stewart</u>

The first ground of appeal to this court, the issue of whether the claims of 18 creditors were actually assigned to Datarite, does not appear to have been a ground of appeal before Justice Stewart.

On the next two grounds of appeal, whether the Registrar failed to appreciate the evidence before him in concluding that Datarite's purpose in acquiring and voting the 18 claims was an improper one, and whether such purpose was a relevant consideration, Justice Stewart, in upholding the Registrar, took a different route to arrive at the same conclusion. She stated:

> Although stated in the context of voting by debenture holders when the majority had votes to modify the rights of the debenture holders in a clause, the statements of principle by Viscount Haldane of the Judicial Committee of the Privy Council in **British America Nickel Corporation v. M. J. O'Brien,** [1927] A.C. 369 at p. 371 are, no less, here applicable:

> To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s. 13 of the **English Companies Act** of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities, namely, that the power given must be exercised for the purpose of benefitting the class as a whole, and not merely individual members only.

And later at p. 373, noting this to be a principle which does not depend on misappropriation or fraud, stated:

> . . . but their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member.

The court, applying the principle stated by Viscount Haldane, should not sanction a scheme if it appears that the majority have not voted *bona fide* in the interests of the class as a whole.

Justice Quilliam in an unreported decision of the High Court of New Zealand, **Re: Farmers' Co-Operative Organization Society of New Zealand Limited** (M 12/97, 4 August 1987) in addressing the very issue of a company whose proposal had been defeated by the votes cast by some of its direct competitors, in circumstances where the majority had the right to bind the minority by statute relied on the principle enunciated in **British American Nickel Corp. Inc. v. O'Brien,** supra, during the objection to votes application before him. He concluded the votes should be discounted as their votes were cast out of self-interest and not in the interest of the class of creditors as a whole, or of the company. Unlike the present case, he did not determine there was specific activity of an improper purpose other than recognizing the votes were cast by creditors in direct commercial competition with the company.

The Registrar, on his finding of facts, was not faced with a preexisting creditor voting as it wished for whatever reason. He was faced with a unique set of circumstances where he found the appellant shelf company and Datarite, a competitor of Laserworks, involved a selective, secret arrangement with creditors against Laserworks, an arrangement that

> would hurt some creditors and favour other creditors, although as competitors rather than as creditors, given its purpose of removing Laserworks from the market place and diverting from it, its asset, the market share, so it could be available to Datarite, all of which would result in the balance of the creditors receiving little, if anything, and Laserworks having been deemed a bankrupt.

Justice Stewart found that Datarite was not entitled to use its votes for motives unrelated to the best interest of the creditor group and only pursuant to its own self interest in removing a potential competitor from the market place without regard to the interests of the other members of its class, the other voting creditors. She concluded:

> The Appellant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances principle of class voting. He did not err in concluding improper purpose is relevant.

On the fourth ground she found that while there had been no collusion by the eighteen creditors sufficient to deprive them of the right to vote, the Registrar was justified in determining that in the circumstances Datarite controlled the way the claims were voted. She upheld the Registrar's decision and declined to interfere with it.

<u>Assignment--The First Ground</u>

The appellant submits that the judge erred when she declined to address and reverse the Registrar's finding that 18 unsecured creditors of LaserWorks assigned their rights to the appellant. On a proper appreciation of the evidence, it submits, no assignment took place. It states in its factum:

> The appellant did not take issue with the Registrar's finding that four of the 18 creditors received payment for them prior to the vote .... Each of the four creditors provided executed assignments and proxies to Mr. Goldberg, and each assignment was completed by payment. The 14 remaining creditors did not receive payment for their claims prior to the vote, and the appellant submits that the teamed Registrar failed to appreciate the evidence in this regard when he concluded that the claims of these 14 creditors had been assigned to the appellant before the vote was taken.

LaserWorks submits that the Registrar did not decide whether or not the claims voted by Datarite were assigned:

> The conclusion of the Registrar with respect to the assignment issue is:
>
>> Given my findings with respect to the intent and motive of Datarite, I find it unnecessary to consider whether Datarite should have exercised 1 vote or 18.
>
> The reference to 1 vote or 18 relates to the assignment of claims. If the 18 claims had been assigned to the Appellant, the authorities establish that only one vote could be cast on the proposal. The Registrar found it "unnecessary to consider" this issue. We submit

that the Registrar would need to consider the issue before making a decision.

It seems reasonable that the Registrar did not intend to decide whether the claims were assigned because it would not determine the question before him. Even if the appellant were restricted to voting as one creditor, leaving a majority of creditors in favor of the proposal, the value of the claims voted by the appellant was sufficient to defeat the proposal and thus achieve the appellant's objective.

If the claims had been assigned to the appellant, the voting rights would have been merged and the appellant could only cast one vote for the value of the claims it had acquired. If the creditors retained their own claims, the appellant could have voted once for each creditor for whom it held a proxy. There is authority for this proposition and the parties seem in agreement with it. The rationale is clear. Each creditor has a vote, to be exercised in person or by proxy. If the claim is assigned, the assignor ceases to be a creditor. It loses its right to vote in person or to control the vote of the proxy. The assignor becomes a creditor and is able to vote its claim, no matter the amount of the claim. If it acquires the claims of other creditors the amount of its claim increases, but it does not pluralize itself. It remains one creditor, entitled to one vote.

The appellant referred to **Toia v. Cie de Cautionnement Alta Inc.** (1989), 77 C.B.R. (ICS.) 264 (Que. S.C.). The respondent insurance company paid out 19 claims against a bankrupt under a performance bond; each claimant signed a release and subrogated its claims to the respondent, which filed 19 proofs of claim. The Official Receiver permitted 19 votes but the Quebec Supreme Court reversed this, allowing only one vote. The appellant purports to distinguish **Toia** because "there the respondent completed the assignments by payment prior to the vote."

In my view it is of small importance whether the appellant bought for cash or on credit. The situation seems clear when creditors authorize votes on their behalf by proxy: each creditor is entitled to its vote and the proxy may cast votes for several creditors. It is equally clear when a creditor assigns its claim to another creditor: the assignee creditor has only one vote. This was the case with the four creditors whose assigned claims were accepted and paid for by the appellant. It is less clear with respect to the remaining fourteen creditors who had executed assignments to the appellant. The appellant says they had not yet been accepted, pending proof of the claims. However they had to be proven before they could be voted, and their values were proved for the purpose of calculating their percentage of the total of the unsecured claims. Any condition on the assignment would appear to have been met.

The intention of the parties must be determined: did the appellant vote those claims on its own behalf, or as an agent exercising the rights of the original creditors by proxy? If it had been necessary for the Registrar to decide this question, there was evidence before him that the original creditors had given control over their claims to the appellant by entering into enforceable contracts to assign them. That is, while the appellant voted the claim in the form of proxies, in fact it had acquired sufficient interest in the claims to vote them in its own right, as assignee, as though the assignments had been fully executed. It is clearly an improper practice for an assignee to purport to vote as the proxy of a creditor which has assigned its claim, thereby ceasing to be a creditor. If Datarite was otherwise entitled to vote at the creditor's meeting, it had one vote for the full value of the claims it had acquired. It was not justified in voting by proxy.

I would dismiss this ground of appeal.

Evidence of Datarite's purpose--the second ground

Mr. Goldberg testified as follows to Datarite's purpose in buying claims and voting against the proposal:

> Q. Can you tell me the benefit the numbered company will get in the bankruptcy of LaserWorks?
>
> A. Well, the purpose of the numbered company hopefully in buying the claims is that it'll buy the claims at a reduced price and get full payment one day.

The appellant states that Mr. Goldberg's evidence was uncontradicted, and submits:

> It is respectfully submitted that the Registrar was clearly wrong in his appreciation of the evidence. The learned Judge concluded that the Registrar made a finding of credibility with respect to Victor Goldberg's evidence on this issue. However, the Registrar's decision does not indicate that Mr. Goldberg's evidence on this key issue was even considered. The Registrar simply failed to address Mr. Goldberg's evidence on this issue at all. It is therefore open to this Honourable Court to substitute its discretion for that of the Registrar. It is submitted that the Registrar could only find an improper purpose on the record by overlooking the only piece of direct evidence before him on Datarite's intentions.

Mr. Goldberg was obviously only stating his client's ostensible intentions, not its true ones. The Registrar in fact had commented on Mr. Goldberg's evidence after quoting a passage from the minutes indicating how he had responded to certain questions. He said:

> It is not unfair to say that Mr. Goldberg was obtuse to a very great degree. While this does not necessarily confirm suspicion as to the motives of his client, it does explain the concern expressed by the principals of LaserWorks.

The evidence before the Registrar included the proposal itself, which shows total liabilities of $585,459 of which $247,651 was unsecured, $334, 838 secured and $2,970 preferred. Assets totaled $306,158 including book debts of $170,000, leased vehicles $ 95,958, stock in trade $18,500, cash in the bank (which was the principal secured creditor) $8,000 plus fixtures, furnishings and equipment. Virtually all of the assets would be subject to security. The overall deficiency is shown as $279,301. It is difficult to see a basis for Mr. Goldberg's client's optimism that it might get full payment for the claims it bought at reduced value, or indeed, to see any significant source of dividends for unsecured creditors, on a bankruptcy.

Datarite had not been a creditor of LaserWorks before the proposal. There was evidence, however, that it had been a competitor. The Registrar was entitled to consider the evidence as a whole in making findings of fact and drawing inferences that led him to the conclusion that:

> ... Datarite's intention was to place Laserworks in bankruptcy. The motive was to remove a competitor. That motive reveals an improper purpose...

In my view the Registrar did not fail to appreciate the evidence nor otherwise err in arriving at this conclusion. Neither did Justice Stewart err in upholding him. I would dismiss this ground of appeal.

Is Purpose Relevant? The Third Ground.

(i) The Statute

The appellant submits that the trial judge erred in upholding the Registrar's decision that Datarite engaged in an improper purpose in acquiring and voting the claims of the 18 creditors, and that its purpose was relevant. In view of the conclusion on the second ground that the Registrar did not err in finding improper purpose, the appellant is left with the relevancy argument. It argues that the authority relied on by the Registrar, **De La Hooke, Pappy's Good Eats, Dimples Diapers** and **Shepard,** arises under s. 43(7) of the **BIA** which deals only with bankruptcy petitions:

> 43(7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for *other sufficient cause* no order ought to be made, it shall dismiss the petition. (emphasis added.)

It cites the discussion of the discretion thus created in Houlden & Morawetz, **Bankruptcy and Insolvency Law of Canada** (3d) at p. 2-50:

> Section 43(7) permits the court to dismiss a petition if it concludes "that for any other sufficient cause no order ought to be made". Section 43(7) confers a discretion; the exercise of that discretion must be founded on sound judicial reasoning based on credible evidence and must be exercised judicially according to common sense and justice in a manner which does not occasion a miscarriage of justice.

Section 43(7) clearly does not create the supervisory jurisdiction of the court over the bankruptcy regime; it is simply a concrete application of a discretionary power inherent in the scheme of the BIA. Each step in the bankruptcy process, whether initiated by a creditor's petition for a receiving order or a debtor's assignment for the benefit of creditors, is supervised by court officials or the court itself. For example s. 108 in Part V, the Administration of Estates, relates to "any meeting of creditors". At the meeting which gave rise to this appeal the chairman applied s. 108(3):

> 108(3) Where the chairman is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

Section 187(9) provides a broad directive:

> 187(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

The short answer to the question raised by this ground of appeal is that motive or purpose is relevant to a court authorized to remedy substantial injustice.

The appellant takes the narrow position that proposals are outside the discretionary supervisory jurisdiction of the court because they are not specifically included in s. 43(7) or some equivalent provision. This submission cannot be sustained.

There is a similarity between a creditor's petition for a receiving order under s. 43 and refusal of a proposal. In either case it is something done by a creditor or creditors that places the debtor in bankruptcy, likely against its will. But a proposal is also similar to an assignment: the debtor has itself resorted to protection under the **BIA** and its proposal will be deemed to be an assignment unless it succeeds in persuading its creditors to accept it in their own best interests.

The appellant submits that s. 54 is the provision in the proposals Part of the **BIA** which corresponds with s. 43(7). S. 54 provides:

> 54(1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

While s. 43(7) provides an occasion for the exercise of the court's supervisory jurisdiction, an examination focused on the merits of the petition itself, s. 54(1) does not. Such an examination of a proposal is not necessary at that stage. The validity of the claims voted at the creditor's meeting at which the proposal is accepted or refused is subject to the court's scrutiny under s. 108(3). If the proposal is refused by a regular vote of creditors it vanishes and further examination is unnecessary; the debtor is deemed under s. 57(a) to have made an assignment in bankruptcy and the matter proceeds as on an actual assignment. If the creditors approve the proposal, it is then examined on its merits under s. 59, which provides:

> 59. (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Proposals are therefore just as much a part of the bankruptcy regime, and just as subject to the supervision of the court exercising an equitable jurisdiction under the statute, as petitions and assignments. In **Whiteman v. UDC Finance Ltd.,** [1992] 3 NZLR 684, Hardie Boys J., writing for the New Zealand Court of Appeal with respect to the New Zealand **Insolvency Act,** which varies in detail but not in principle from our own, said at p. 691 that proposals are merely

> . . . the other side of the coin to a petition for adjudication.

The only distinction between petitions and proposals in the exercise of the court's supervisory jurisdiction is that under the scheme of the **BIA** occasions for judicial scrutiny occur at different stages of the process. In the present appeal, court intervention was occasioned by objections to proofs of claims affecting the right to vote at the creditors' meeting considering the proposal. The correct procedure was followed, and the objections were considered by the Registrar who had jurisdiction under s.187(9) to remedy substantial injustice.

Motive or purpose is not relevant to objections to proofs of claim based on statutory exceptions under the **BIA**. These are established in several sections, including s.109(1), persons who had not duly proved and lodged a claim; s.54(3), a relative of the debtor (who may vote against but not for a proposal); 109(4), the debtor as proxy for a creditor; s.109(6), a creditor who did not deal with the debtor at arm's length (with exceptions); s.110(1), a person with a claim acquired after the bankruptcy unless the entire claim is acquired; s.111, a creditor with a claim on or secured by a current bill of exchange (subject to conditions); s.112, a creditor holding security (subject to conditions); and s. 113(2), a trustee as proxy (subject to restrictions). See also s. 109, the trustee as creditor.

(It will be noted that many of these exceptions arise from circumstances that could give rise to conflict of interest. This will be considered further under the fourth ground of appeal.)

However the statutory exceptions are not a code exhausting the forms in which substantial injustice may manifest itself. Objections will be sustained under s. 108(3) if they result from a crime or a tort against the debtor or a crteditor. In the present appeal, and in the authorities cited by the Registrar, the substantial injustice assumes the guise of tortious behavior, to which motive is relevant. In the s. 108(3) context the commonest torts, or instances of substantial injustice arising from tortious behavior, relate to abuse of process and fraud. However conspiracy to harm was also found in **Dimples Diapers.**

Tortious or tort-tike behavior falling short of a fully developed tort susceptible of formal proof or definition can nevertheless result in substantial injustice, particularly for persons at a point so vulnerable they must resort to insolvency protection. (See **Shepard**.) In my view that is why Parliament chose the language it did in s.187(9): to create a discretionary jurisdiction in courts that is not fettered, for example, by the high standards required for establishing such torts as abuse of process in other contexts. What remains to be considered is the threshold level of the substantial injustice which will result in remedial action by the court.

(ii)The Authorities

The four cases cited by the Registrar establish that the threshold is crossed when the **BIA** is used for an improper purpose. An improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament.

Farley J. held in **Dimples Diapers** that:

> . . . the **Bankruptcy Act**, R.S.C. 1985, c. B-3 has as its purpose the provision of "the orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis". (L.W.Houlden and C.H.Morawetz, Bankruptcy Law of **Canada**, 3rd ed. (looseleaf) (Toronto: Carswell, 1989) at p. 1-3 [A&4]....

In the cases cited the improper purpose takes the form of abuse of process or tortious behavior closely analogous to abuse of process. In each case the court reacted to what could be seen as substantial injustice. The remedy of choice arising under s. 43(7) is refusal of the petition. The appropriate remedy in the present case is rejection of the tainted votes.

In a vigorous judgment in **Dimples Diapers** Farley J. dismissed the bankruptcy petition because it was brought for an improper purpose, to recover the diaper trademark and business opportunity, and awarded damages for abuse of process and conspiracy against three creditors. He held at p. 219:

> ...The tort of abuse of process consists in the misuse of a legal process for any purpose other than that which it was designed to serve. It is immaterial in establishing abuse of process that the process was properly commenced or founded by the defendants and it does not matter that the process be concluded in the instigator's favour. The improper purpose is the gravamen of liability. See **Unterreiner v. Wilson** (1982), 40 O.R. (2d) 197, 24 C.C.L.T. 54, 142 D.L.R. (3d) 588 (H.C.), at p. 203 [O.R.], appeal dismissed (1983), 41 O.R. (2d) 472, 146 D.L.R. (3d) 322 (C.A.), and J.G.Fleming, **The Law of Torts**, 7th ed. (Sydney: Law Book, 1987) at pp. 591-592.
>
> Potts J. In **R. v. Cholkan & Co. v. Brinker** (1990), 71 O.R. (2d) 381, 1 C.C.L.T. (2d) 291, 40 C.P.C. (2d) 6 (H.C). at p. 8 [C.P.C.] said:
>
>> Most recently, Montgomery J. writing for the divisional Court in **Bentham v. Rothbart** (1989), 36 O.A.C. 13 (Div. Ct.), stated:
>>
>> The constituent elements of the tort of abuse of process are: (a) a collateral improper purpose such as extortion; and (b) a definitive act or threat in furtherance or a purpose not legitimate in the use of the process.

Montgomery J. was clearly using "extortion" as an example only. Any crime or tort would be an improper purpose.

In **de la Hooke** the petition was dismissed when petitioning creditors, who had had no business dealings with the debtor, obtained an assignment of a judgment debt he owed for the sole purpose of filing a petition in bankruptcy to remove him as a business competitor who was using a similar trade name. Registrar Cook cited a number of leading English cases relevant to the circumstances of the present appeal. These included **King v. Henderson**, [1898] A.C. 720 at p. 731 which considered abuse of process or fraud on the court; **Ex Partre Griffin; in re Adams** (1879), 12 Ch. Div. 480 in which a worthless debt was purchased to take proceedings in bankruptcy to force the debtor to give up a just debt, causing Brett L.J. to remark, "a viler fraud I have never heard of"; **Ex parte Harper; In re Pooley** (1882), 20 Ch. D. 585 at p. 692 in which buying a debt to force a bankruptcy in order to get rid of a trustee was found "a gross abuse of the bankruptcy laws;" and **In re a Debtor** [1928] 1 Ch. 199 at p. 211 in which the bankruptcy laws were used for the collateral purpose of extortion.

In **Pappy's Good Eats** a petition was denied when three franchisees of the debtor, who were not creditors, contracted with the petitioning landlord , who had a $65,000 unsatisfied judgment against the debtor, to pay the landlord's costs to petition the debtor into bankruptcy so they would be relieved of obligations under their franchise agreements. Henry J. held the effect of the agreement was to "embroil the petitioning creditor in the improper objective of the purchasers who as non-creditors have no status in these proceedings and are intermeddling in it. The whole proceeding is inescapably tainted; the petition must be dismissed." He found that "the abuse occurred when the parties agreed or arranged improperly to use the facility of the Act to advance the objectives of the franchisees to cause injury to the debtor."

In **Shepard** it was found that the purpose of the petitioner was to gain control over certain shares of the debtor, an important business advantage. "It is not appropriate or indeed, correct in law, to have the courts facilitate such an objective when the objective is very clearly the main purpose of the application." This finding is consistent with a finding of substantial injustice resulting from abuse of process.

(iii) The Present Case

It is most significant that the appellant was not a creditor of LaserWorks prior to the proposal. Intermeddling by strangers to the pre-existing debtor creditor relationship for an improper purpose was a determinative factor in **Pappy's Good Eats.** The practice of buying dubious claims against an insolvent for purposes foreign to the bankruptcy process was denounced in the English cases cited in **de la Hooke.** The Registrar in the present case understandably looked askance at it. Few legitimate reasons come to mind for buying into a bankrupt estate. When somebody does so, it is a matter of common sense to assume, subject to correction, they intend to use the bankruptcy process for some purpose it was not meant for. In the present case it was readily apparent that mischief was afoot.

The "orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis" was not the purpose behind the acts of the appellant. The appellant made separate approaches to each of the eighteen creditors whose claims it succeeded in acquiring. It negotiated a separate deal with each for varying considerations presumably seen to be more advantageous to the creditor than reliance on the proposal. From most of them it obtained an agreement, an executed assignment and a proxy. It purported to vote the proxies of former creditors whose claims had been assigned to it. Its purpose was not an orderly recovery of debts from the debtors assets but to limit competition by the debtor in its own marketplace by rejecting the debtor's proposal and forcing it into bankruptcy.

The appellant was acting on its own making sharp use of the provisions of the **BIA** for its own advantage. There was no evidence that the co-operating creditors were part of a conspiracy with the appellant to injure the debtor. Otherwise the tort of conspiracy to injure could be found where the predominant purpose of the appellant's conduct is to cause injury to the plaintiff, whether the means used by the defendants are lawful or unlawful: **Canada Cement LaFarge Ltd, v. British Columbia Lightweight Aggregate Ltd.,** [1983] 1 S.C.C. 452.

It is undeniable that the appellant caused injury to the debtor not negligently but deliberately. The debtor made its proposal to avoid bankruptcy; bankruptcy therefore must have been seen by Laserworks as a more injurious alternative than acceptance of the proposal by the creditors. Laserworks had the heavy burden of persuading its creditors that their best interests lay in approving the proposal; it did not have the impossible burden of dissuading a financially stronger competitor bent on using the provisions of the **BIA** to destroy it as a competitor. The appellant derailed the proposal procedure to force the debtor into bankruptcy. Using bankruptcy to cause injury, thereby eliminating the debtor as an entity capable of competing in the marketplace, is abusive of the purpose of the BIA. It does not qualify as "the orderly and fair distribution of (its) property." Annihilation of an individual business or a company may be an unfortunate consequence of a bankruptcy, an unavoidable side-effect, but it is not the purpose of the **BIA**. Use of the **Act** to accomplish such an objective is in my view so abusive of the purpose of the legislation as to engage the supervisory jurisdiction of the courts under s. 187(9). It is a substantial injustice to be remedied.

No distinction in principle is possible between the present case and the four cited by the Registrar. He identified the problem and he applied the remedy. He was upheld on appeal in the Supreme Court. I would dismiss this ground of appeal.

Class voting--The Fourth Ground

In upholding the Registrar Justice Stewart added a string to his bow by introducing the class voting analysis of Viscount Haldane in **British American Nickel**. In light of the holdings respecting the second and third grounds of appeal, it is not necessary to the outcome to decide this ground.

The appellant submits that the trial judge was wrong in concluding there was an abuse on a minority of a class of unsecured creditors and that a duty in this respect was owed by the appellant:

> . . . There was no abuse on a minority of the unsecured creditors and no duty was imposed on the Appellant to cause votes to be cast in the best interest of the class. Without such a duty the learned Judge was without authority to consider Datarite's motives and the votes in question should have been allowed.

In **British America Nickel** Viscount Haldane stated that where a power is conferred on a special class, a majority in exercising a power to modify the rights of a minority must exercise that power in the interests of the class as a whole.

> . . . But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member...

In the present case the minority creditors saw their alternative of furthering their best interests by voting in favour of the proposal disappear when the votes amassed by the appellant were exercised, not in the interest of making the most favourable recovery from a combination of a distribution of the assets of LaserWorks and its continuance in business as a customer or potential customer, but in the interests of removing a competitor of Datarite. Justice Stewart was concerned that the other creditors, as well as the debtor, suffered from the abusive use of the provisions of the **BIA**. Of the sixteen creditors who did not assign their claims to Datarite, fourteen voted in favour of the proposal.

The rationale for Viscount Haldane's conclusion in **British America Nickel** was carefully reviewed by Hardie Boys J. in **Whiteman v. UDC Finance Ltd.** The court found it should not intervene in the refusal of a proposal by creditors including several who were being sued by the debtor, and who therefore had a collateral interest in seeing him out of business.

Hardie Boys J. cited the same passage quoted above by Justice Stewart from Vicount Haldane's judgment. It concludes that there is a restriction on powers conferred on a majority of a special class in order to enable that majority to bind a minority:

> ...They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely,

> that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.

Hardie Boys J. considered **Re Farmers' Co-operative,** which was also cited by Justice Stewart, in which votes of several creditors who were competitors of the debtor were disallowed .

> ...In a later development of the same matter, but not now involving the Court's sanction under s. 205, Gallen J. accepted that the Court has an overriding control, not limited to the approval stage under s. 205, and may restrict a right to vote where the equities of a particular situation require it: see [1992] 1 NZLR 348. It is unnecessary for present purposes to decide whether these cases were correctly decided, for even if they were, the principle is not of unlimited application, and does not apply to the exercise of voting rights generally. This is clear from what Viscount Haldane said in the **British America Nickel** case.
>
> Immediately after the passage already quoted, his Lordship said
>
>> Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share.
>
> Thus in **Pender v. Lushington** (1877) 6 Ch. D. 70, 75-76 Jessel MR said there is:
>
>> . . . no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.
>
> While the voting rights conferred by Part XV of the **Insolvency Act** are not akin to a "right of property attaching to a share", they are rights conferred without reservation. There is no requirement for class voting; there is instead a general right conferred equally on all creditors. The rationale of the principle does not apply. It is well settled that the motive (short of fraud) of a petitioning creditor, no matter how reprehensible, is irrelevant to his right to obtain an order of adjudication: **King v. Henderson** [1898] AC 720, **Re King, ex parte Commercial Bank of Australia Ltd.** (No. 2) [1920] VLR 490. The motive of a creditor voting on a proposal, really the other side of the coin to a petition for adjudication, can be no different. That is not to say that there may be no remedy in an extreme case, such as fraud or mistake. But certainly where, as here, there are perfectly legitimate reasons for opposing the proposal, a creditor is not to be denied that right because he may have some other motive as well...

If the exception made for fraud is broadened to "substantial injustice" I would take Hardie Boys J.'s conclusions to be a fair statement of the law in Canada as well, as applied by Canadian courts in the cases cited by the Registrar. The New Zealand court included mistake as well as fraud as an exception. A creditor is not to be deprived of the right to vote for wrongful motives alone; motive must be coupled with a tortious act to support a finding of improper purpose.

A Canadian case supporting a broad interpretation of the right of creditors to vote on proposals is **Re Bedard Louis Inc.** (1991) 22 C.B.R. (3d) 218. The debtor sued three creditors who had sought to seize his goods before judgment for amounts far exceeding their claims against him. One creditor petitioned for a receiving order, and the Quebec Superior Court rejected the debtor's argument that the petitioner was not a creditor because of the large undecided actions. The debtor was declared bankrupt and later filed a proposal. The trustee refused to let the three creditors vote at a creditors' meeting considering the proposal because of a possible conflict of interest. The Superior Court allowed an appeal against the trustee's decision, and the Quebec Court of Appeal upheld the Superior Court, holding (headnote) that:

> No provision of the Act authorizes the trustee to exclude a creditor whom he considers to have a conflict of interest. The debtor's action for damages against the creditors, which constituted a debt not yet payable, did not strip the creditors of their status of ordinary creditors. By the proposal, the debtor presented the creditors with terms of payment which were different from those provided legally by contract.
>
> The Act was intended to allow the voting of all duly acknowledged creditors. Exceptions to that rule were properly specified in the Act and none of them pertained to a creditor against whom a debtor had filed legal proceedings.

The Proposals Part of the **BIA** recognizes only two classes of creditors, secured creditors who are presumably protected by the security they hold, and unsecured creditors, all the others. This does not appear to meet Viscount Haldane's criterion of a special class bound to exercise its voting rights for the benefit of the class as a whole. That concept seems surplus to and difficult to reconcile with the scheme of the **BIA** where, as the Quebec Court of Appeal found in **Bedard,** all duly acknowledged creditors are entitled to vote as they please, subject to exceptions set out in the **Act** (and the exception for tortious or criminal behavior.)

As remarked above, those exceptions reflect the manner in which Parliament dealt with conflicts of interest which might arise in the context of voting on proposals. Parliament has obviously legislated on the subject and cannot be assumed to have created by implication an exception for general, unspecified, conflicts of interest. The mere fact that a creditor is also a competitor of the debtor or otherwise in a conflict of interest with the debtor does not give rise to a statutory exception. The scheme for protecting minority creditors adopted under the BIA was not a class voting concept but rather a system of specific exceptions coupled with a discretionary power in the courts to remedy substantial injustice.

It is not necessary to make a final determination on this point. The rational of Justice Stewart's decision is found in her adoption of the Registrar's conclusions as to improper purpose in the following passage:

> The applicant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances principle of class voting. He did not err in concluding improper purpose is relevant.

That is, while the Registrar's decision was consistent with considerations of class voting, he was upheld on his findings of improper purpose.

I would dismiss the fourth ground of appeal.

Conclusion

The appellant attempted to abuse the provisions of the **BIA** by using them to intermeddle for an improper purpose with the proposal of a debtor to its creditors, giving rise to a substantial injustice. This affected not only the debtor but the remaining creditors who supported the proposal. The Registrar made no error in discerning this from the evidence and in exercising the court's discretionary jurisdiction to remedy substantial injustice. He was upheld on appeal to the Supreme Court. The appellant's actions are not to be condoned. I would dismiss the appeal with costs which I would fix costs at $3,000 plus disbursements to the Respondent and $3,000 plus disbursements to the Trustee.

Freeman, J. A.

Concurred in:

Pugsley, J.A.
Cromwell. J.A.

1997 B19853

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY

IN THE MATTER OF the Proposal of Laserworks Computer Services Inc.

-and-

IN THE MATTER OF Section 194(2) of *Bankruptcy and Insolvency Act*, &S.C. 1985, c.B-3

- and -

IN THE MATTER OF an appeal by 3004876 Nova Scotia Limited

DECISION

HEARD:	at Halifax, Nova Scotia, before the Honourable Justice Margaret J. Stewart on June 24, 1997
DECISION:	August 13, 1997
COUNSEL:	Michael, S. Ryan, Q.C. Counsel for the Appellant, 3004876 Nova Scotia Limited Roy F. Redgrave Counsel for the Laserworks Computer Services Limited D. Bruce Clarke Counsel for McCuaig & Company Inc., Trustee under Proposal

C.A. No. 141313

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

3004876 NOVA SCOTIA LIMITED

Appellant

-and-

LASERWORKS COMPUTER SERVICES INC.

Respondent

REASONS FOR
JUDGMENT BY: Freeman, J.A.

TAB 13

CITATION: Timminco Limited (Re), 2012 ONSC 4471
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120803

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, AS AMENDED

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Maria Konyukhova, for the Applicants**

Robin B. Schwill, for J. Thomas Timmins

Steven J. Weisz, for the Monitor

Debra McPhail, for the Superintendent of Financial Services

Thomas McRae, for B51 Non-Union Employee Pension Committee and B51 Union Employee Pension Committee

Charles Sinclair, for the United Steelworkers

James Harnum, for Mercer Canada

HEARD: **JUNE 4, 2012**

ENDORSEMENT

OVERVIEW

[1] Mr. J. Thomas Timmins, a former Chief Executive Officer ("CEO") of Timminco Limited ("Timminco") moves for an order that Timminco be ordered to comply with its obligations under a consulting agreement between Timminco and Mr. Timmins dated September 19, 1996 (the "1996 Agreement") and to remit to Mr. Timmins the monthly amounts that he claims to be entitled to under the 1996 Agreement.

[2] In response, Timminco brought a cross-motion for an order declaring that Timminco's obligations under the 1996 Agreement, as amended by letter agreement effective May 28, 2011 (the "Letter Agreement" and, together with the 1996 Agreement, the "Agreement"), constitute pre-filing obligations which are stayed by the Initial Order granted in these proceedings on January 3, 2012.

[3] Alternative positions have also been presented by the parties.

[4] Timminco puts forth the alternative that, if Mr. Timmins' motion is granted, Timminco seeks an order that the 1996 Agreement be disclaimed in accordance with section 32 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and that the effective date of the disclaimer of the Agreement (if such a disclaimer is held to be required) should be April 30, 2012.

[5] In response to this alternative position, Mr. Timmins seeks an order that the court deny Timminco's request to have the 1996 Agreement disclaimed and, in any event, if the 1996 Agreement is disclaimed, Timminco should not be relieved of its obligation to pay the monthly fees that have and continue to accrue from the date Timminco commenced CCAA proceedings until the date that any such disclaimer is effective.

[6] Mr. Timmins asks that the court deny Timminco's request to have the 1996 Agreement disclaimed in accordance with section 32 of the CCAA as the disclaimer would not necessarily enhance the prospects of a viable arrangement being made in respect of Timminco, and would objectively result in significant financial hardship to Mr. Timmins.

FACTS

[7] Mr. Timmins resigned from his position as CEO on May 28, 2001, but remained a director of Timminco until mid-2007, at which time he resigned from the board and sold all of his remaining equity interests.

[8] The preamble to the 1996 Agreement provides:

> The Consultant is an executive of the Corporation who has gained such a level of knowledge, experience and competence in the Corporation's business that it is in the Corporation's interest, following his retirement from employment, to ensure that the Corporation continues to have access to the Consultant for advice and consultation and the Corporation wishes to ensure that the Consultant shall not engage in activities which are competitive with the Corporation's business.

[9] The 1996 Agreement provides that Timminco agreed to pay Mr. Timmins a monthly amount by which $29,166.66 exceeds the monthly amount to which [Mr. Timmins] is entitled on [Mr. Timmins] retirement under any pension or retirement plans of [Timminco].

[10] The monthly payments were to commence on the first day of the month following Mr. Timmins retirement and terminate only on Mr. Timmins death (subject to earlier termination due

to any breach of obligations by Mr. Timmins). There has been no alleged breach on the part of Mr. Timmins of any such obligations.

[11] Under the 1996 Agreement, Mr. Timmins was to consult with Timminco "within the time limits from time to time of his physical and other abilities…; provided, however, that consultation and advice shall never occupy [Mr. Timmins] time to such an extent as shall prevent him from devoting the greater portion of his time to other activities".

[12] At the time of his resignation as CEO, the 1996 Agreement was amended by the Letter Agreement.

[13] Pursuant to the Letter Agreement, Timminco agreed to pay Mr. Timmins a monthly amount of $20,833.33 without further deduction except as may be required by law, commencing on July 1, 2001.

[14] The Letter Agreement also provided that Timminco would terminate various employment benefits of Mr. Timmins (such as car lease and parking) and would cease to provide Mr. Timmins with office space and secretarial assistance after September 30, 2001.

[15] In connection with the Letter Agreement, Mr. Timmins executed a release and indemnity which provides, in part, as follows:

> Whereas I have agreed to retire voluntarily as Chief Executive Officer and an employee of Timminco Limited and as a director and/or officer of any subsidiaries of Timminco Limited (hereinafter referred to collectively as "Timminco") effective immediately.
>
> And whereas I have agreed to accept the consideration described in the attached letter to me from Timminco dated May 28, 2001 and in the agreement between Timminco and me dated as of September 19, 1996 (collectively, the "Retirement Agreement"), in full settlement of any and all claims I may have relating to my employment with Timminco or the termination thereof;…I understand and agree that the consideration described above satisfies all obligations of Timminco, arising from or out of my employment with Timminco or the termination of my employment with Timminco, including without limitation obligations pursuant to the *Employment Standards Act (Ontario)* and the *Human Rights Code (Ontario)*. For the said consideration, I covenant that I will not file any claims or complaints under the *Employment Standards Act (Ontario)* or the *Human Rights Code (Ontario)*.

[16] Following his retirement in 2001, Mr. Timmins remained a member of Timminco's board of directors until October 2007 and served as a member of several board committees until that time, including the strategic committee of the board from June 2003 until October 2007. He received director fees and was reimbursed for his expenses in connection with his services as a member of the board of directors of Timminco and its various committees.

[17] Mr. Timmins states that he has fulfilled all contractual obligations imposed on him by the 1996 Agreement and that he has always been prepared to provide his consulting services to Timminco, as required by the 1996 Agreement, whenever from time to time requested by Timminco.

[18] The evidence of Mr. Kalins, President, General Counsel and Corporate Secretary of Timmins, is that Timminco has not sought or received any consulting services from Mr. Timmins following his retirement.

[19] Mr. Timmins has a different view. His evidence is that he provided consulting services during the early period of Dr. Schimmelbuch's term as CEO.

[20] Since the execution of the Letter Agreement, Timminco has paid Mr. Timmins approximately $2.625 million. Mr. Kalins states that the payments under the Letter Agreement constitute the entirety of Mr. Timmins' entitlements from Timminco following his retirement.

[21] Timminco has filed statements of pension, retirement, annuity and other income ("T4A Forms") and/or statements of amounts paid or credited to non-residents of Canada ("NR4 Forms") with the Canada Revenue Agency in connection with payments made by Timminco to Mr. Timmins in each year from 2002 to 2011. The T4A Forms and NR4 Forms filed by Timminco with respect to Mr. Timmins in each of those years list amounts paid to Mr. Timmins under the category of "retiring allowances". Mr. Kalins deposed that Timminco is not aware of any requests from Mr. Timmins to amend or refile any of the T4A Forms or NR4 Forms filed by Timminco since 2002.

[22] Timminco complied with its obligations to pay the monthly consulting fee to Mr. Timmins until December 2011.

[23] Payment was due on January 1, 2012, which was not made. The Initial Order was granted on Tuesday, January 3, 2012.

[24] On February 8, 2012, a debtor-in-possession financing agreement (the "DIP Agreement") between Timminco and QSI Partners Ltd. ("QSI" or the "DIP Lender") was approved. Mr. Timmins was not served with notice of the motion to approve the DIP Agreement.

[25] On March 30, 2012, counsel for Timminco sent a letter to counsel for Mr. Timmins enclosing a formal notice of disclaimer of the 1996 Agreement pursuant to section 32 of the CCAA. According to the correspondence, the 1996 Agreement was to be disclaimed effective April 30, 2012.

ANALYSIS

[26] Counsel to Mr. Timmins set out four issues:

(a) Was Timminco entitled to stop paying the monthly consulting fee to Mr. Timmins, notwithstanding Mr. Timmins' position that these payments are post-filing obligations under the 1996 Agreement between the parties?

(b) Should Timminco be entitled to disclaim the 1996 Agreement notwithstanding that:

(i) the company's ongoing obligations under the 1996 Agreement have not impeded its ability to effect a successful sale of its assets; and

(ii) the disclaimer would result in significant financial hardship to Mr. Timmins.

(c) In the event that Timminco was not entitled to stop paying the monthly consulting fee, is Mr. Timmins entitled to payments for the period from January 1, 2012 up to the effective date (if any) of the disclaimer?

(d) In the event that Timminco is entitled to disclaim the 1996 Agreement, what should the effective date of that disclaimer be?

[27] Counsel to Timminco set forth the issue as being whether Timminco's obligations under the Agreement constitute pre-filing obligations which are stayed by the Initial Order.

[28] In a supplementary factum, counsel to Timminco broadened the issue to read as follows:

(a) Should Mr. Timmins' motion for an order that the 1996 Agreement is not to be disclaimed or resiliated be granted; and

(b) If Mr. Timmins' motion referenced in (a) above be granted, should the effective date of the disclaimer of the 1996 Agreement be extended past April 30, 2012 (the day that was 30 days after the day on which Timminco gave notice of the disclaimer to Mr. Timmins).

[29] Counsel to Mr. Timmins submits that the 1996 Agreement is clear and unambiguous and that Timminco's attempts to describe the unpaid monthly consulting fees as a pre-filing claim inappropriately mischaracterizes the nature of the 1996 Agreement. Counsel submits that the unpaid amounts can only be characterized as the pre-filing claim if Mr. Timmins earned the right to be paid an amount during his employment with Timminco (which amount was then to be paid out to him over time after the termination of his employment), without further obligations owing from Mr. Timmins to Timminco. Counsel to Mr. Timmins submits that clearly is not the case as the monthly consulting fees do not constitute compensation deferred from a prior employment agreement between the parties and the fees cannot be said to be owing for employment services previously performed by Mr. Timmins.

[30] Mr. Timmins takes the position that, while the Letter Agreement dealt with a number of termination of employment issues, it specifically did not amend the 1996 Agreement other than to fix the monthly consulting fee and, in other respects, the 1996 Agreement was to remain in full force and effect.

[31] Specifically, from Mr. Timmins standpoint, there were no pension or retirement benefits to forego at the time he entered into the Letter Agreement as the pension plan in which he had participated prior to his resignation was terminated and wound up in 1998 with a lump sum entitlement having been paid out.

[32] Counsel for Mr. Timmins goes on to submit that the purpose and effect of the 1996 Agreement is clear and unambiguous on its face – (i) to ensure that Mr. Timmins advice remains available to Timminco; (ii) to ensure that he or his investment company do not engage in activities which are competitive to Timminco's business; and (iii) to ensure that Mr. Timmins does not disclose or otherwise use confidential information.

[33] Counsel submits that Mr. Timmins' and Timminco's obligations under the 1996 Agreement are ongoing post-filing obligations, and as such cannot be stayed and suspended in the CCAA proceedings.

[34] In my opinion, the arguments of Mr. Timmins are flawed.

[35] It seems to me that the benefits conferred on Mr. Timmins under the 1996 Agreement, as amended by the Letter Agreement are, in substance, termination and/or retirement benefits. These are unsecured claims. Counsel to the Applicant has summarized the following attributes or characteristics of the Agreement in support of the Applicant's position that the claim of Mr. Timmins is, in substance, for termination and/or retirement benefits:

(a) the amount of Mr. Timmins' monthly fee under the 1996 Agreement was essentially a "top up" to any other retirement and pension benefit that Mr. Timmins would receive from Timminco;

(b) the "consulting" term of the 1996 Agreement was to commence the first day of the month following Mr. Timmins' retirement;

(c) under the Agreement, Mr. Timmins is not entitled to any retirement or pension benefits from Timminco following his retirement other than the payments;

(d) neither the 1996 Agreement nor the Letter Agreement provide for any minimum amount of consulting to be provided by Mr. Timmins in order to be entitled to receive the monthly payments;

(e) all other employment benefits and provision of services to enable Mr. Timmins to provide employment services to Timminco were terminated by the Letter Agreement; and

(f) Mr. Timmins has not provided any consulting services to Timminco following his retirement as CEO.

[36] From the standpoint of Timminco, for all intents and purposes, the Letter Agreement concluded whatever employment relationship remained between Mr. Timmins and Timminco.

[37] In addition, in connection with the Letter Agreement and his retirement, Mr. Timmins also executed a release in indemnity wherein he released any and all claims he may have had relating to his employment with Timminco or the termination thereof and agreed that the consideration described in the Agreement satisfies all of the obligations of Timminco arising from or out of his employment with Timminco or the termination of his employment.

[38] It is especially significant that the release and indemnity specifically references both the 1996 Agreement and the Letter Agreement.

[39] Further, the filings made by Timminco with the Canada Revenue Agency constitute further evidence of the payments made to Mr. Timmins under the Agreement are, in substance, unsecured termination and/or retirement benefits. Mr. Timmins discounts this point indicating that it is the responsibility of Timminco to issue the tax forms. However, it is the responsibility of Mr. Timmins to file the return and to ensure its accuracy.

[40] In my view, the inescapable conclusion is that when the 1996 Agreement is considered together with the amendments set out in the Letter Agreement, in substance, the parties entered into an arrangement that addressed termination and/or retirement benefits.

[41] The law in this area is clear. The courts have repeatedly found that termination and/or retirement benefits are pre-filing unsecured obligations of debtor companies undergoing CCAA proceedings. See *Indalex Limited (Re)* (2009), 55 C.B.R. (5^{th}) 64 (Ont. S.C.J.), *Re Nortel Networks Corporation, Re* [Recommencement of Benefit Motion] (2009) 55 C.B.R. (5^{th}) 68 [Nortel] and *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5^{th}) 217.

[42] Further, the debtor company's obligation to make retirement, termination, severance and other related payments to unionized and non-unionized employees have been held to be pre-filing obligations. See Nortel, paras. 10, 12, 67. At para. 67, I stated:

> …The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3 [of the CCAA]. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

[43] It is clear in this case that Mr. Timmins did not provide any services after the date of the Initial Order.

[44] The Timminco Entities are insolvent and are not able to honour their obligations to all creditors. If the benefits conferred on Mr. Timmins under the Agreement are not stayed, Mr. Timmins would, in effect, receive an enhanced priority over other unsecured creditors, which would be contrary to the scheme and purpose of the CCAA. In this respect, it is noted that the position of the Applicant on this motion was supported by counsel to FSCO, both the Non-Union and Union Employee Pension Committee, the United Steelworkers and Mercer Canada.

[45] The Monitor expressed no view on whether the monthly payment obligations were a pre-filing or a post-filing obligation. The Monitor did, however, approve of the proposed disclaimer (see below).

[46] In my view, it is necessary to briefly address the submission made by counsel to Mr. Timmins that the CCAA order does not preclude Mr. Timmins' claim for the unpaid monthly consulting fees and the related submission that the CCAA order does not stay pre-filing obligations. Paragraph 11 of the CCAA clearly provides that the Timminco Entities are directed to make no payments of principal, interest or otherwise on account of monies owing by the Timminco Entities to any of their creditors as of January 3, 2012. Having made the determination that the obligation of Timminco to Mr. Timmins under the Agreement constitutes a pre-filing claim, this provision is broad enough to cover any and all pre-filing obligations owing to Mr. Timmins.

[47] The foregoing is sufficient to dispose of the issues raised in the motion and cross-motion. However, in the event that I am in error in my conclusion, the secondary issue has to be addressed; namely, whether Timminco should be entitled to disclaim the 1996 Agreement and, if so, what should be the effective date of the disclaimer.

[48] Section 32 of the CCAA permits a counter-party to a contract disclaimed by the debtor company to apply to court for an order that the agreement is not to be disclaimed or resiliated.

[49] Section 32(4) sets out factors to be considered by the court, among other things, in deciding whether to make the order:

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[50] In alternative submissions, counsel to Timminco takes the position that the motion of Mr. Timmins should be dismissed because:

(a) the Monitor has approved the proposed disclaimer;

(b) the disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Timminco;

(c) the disclaimer is expected to benefit the stakeholders of Timminco as a whole in that it will permit Timminco to maximize recoveries to its stakeholders;

(d) the disclaimer will not cause any significant financial hardship to Mr. Timmins; and

(e) prohibiting Timminco from disclaiming the Agreement will result in a windfall to Mr. Timmins at the expense of the other unsecured creditors of the Timminco Entities.

[51] In analyzing this aspect of the motion, I accept the submission of counsel to Timminco that the scope of the CCAA and the various protections it affords debtor companies should not be interpreted so narrowly as to apply only in the context of a restructuring process leading to a plan arrangement for a newly restructured entity. The Court of Appeal for Ontario stated in *Nortel (Re)* 2009 ONCA 833, there is "no reason…why the same analysis cannot apply during a sale process that requires the business to be carried as a going concern".

[52] In my view, the section 32 (4)(b) requirement that a disclaimer of an agreement with a debtor company enhance the prospects of a viable compromise or arrangement being made should be interpreted with a view to the expanded scope of the statute.

[53] In this particular case, the overriding objective of the CCAA must be to ensure that creditors in the same classification are treated equitably. Such treatment will enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company.

[54] Similar views were expressed by the court in *Homberg Invest Inc. (Arrangement Relatif á)*, 2011 QCCS 6376 where the Quebec Superior Court held, among other things, that it is not necessary to demonstrate that a proposed disclaimer is essential for the restructuring period. It merely has to be advantageous and beneficial.

[55] It is also noted that counsel to the Applicants submitted that at the commencement of the CCAA proceedings, the Timminco Entities ceased making payments with respect to many of their pre-filing obligations in order to preserve their ability to continue operating and to implement a successful sale of their assets. The continued existence of the Agreement and of the requirement to make the payments thereunder would have further strained the Timminco Entities already severely constrained cash flows. Further, counsel contends that disclaimer of the Agreement and the cessation of payments to Mr. Timmins thereunder improved the Timminco Entities' cash flows and their ability to continue implementing a sales process with respect to their assets.

[56] Counsel to Timminco also points out that under the DIP Agreement, approved on February 8, 2012, the Timminco Entities are restricted to use the proceeds of the DIP Facility for the purpose of funding operating costs, expenses and liabilities in accordance with the cash flow projections. Although the DIP Agreement does not prohibit the payment of amounts akin to the amounts owing under the Agreement, the cash flow projections approved by the DIP Lender do not provide for a payment of the monthly payments under the Agreement; making such payments would accordingly result in an event of default under the DIP Agreement. Further, counsel adds that without access to the DIP Facility, the Timminco Entities would have been unable to implement a sales process designed to maximize the benefits to their stakeholders.

[57] I am satisfied that, in the context of this alternative argument, the disclaimer of the Agreement, if necessary, is fair, reasonable, advantageous and beneficial to the Timminco Entities' restructuring process.

[58] Counsel to Mr. Timmins also raised the issue that the disclaimer of the 1996 Agreement would objectively result in significant financial hardship to Mr. Timmins.

[59] However, Mr. Timmins did acknowledge that, if the test of whether the disclaimer of an agreement that pays a party $250,000 per year will cause "significant financial hardship to that party" depends on the individual characteristics and circumstances of that party, the disclaimer of the 1996 Agreement will not cause significant financial hardship to Mr. Timmins.

[60] I am in agreement with the submission of the Timminco Entities that the test of whether a disclaimer of an agreement will cause significant financial hardship to the counter party depends and is centered on an examination of the individual characteristics and circumstances of such counter party. Further, an objective test for "significant financial hardship" would make it difficult to debtor companies to disclaim large contracts regardless of the financial ability of the counter parties to absorb the resultant losses. It seems to me that such a result would be contrary to the purpose of principles of the CCAA.

[61] Based on the record, I am unable to conclude that the disclaimer would likely cause significant financial hardship to Mr. Timmins.

[62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[63] For the foregoing reasons, the alternative relief sought by Mr. Timmins, to the effect that the Agreement is not to be disclaimed, is denied.

[64] The remaining outstanding issue is whether or not the disclaimer of the Agreement should be effective April 30, 2012. Counsel to Mr. Timmins takes the position that the effective date of the disclaimer should be no earlier than the date of the determination of this motion.

[65] On March 30, 2012, counsel for Timminco sent a letter to Mr. Timmins' counsel enclosing a formal notice of disclaimer which was to be effective April 30, 2012. In accordance with section 32 (2) of the CCAA, on April 13, 2012, Mr. Timmins filed his motion objecting to the disclaimer. Counsel to Mr. Timmins sought to have the motion heard in advance of April 30, but on account of scheduling issues, the motion did not proceed until June 4, 2012. Counsel to Mr. Timmins takes the position that given that the CCAA Order prohibits Mr. Timmins from ceasing to comply with his obligations under the 1996 Agreement, it is only fair that payment for such obligations should be made up until the date that the court makes its determination on this motion.

[66] The contrary position put forth by counsel to Timminco is that the Timminco Entities did not deliver a notice of disclaimer until March 30, 2012 because they were of the view that the obligations under the Agreement constitute Timminco's unsecured pre-filing obligations which

were stayed by Initial Order and that Timminco was authorized to stop making the payments under the Agreement without being required to disclaim the Agreement. Consequently, counsel submits that the Timminco Entities only delivered a notice of disclaimer in response to correspondence with Mr. Timmins' counsel and did so expressly without prejudice to their position that the obligations under the Agreement were pre-filing obligations.

[67] Counsel to Timminco acknowledged that, if the court found that Timminco's obligations did not constitute pre-filing obligations and the Agreement needed to be disclaimed prior to Timminco being entitled to cease making payments, Timminco would be obligated to make the payments that became due prior to the effective day of the disclaimer, namely, April 30, 2012.

[68] I am satisfied that the delay between the commencement of this motion by Mr. Timmins and its hearing was attributable to scheduling issues and the demands on Timminco's management and counsel's time placed by the Timminco Entities' CCAA Proceedings, including the sales process being undertaken by the Timminco Entities for the benefit of their stakeholders. Given these competing priorities, it seems to me that it would be unfair to extend the effective date of the disclaimer, if necessary, beyond April 30, 2012.

[69] As noted, my comments with respect to the disclaimer issue are for the assistance of the parties, in the event that my determination of the pre-filing issue is found to be in error.

DISPOSITION

[70] In the result, the motion of Mr. Timmins is dismissed. The relief requested by Timminco in the cross-motion is granted.

MORAWETZ J.

Date: August 3, 2012

TAB 14

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re),* 2020 BCSC 1883

Date: 20201202
Docket: S200586
Registry: Vancouver

In the Matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

- and -

In the Matter of the *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, c. 54

- and -

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment
(Sale Approval)

Counsel for the Petitioner:	J.R. Sandrelli V. Cross
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Counsel for Primacorp Ventures Inc.:	P. Rubin G. Umbach
Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.:	K. Jackson G. Nesbitt
Counsel for Southern Star Developments Ltd.:	P. Reardon K. Strong
Counsel for Vanchorverve Foundation:	C.D. Brousson
Counsel for Dana Hospitality LP:	D.V. Bateman

Counsel for Halladay Education Group:	D. Lawrenson
Counsel for Capilano University:	K. Mak
Counsel for Landrex Ventures Inc.:	J. D. West
Counsel for Quest University Faculty Union:	J. Sanders S. Rogers
Counsel for Bank of Montreal:	K. Davies
Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training:	A. Welch
Counsel for 1114586 B.C. Ltd.:	K.E. Siddall
Counsel for Association for the Advancement of Scholarship:	L. Hiebert
Place and Date of Hearing:	Vancouver, B.C. November 12-13, 16, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. November 16, 2020
Place and Date of Written Reasons:	Vancouver, B.C. December 2, 2020

INTRODUCTION

[1] On November 3, 2020, the petitioner, Quest University Canada ("Quest"), applied for various orders in these *Companies' Creditors Arrangement Act,* R.S.C. 1985 c. C-36 ("*CCAA*") proceedings. Orders sought by Quest included approval of a sale transaction with Primacorp Ventures Inc. ("Primacorp") and orders necessary to facilitate that transaction, namely allowing Quest to implement a claims process and calling a meeting to consider its plan of arrangement.

[2] On November 3, 2020, I granted the Claims Process Order and a Meeting Order to allow the creditors to consider Quest's plan of arrangement dated November 1, 2020 (the "Plan"). I also approved Quest's agreement to pay Primacorp a Break Up Fee and granted a charge to secure that amount: *Quest University Canada (Re)*, 2020 BCSC 1845.

[3] I adjourned Quest's application for a Transaction Approval and Vesting Order (TAVO) to approve the Primacorp transaction to these hearing dates to allow opposing parties to consider the matter further and prepare necessary materials.

[4] Southern Star Developments Ltd. ("Southern Star") has since formalized its opposition to the granting of the TAVO. Indeed, its opposition has since increased in force because Quest and Primacorp have now changed the relief sought to approve the Primacopr transaction within the context of a "reverse vesting order" ("RVO"), as explained below. Southern Star also now applies for an order prohibiting Quest from disclaiming certain subleases, as is required in order for the Primacorp transaction to proceed.

[5] In the meantime, other parties have joined in opposing the approval of the Primacorp transaction for a variety of reasons, including those advanced by Southern Star in relation to the RVO.

[6] At the conclusion of this hearing, I granted the RVO and dismissed Southern Star's application, with written reasons to follow. These are my reasons for those orders.

BACKGROUND FACTS

[7] This *CCAA* proceeding has been underway for almost ten months, after the granting of the Initial Order on January 16, 2020.

[8] Since that time, the Court has extended the stay of proceedings a number of times, to allow Quest to undertake efforts to find a restructuring solution to its financial difficulties that would allow it to continue its educational endeavours. Many stakeholders have been actively involved in these proceedings, including secured creditors who, collectively, will be owed approximately $30.7 million by the end of December 2020.

[9] I have also approved interim financing to allow Quest to continue its operations while in this proceeding, with that debt now approaching $11 million.

[10] Quest's assets include lands in Squamish, BC, being Lot 1, on which the campus is located (the “Campus Lands”), as well as the surrounding 38 acres (the “Development Lands”.) Lot 1 is encumbered by various charges, liens, interests, mortgages and assignments of rent, including a mortgage held by Capilano University (“CapU”). In addition, CapU holds various rights of first refusal, including a right of first refusal to purchase, a right of first refusal to lease and rights of first refusal to acquire the charges of Quest’s major secured creditor, Vanchorverve Foundation (“VF”) (collectively, the “ROFR”).

[11] Quest is also the registered owner of five real property lots (Lots A-E), four of which are the sites of its university residences (on Lots A-D) (collectively, the “Residences”).

[12] One of the significant flashpoints in this proceeding has been, and continues to be, in relation to the Residences that Quest leases from Southern Star. After the Residences became vacant in March 2020 following the onset of the COVID-19 pandemic, Quest attempted to defer payment of the substantial lease payments owed to Southern Star. On June 19, 2020, I denied that relief: *Quest University Canada (Re)*, 2020 BCSC 921 (the “Rent Deferral Reasons”).

[13] Quest's principal focus in these proceedings has been toward identifying a partner/investor to purchase its land assets and/or identifying an academic partner/investor that would permit Quest to continue as a post-secondary institution.

[14] Since January 2020, Quest's Board of Governors and its Restructuring Committee have been working with a private educational consultant, Halladay Education Group Inc. to find a prospective academic partner. In addition, since March 2020, Quest has been working with Colliers Macaulay Nicolls Inc. to find prospective purchasers for Quest's real property assets.

[15] There is no dispute that the sale and partner search process (SISP) has been extensive, as confirmed by the Monitor. Quest submits, and I accept that its management, the Restructuring Committee, and the Board analyzed all proposals based on a number of factors, including:

a) Creditor recovery from the purchase price or other consideration under the proposal;

b) That the proposal would result in a completed transaction;

c) That the proposal offered allowed for Quest's long-term continuation as a post-secondary academic institution; and

d) That the proposal would lead to the continuation of a school on Quest's lands that aligned with Quest's current vision and academic quality.

[16] The SISP resulted in a number of academic and real estate organizations approaching Quest to express interest in pursuing a transaction. Quest engaged with a number of potential purchasers or partners from Canada, the United States and other countries. Some parties executed Non-Disclosure Agreements (NDAs) and Quest received numerous Letters of Intent (LOIs) and other proposals.

[17] On May 28, 2020, this Court granted an extension of the stay of proceedings. At that time, Quest stated that there was a realistic potential of a transaction with the

party identified as the “Academic Partner”. Unfortunately, that transaction did not proceed.

[18] On August 7, 2020, this Court granted a further extension of the stay of proceedings to December 24, 2020 to allow Quest to continue seeking proposals towards a transaction by that deadline and to allow Quest to offer the fall term to its students. Quest was still in discussions with various interested parties at that time. By then, Quest had received LOIs, including one from Primacorp (identified as “Academic Partner #2) as of July 29, 2020.

[19] Since August 7, 2020, Quest and Primacorp have worked extensively to negotiate the definitive documents toward completing a transaction. On September 16, 2020, Quest and Primacorp executed a Purchase and Sale Agreement (the “Primacorp PSA”).

[20] The Primacorp transaction, as originally presented, provided for:

a) Sufficient funds to pay Quest’s secured creditors’ claims, including claims secured by the *CCAA* charges;

b) Funding for a plan of arrangement to be voted on by Quest’s unsecured creditors;

c) Funds for these insolvency proceedings; and

d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

[21] The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They were complete by October 28, 2020 and included, as defined in the Monitor’s Fourth Report, the Primacorp PSA, the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms included:

a) Primacorp will purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the residence Lands (Lots A-E; four of which involve Southern Star's subleases), chattels and vehicles;

b) Primacorp will lease specific Campus Lands back to Quest under a long-term lease arrangement;

c) Primacorp will provide marketing and recruiting expertise to support Quest as a university;

d) The Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales;

e) Primacorp will fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and $1.35 million under Quest's Plan; and

f) Primacorp will provide Quest with a $20 million secured working capital facility to support its operations.

[22] The Primacorp transaction was subject to a number of significant conditions:

a) Quest's disclaimer of the four Southern Star subleases of the Residences or an agreement with Southern Star. On October 23, 2020, Quest disclaimed those subleases;

b) Court approval of the Primacorp transaction including approval of a Break Up Fee and Break Up Fee Charge to secure Primacorp's costs. On November 3, 2020, I approved the Break Up Fee and granted a charge to secure this amount;

c) Creditor approval of Quest's Plan under the *CCAA*. On November 3, 2020, I granted the Meeting Order to allow Quest to present the Plan, after having completed a claims process under the Claims Process Order, also granted on that date; and

d) Court approval of the Plan under the *CCAA*.

[23] On November 3, 2020, when Quest sought the TAVO (which was adjourned), Quest asserted that the Primacorp transaction was beneficial in many respects. Quest argued that it maximized the value of Quest's assets, offered the greatest benefit to stakeholders, had a high likelihood of completing, provided a recovery for secured and unsecured creditors, and had the highest likelihood that Quest will continue to operate within its current academic model.

[24] The Monitor concurred. In its Fourth Report dated November 2, 2020, the Monitor referred to the fact that there were only two viable proposals, with Primacorp's offer being the superior one. The Monitor's Supplemental and Confidential Report dated November 2, 2020 (the "Confidential Report") is also before the Court, although filed under seal. That Confidential Report referred to four other proposals received by Quest that were "not currently at a stage such that they are capable of being accepted by Quest".

[25] Quest and Primacorp both see the closing of the Primacorp transaction as very time sensitive. Pursuant to agreements with the Interim Lender, Quest was required to enter into a transaction by October 30, 2020 with an anticipated closing of November 30, 2020. The Interim Lender has since agreed to amend that requirement to extend the necessary closing date to December 24, 2020 in accordance with the Primacorp transaction.

[26] In addition to satisfying increasing pressure to repay its secured creditors, Quest seeks to exit these *CCAA* proceedings as soon as possible to allow it to recruit and plan for the upcoming 2021/22 academic year. Finally, there are other more financially driven and critical concerns. The Interim Lender has indicated that it will not fund its loan past December 2020. Without funding of some sort, Quest has no liquidity or financial ability after that time to continue operations.

ISSUES

[27] The paramount issue for consideration is, of course, whether the Court should approve the Primacorp transaction under s. 36 of the *CCAA*. A number of subsidiary issues also emerged at this hearing, as a result of submissions from various stakeholders:

a) Lot E: Southern Star objects to the TAVO (now RVO), as vesting off any interest it may have under an unregistered lease of Lot E;

b) ROFR: CapU objects to the sale to Primacorp, asserting that Quest is ignoring its rights under the ROFR that allows CapU to purchase/lease Quest's lands;

c) Other Offer: Landrex Ventures Inc. ("Landrex"), together with CapU, assert that they should be given further time to finalize their offer for Quest's assets;

d) Disclaimers: Southern Star, supported by its secured creditor, Bank of Montreal (BMO), applies for an order that the subleases of the Residences not be disclaimed by Quest; and

e) RVO: Southern Star and another unsecured creditor, Dana Hospitality LP ("Dana"), object to the TAVO (now RVO), as being inappropriate and unfair in the circumstances and contrary to the spirit of the *CCAA*.

[28] I will address the subsidiary issues in the first instance, before turning to an overall assessment of the Primacorp transaction and whether the Court should approve that transaction.

Lot E

[29] As I described in the Rent Deferral Reasons (at para. 62), Quest, Southern Star and other parties are involved in a complex suite of agreements concerning the Residences that were built some time ago.

[30] Quest is the limited partner in a limited partnership agreement with Southern Star, who is the General Partner (GP). They formed the Southern Star Developments Limited Partnership (the "LP") to build the Residences. Quest, as the owner of Lots A-D, leases those lands under Ground Leases to Southern Star (as the GP of the LP). The ground leases are at a nominal rate. In turn, Southern Star (the GP), as landlord, and Quest, as tenant, entered into Subleases for the Residences, once they were built.

[31] The initial arrangements between Quest and Southern Star anticipated that a fifth student residence would be built on Lot E, the lot adjacent to Lot D.

[32] In September 2017, as part of those arrangements, Quest and Southern Star executed certain Land Title documents (Form C Charges) attaching a Ground Lease and a Sublease with respect to Lot E. When the parties executed the Form C Charges, the Ground Lease was incomplete in many respects; it did not include any legal description because Lot E was created after the execution of the Form C Charges; and, it did not specify the applicable dates of the 99-year term. Finally, the Schedules to the Ground Lease included various documents between Quest, Southern Star and Southern Star's lender intended to be later executed once the Ground Lease, the Sublease and the mortgage were finalized and registered at the Land Title Office.

[33] The parties delivered to Form C Charges to a law firm to be held in escrow pending the commencement of construction of the Lot E residence. Only recently, in response to this application, did a lawyer of the law firm complete the legal description for Lot E. Quest authorized this addition some time ago and I do not consider that matter as determinative of Southern Star's rights, if any, under the Lot E Ground Lease.

[34] At present, Quest's title to Lot E remains clear of any registration relating to Southern Star's Ground Lease so there is no need for Quest to obtain a vesting order to remove it from the title. However, Quest and Primacorp seek an order that any claims that arise from the yet incomplete and unregistered Ground Lease on

Lot E shall not attach to Quest's assets that are to be vested in Primacorp. They also seek an order permanently enjoining Southern Star from registering the Lot E Ground Lease against title to Lot E.

[35] Southern Star objects to the RVO as vesting off any interest it may have in the unregistered Lot E Ground Lease, arguing:

a) This Court has no jurisdiction to do so under the *CCAA*. Southern Star argues that this is simply a disguised disclaimer of the Ground Lease that the *CCAA* expressly prohibits. Disclaimers are allowed pursuant to s. 32 of the *CCAA*, however, limits are imposed by s. 32(9)(d) which provides that disclaimers can not be made:

> . . . in respect of real property or of an immovable if the company is the lessor.

b) If such jurisdiction exists under the *CCAA*, the relief sought is not fair and equitable in the circumstances.

[36] I will begin by discussing the nature of any interest held by Southern Star in relation to the Lot E Ground Lease.

[37] In my view, no "lease" *per se* is yet in existence and valid and enforceable between Quest and Southern Star. Although the parties executed the Form C Charges relating to the Lot E Ground Lease, Southern Star's principal, Michael Hutchison, acknowledges that they were not to be registered until construction had commenced. I conclude that the parties did not intend that the Ground Lease would be valid and effective between them until that time, in conjunction with the registration of the Sublease and the execution and registration of Southern Star's mortgage that would allow construction to begin.

[38] Southern Star does not argue that it has acquired any legal or beneficial interest in Lot E. At its highest, I conclude that Southern Star's rights to Lot E are purely contractual; Quest agreed that it would grant the Lot E Ground Lease in the future and it would become effective upon certain conditions being satisfied – in

essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.

[39] Further, even assuming that this is a "disguised" disclaimer, I conclude that Quest is not a "lessor" as that term is used in s. 32(9)(d) of the *CCAA*. Quest agreed that, if certain conditions were satisfied, it would become a "lessor" under the Ground Lease; however, that has not come to pass.

[40] I conclude that I have the jurisdiction under s. 11 of the *CCAA* to grant the order sought by Quest to ensure that Southern Star does not assert any rights under the Lot E Ground Lease at a future date. In addition, I rely on s. 36(6) of the *CCAA* that allows the Court to exercise its jurisdiction to vest off "other restrictions".

[41] The exercise of the Court's jurisdiction under s. 11 and 36 of the *CCAA* requires that the relief sought be "appropriate". This is in the sense that it accords with the statutory objectives of the *CCAA*, not only in terms of what the order will achieve, but the means by which it employs to that end: *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[42] In this respect, the parties have advanced arguments as to equitable considerations in terms of whether such relief is appropriate in the circumstances, while taking into account the respective positions of the parties. While in the receivership context, Quest has referred to various authorities that discuss the balancing of interests in similar situations where leases (in these cases effective and enforceable) were vested off title: *Meridian Credit Union Ltd. v. 984 Bay Street Inc*., [2006] O.J. No. 3169 (Ont. S.C.J.) at paras. 19-23, citing *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154; *Romspen Investments Corp. v. Woods Property Development Inc*., 2011 ONSC 3648 at para. 66; rev'd other grounds *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817 at para. 25.

[43] Southern Star argues that the equities favour it, not Quest, in these circumstances.

[44] Southern Star contends that neither Quest nor Primacorp have made any attempt to negotiate with it concerning its interest in Lot E. I would not accede to this argument. While the negotiations between Quest, Primacorp and Southern Star were not fruitful, it remains the case that Quest has made good faith efforts to address Southern Star's interests, although its ability in that respect were hampered by Primacorp's willingness to accommodate those interests.

[45] Southern Star also argues that it will be prejudiced if its contractual right is vested off in that Quest and Primacorp are not offering compensation for the loss of that interest. Southern Star focusses on what it says is the "status *quo*", arguing that it has the "right" to build a residence on Lot E. However, any such "right" is illusory at best, since Quest has no present ability to occupy the Residences, let alone the financial capability to participate in the construction of a fifth one on Lot E. Nor is there any realistic prospect that Quest will be in a position to do so in the future.

[46] Southern Star's argument in relation to Lot E is an attempt to gain leverage more than anything else. If Southern Star's argument succeeds and the relief sought is refused, Southern Star would be in the same position—facing a sale of Lot E and a likely order vesting off any rights or interests it may have. It is a condition of the Primacorp transaction that Lot E be transferred to it without any further involvement with Southern Star. Without an order rejecting Southern Star's claim in respect of the escrowed Ground Lease on Lot E, the likely result would be the end of these proceedings and the commencement of realization proceedings by the Interim Lender and other secured creditors.

[47] The Ground Lease is not effective and enforceable; the Ground Lease is not registered on title to Lot E. Given the circumstances, Quest has no ability to build a residence on Lot E and there is no reasonable prospect of that happening, given its insolvency and the need to dispose of its assets, including Lot E.

[48] While I acknowledge the negative impact on Southern Star arising from this relief, that impact must be balanced in the context of Quest's restructuring efforts in this proceeding. Those efforts are intended to address not only Southern Star's interests, but also the myriad interests held by other stakeholders. The sale of Lot E to Primacorp will allow Quest to realize on its interest in Lot E to the benefit of the stakeholders as a whole.

[49] I conclude that the relief sought by Quest in the RVO in relation to Lot E is appropriate and it is granted.

CapU ROFR

[50] Lot 1 and Lots A-E are subject to various charges in favour of CapU.

[51] In March 2019, Quest granted mortgage security in favour of CapU in connection with a loan made to Quest. As part of these agreements, in April 2019, Quest also granted the ROFR in favour of CapU. CapU registered the ROFR against these lands. Under the Primacorp transaction, Quest is required to obtain title to Lot 1 and Lots A-E without reference to the ROFR.

[52] Pursuant to s. 9 of the *Property Law Act*, R.S.B.C. 1996, c. 377, a right of first refusal to land is an equitable interest in land.

[53] CapU has referred to two non-*CCAA* cases that discuss ROFRs generally.

[54] In *Adesa Auctions of Canada Corp. v. Southern Railway of B.C.*, 2001 BCSC 1421 at paras. 26-30, the Court found that the contractual terms were to be strictly enforced and that the rights under the ROFR could not be defeated or circumvented by an offer that included other lands not covered by the ROFR. To similar effect, *Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*, 2016 BCCA 84 at para. 41 states, following *Adesa*, that a ROFR will be triggered by a package sale that includes the subject property, subject to contrary language in the ROFR.

[55] It is common ground, however, that different considerations may also apply in the *CCAA* context. Having said that, there is little case authority on the ability of a court in *CCAA* proceedings to vest off a ROFR, whether triggered or not.

[56] In “Rights of First Refusal and Options to Purchase in Insolvency Proceedings” (2019) 8 J.I.I.C. 103 (the “ROFR Article”), the authors Virginie Gauthier, David Sieradzki and Hugo Margoc extensively review the issue, including in relation to Options to Purchase (OTPs). At 106, the authors state:

> . . . Section 11 of the *CCAA* grants courts the right to "make any order that it considers appropriate in the circumstances" except as limited by the CCAA. As such, the *CCAA* court is well equipped to approve the sale of an OTP- or ROFR-encumbered asset to a party other than the rights-holder and without having first complied with the restrictive covenants if the transaction is in the best interests of the creditors at large, provided that the interest of the OTP or ROFR-holders is taken into account. The court will consider, *inter alia,* the monitor's views on these issues before making any such approvals.

[57] At 118-119, the authors conclude that:

> While jurisprudence on this matter is not conclusive, it appears that a *CCAA* court would likely only vest out a valid and unexpired OTP that runs with the land in exceptional circumstances such as in the context of a going-concern restructuring where obtaining the highest possible price for the encumbered asset is paramount to support the restructuring efforts of the debtor company, and where the OTP rights-holders are also creditors in the proceeding and could seek compensation for any loss incurred due to the removal of the OTP right.
>
> . . .
>
> In summary, common law *CCAA* courts may vest out valid or unexpired ROFRs and OPTs in a case where the equities favour such an order or on consent.

[58] Quest has referred to *Bear Hills Pork Producers Ltd. (Re),* 2004 SKQB 213*,* additional reasons 2004 SKQB 216. In that *CCAA* proceeding, the debtors sought approval of a sale of bundled assets relating to a hog farm, in the face of a ROFR that applied to the land only. Justice Kyle referred to the overall security affecting the assets; the court also commented that a withdrawal of the lands from the sale would not allow the proposed sale to complete, leading possibly to a liquidation (at paras. 4-5).

[59] However, in *Bear Hills*, Kyle J. relied on authorities that have since been questioned in *Alim Holdings* (see paras. 38-41). Justice Kyle's conclusion at para. 10 that the ROFR was not triggered runs contrary to the court's conclusion in *Alim Holdings* at para. 41.

[60] I have no doubt that courts across Canada have vested off ROFRs in the context of assets sales approved in *CCAA* proceedings. For example, Quest refers to *Artic Glacier Income Fund (Re)*, [2012] M.J. No. 451 (Q.B.) where a ROFR was vested off title, although the circumstances under which that *CCAA* relief was granted is not clear.

[61] Similarly, in *Great Slave Helicopters Ltd. v. Gwichin Development Corp*. (November 23, 2018), CV-18-604434-00CL (Ont. S.C.J.), Justice Hainey's endorsement directed that a purchaser of aggregated assets in a *CCAA* proceeding provide certain information to the holder of the ROFR with respect to the purchase price allocation. The ROFR Article, which discusses the circumstances before the court in *Great Slave Helicopters* at 108-109, indicates that the issue of the exercise of the ROFR was ultimately resolved consensually.

[62] Fortunately, in this case, there is no dispute concerning the Court's jurisdiction to address CapU's rights arising under the ROFR. Both Quest and CapU agree that the Court has jurisdiction under the *CCAA* to vest off the ROFR, subject to a consideration of the equities as between the parties.

[63] For the following reasons, I conclude that a balancing of the equities favours vesting off CapU's ROFR to allow the Primacorp transaction to proceed:

a) Since January 2020, Quest has been pursuing a going concern restructuring that will permit it to remain as a university and employer in the Squamish area. CapU has been involved in this proceeding from the outset and was well aware of the opportunity to participate in that pursuit;

b) There is a significant issue as to whether the ROFR has even been triggered by delivery of the Primacorp PSA. The definition provided in the ROFR of “Bona Fide Offer to Purchase” means, in part, an offer that is:

> (iii) only for the entirety of the Property [the lands] and all chattels thereto and <u>no other property, rights or assets</u>
>
> [Emphasis added.]

The definition of “Purchased Assets” in the Primacorp PSA is broad and refers not only to lands and chattels, but a variety of other assets (for example, contracts, plans, permits, vehicles and intellectual property). This express language is what the court in *Alim Holdings*, at para. 41, described could indicate an intention that any such aggregated offer would *not* trigger the ROFR;

c) The term of the ROFR expires in March 2024. The ROFR appears to contemplate that, even if CapU does not exercise the ROFR, the purchaser of the lands must still agree to grant CapU a ROFR on the same terms. Similarly, “change of control” provisions are potentially effective that would allow CapU to later acquire control of Quest in place of anyone else. This would frustrate Primacorp’s expectation under the Primacorp PSA that it would have the right to nominate the board of governors for Quest after closing;

Primacorp does not agree to assume these restrictions. In addition, every other offer for Quest’s assets required that the ROFR be vested off title to the lands. It is difficult to see that any purchaser would agree to take title to purchased assets with such significant restrictions. If the ROFR is effective, this would give rise to a severe “chilling effect” on the market, with potentially disastrous results for Quest’s restructuring efforts;

d) The 60-day period within which CapU is entitled to consider any “Bona Fide Offer to Purchase” is simply unworkable in these circumstances. This is not a matter of expediency, without regard to any rights held by CapU. Quest will have no funds to continue its operations past December 2020 and, if realizations by the secured creditors ensue, CapU’s ROFR rights will be illusory at best;

e) CapU complains that it received the redacted Primacorp PSA only recently, on October 29, 2020. CapU then requested an unredacted copy, which Quest agreed to do upon CapU executing an NDA. CapU refused to sign the NDA, stating that it would hamper its ability to participate in its own offer. Again, CapU has had months to formulate its own offer;

f) Quest asserts that CapU has no intention to or ability to make its own offer for all of Quest’s assets in competition to the Primacorp transaction. CapU has not put forward any evidence at this hearing to confirm such intention or ability. Similarly, there is no evidence that CapU truly wishes to or is able to exercise any rights under the ROFR to purchase Quest’s lands and chattels;

g) I consider that the evidence conclusively supports that CapU advances its arguments under the ROFR simply as a tactic to oppose the Primacorp transaction and delay the matter so that it and Landrex can seek to advance their own joint competing offer;

h) As I will discuss below, the terms of the joint Landrex/CapU proposal is only semi-formed at this point and Quest has indicated that some major terms are not acceptable. As such, it is highly questionable that this joint offer is, as CapU asserts, a “better, higher offer”;

i) I conclude that Quest has given proper regard to and has not ignored CapU’s rights under the ROFR in the context of these proceedings.

CapU has had sufficient information even from the redacted Primacorp PSA to discern the substance of the Primacorp transaction in terms of advancing any competing offer or exercising the ROFR;

j) Given the above circumstances, including CapU's involvement in Quest's lengthy efforts to restructure, I cannot conclude that CapU will suffer significant prejudice if the ROFR is vested off. Quest has indicated that CapU will have the opportunity to file a proof of claim in respect of any loss alleged to arise because of the vesting off of the ROFR. Of course, the value of any such claim would be questionable unless CapU can establish that its rights were triggered by the Primacorp transaction and that it had the ability to complete under the ROFR; and

k) The Monitor supports the Primacorp sale, as maximizing the value of Quest's assets for the stakeholders and allowing a successful restructuring of Quest's business.

[64] If CapU has rights under the ROFR, allowing CapU to assert those rights would delay the Primacorp sale and potentially negate it, all with potentially devastating effect on the broader stakeholder group. The Primacorp sale is the only sale that is before the Court that would result in a restructuring of Quest for the benefit of the stakeholders. Clearly, within that context, the rights of all affected stakeholders must be balanced in respect of any rights held by CapU.

[65] In *Bear Hills,* similar considerations were before the court. The Saskatchewan Court of Queen's Bench approved a bundled sale of assets, without first requiring compliance with a ROFR. In part, the prospective purchaser would only consider purchasing the complete bundle of properties for an aggregate purchase price and did not allocate value on a property-by-property basis.

[66] As I have sought to do here, the court in *Bear Hills* (at para. 9) was attuned to the overarching and remedial statutory purpose and objective of the *CCAA* to avoid

the “social and economic losses resulting from liquidation of an insolvent company”: *Century Services* at para. 70 and *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 40-41. This objective is not to be achieved simply in the most expedient manner and without due regard to interests of stakeholders that are affected in that process. As the Court further stated in *Century Services* at para. 70, any restructuring is best achieved when “all stakeholders are treated as advantageously and fairly as the circumstances permit”.

[67] I am satisfied that it is appropriate, in the context of the Primacorp transaction, to vest off the ROFR held by CapU. In that regard, I have also considered the factors set out in s. 36(3) of the *CCAA* in terms of assessing any rights of CapU under the ROFR in that context.

Landrex / CapU Offer

[68] Landrex, supported by CapU, opposes approval of the Primacorp transaction. Landrex argues that they should be given further time to present an offer for Quest’s assets in competition with the Primacorp transaction.

[69] As with CapU, Landrex has been fully engaged in discussions with Quest for some time now, having been alerted to the possibility of a transaction as long ago as fall 2019. Landrex’s interest in Quest has always been in conjunction with securing an academic partner, namely, CapU.

[70] In June 2020, Landrex and Quest entered into an agreement for a sale; however, the conditions lapsed.

[71] On October 8, 2020, Landrex and Quest executed a further purchase and sale agreement (the “Landrex PSA”) providing for a purchase price of $51 million for most of Quest’s assets (Lot 1 only and excluding Lots A-E: obviating any need for disclaimers of the Southern Star Subleases or vesting off any of Southern Star’s rights under the Lot E Ground Lease). The closing date under the Landrex PSA is December 23, 2020.

[72] By the start of this hearing, significant conditions precedent in respect of the Landrex PSA were still outstanding. Those included the financing condition in favour of Landrex and the mutual condition by which “another party” (CapU) was to have secured a sublease with Quest after Landrex had granted CapU a lease in the first instance.

[73] Landrex suggests that Quest is contractually bound to honour the Landrex PSA by allowing it further time to remove the conditions precedent, citing the good faith organizing principle discussed in *Bhasin v. Hrynew*, 2014 SCC 71. Further, Landrex argues that Quest has a duty to take all reasonable steps to satisfy the conditions precedent: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072.

[74] Further discussions and negotiations continued between Landrex and Quest beyond October 8, 2020; however, matters under the Landrex PSA were not advanced.

[75] By late October 2020, Quest was under significant pressure, if not a legal requirement from the Interim Lender, to conclude a transaction. At that time, only two potentially viable proposals were on the table, one being from Primacorp. As above, where the Monitor noted in its Confidential Report that other proposals were “not currently at a stage such that they are capable of being accepted by Quest”, those “other proposals” included the Landrex PSA.

[76] By the time the Landrex PSA was executed on October 8, 2020, Landrex was not aware that Quest had already signed the Primacorp PSA. However, I agree with Quest’s counsel that Landrex had not secured any rights of exclusivity in terms of advancing its offer. The Landrex PSA provided:

> 20.2 Notwithstanding anything else contained herein, Landrex acknowledges and agrees that, following from date of the acceptance of this Offer by the Vendor until the date that the Vendor waives or declares satisfied the Vendor’s Condition, the Vendor will be authorized to negotiate with or offer the Property for sale to any third party (including the entering into of any agreement by the Vendor with any third party). . . .

[77] Under the Landrex PSA, Quest's Vendor's Condition was approval from its Board of Governors. Quest never obtained that approval because Quest's Board of Governors did not agree to certain deal terms under the Landrex PSA.

[78] By October 29, 2020, Landrex would have been fully aware that its offer was not going to be advanced by Quest any further since, by then, Quest had chosen Primacorp.

[79] On November 2, 2020, Landrex made a further offer for $53.5 million. The only other significant change to their offer was to describe the requirement for a lease/sublease arrangement between Landrex, "another party" (intended to be CapU) and Quest as Landrex's condition precedent, not a mutual condition precedent. Quest did not accept this offer.

[80] In any event, by that time, Landrex's financing condition was far from being satisfied. On November 9, 2020, TD Asset Management ("TD"), Landrex's lender, provided a letter simply stating that it was continuing to work with Landrex and CapU to provide that financing.

[81] I acknowledge that, since the initial hearing date of November 3, 2020, Landrex has moved to finalize its offer but it has only done so to some extent.

[82] On November 13, 2020, Landrex secured a letter from TD that referred to a term sheet being in place after a final financing structure was negotiated (no documents were disclosed). However, TD's commitment is clearly conditional upon CapU's board approving the lease between Landrex and CapU at a meeting that is not scheduled to take place until November 24, 2020. There is no evidence as to what those lease terms are and whether there is a reasonable likelihood that CapU's board will approve it. Further, this whole arrangement continues to hinge on a negotiated sublease between CapU and Quest, which is not in place.

[83] On November 16, 2020, Landrex's counsel advised of yet further developments: (i) removal of its financing condition; (ii) an LOI with Southern Star by

which it would take over the Residences but not require disclaimer of the Subleases; and, (iii) agreement with CapU to remove the ROFR.

[84] Despite these developments, Quest advised that it was still not agreeable to the terms of the Landrex transaction. In addition, the Monitor continues to support approval of the Primacorp transaction, noting the uncertainty and potential delay of CapU obtaining ministerial approval to allow its participation in the Landrex transaction.

[85] The s. 36(3) factors continue to provide a useful structure for consideration of the Landrex transaction, and these late breaking developments.

[86] I am satisfied that Landrex was given a reasonable opportunity to participate in the SISP and that it has been aware of this opportunity for many months, even before it officially began. The fact that the cash consideration under the Landrex transaction exceeds that of Primacorp is deserving of consideration. However, other considerations arise, including that the Primacorp transaction involves significant other benefits to Quest in terms of its future operations, including the working capital facility of $20 million.

[87] Both Quest and the Monitor continue to be of the view that the Primacorp transaction is more beneficial to the creditors. I agree with this, particularly considering the continuing uncertainty and risk associated with the Landrex/CapU transaction that is yet to be resolved, leaving aside that Quest has unequivocally stated that it has no intention to pursue it. Even if the further negotiations required under the Landrex sale were advanced in an expeditious manner, it seems unlikely to be finalized by the end of the year. To the contrary, the Primacorp transaction has been finalized after weeks of complex negotiations and Quest and Primacorp are ready to close without further delay. I agree that time is of the essence at this stage of the proceedings, for the reasons already noted above.

[88] In the overall circumstances here, I see no reason to delay, if not risk, the “bird in hand” transaction that arose through a reasonable sales process, in the hope that a more uncertain transaction may be finalized, such as with Landrex.

Southern Star Disclaimers

[89] On October 23, 2020, and with the approval of the Monitor, Quest issued notices of disclaimer (the “Disclaimers”) to Southern Star relating to the Subleases on Lots A-D by which Southern Star leases those lands and the Residences to Quest.

[90] A condition precedent of the Primacorp transaction is that either Quest will disclaim the Subleases or Primacorp will have entered into an agreement with Southern Star to its satisfaction. The evidence discloses that negotiations did take place between the parties but they did not reach a mutually acceptable agreement.

[91] Quest’s rent payments to Southern Star under the Subleases for the Residences on Lots A-D total approximately $236,218 per month.

[92] Very recently, on November 15, 2020, before the conclusion of this hearing, Quest voluntarily withdrew the Disclaimers with respect to Lots A-B. Accordingly, failing an agreement between Primacorp and Southern Star, it remains a condition of the Primacorp transaction that Quest’s Disclaimers of the Subleases in relation to Lots C-D be upheld.

[93] The Ground Leases are registered against Lots A-D. BMO’s security is registered against Southern Star’s interest under the Ground Leases; in addition, Fivestone Capital Corp. (“Fivestone”), a company controlled by Mr. Hutchison, has registered security against the Grounds Leases. Quest does not seek any relief in respect of the Ground Leases; unlike Lot E, those documents are fully effective and enforceable and have been the basis upon which the parties have developed those properties.

[94] What remains to be addressed is Southern Star's application pursuant to s. 32(2) of the *CCAA*, supported by BMO, for an order disallowing any disclaimer by Quest of the Subleases of the Residences on Lots C-D. Section 32(4) of the *CCAA* lists various non-exhaustive factors that the court is to consider in relation to disputes over disclaimers:

> In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[95] In *League Assets Corp. (Re)*, 2016 BCSC 2262, I discussed the significance of disclaimers in *CCAA* proceedings, both from the point of view of the counterparty and that of the entire stakeholder group:

> [49] These *CCAA* provisions are not inconsequential in the face of this type of proceedings. At this point, the matter is no longer between the debtor company and a counterparty. There are other stakeholders involved and the statutory provisions, and the provisions of court orders such as the Initial Order, are meant to protect the stakeholder group as a whole, while also allowing a certain amount of flexibility for the debtor company. A disclaimer of a contract has consequences not only to the debtor company, but the estate generally. Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the creditors. It is in that context that the *CCAA* requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.

[96] The factor under s. 32(4)(b) of the *CCAA* as to enhancing the prospects of a viable restructuring applies equally in respect of disclaimers in the context of a sales process by which the business is to continue as a going concern: *Timminco Ltd. (Re)*, 2012 ONSC 4471 at paras. 51-52 and *Aveos Fleet Performance Inc. (Re)*, 2012 QCCS 6796 at paras. 48-50. In addition, the disclaimer need not be proven as "essential", only "advantageous and beneficial": *Timminco* at para. 54.

[97] Quest asserts that the Disclaimers are necessary to pursue and complete the Primacorp transaction, which it considers the best possible outcome for Quest and its stakeholders, including students, faculty, staff, secured and unsecured creditors, suppliers and vendors. In its letter dated October 28, 2020 to Southern Star, Quest also refers to its liquidity crisis and that amounts owing to its secured creditors became due some time ago.

[98] In its Fourth Report dated November 2, 2020, the Monitor confirmed its approval of the Disclaimers, based on:

> 2.8.1 The residences are not currently being used by Quest (other than two units being used by staff members and some limited use by a film crew recently) given on-line learning format being employed as a result of COVID 19;
>
> 2.8.2 It is a term of the Primacorp Agreement that the subleases be disclaimed; and,
>
> 2.8.3 The Monitor noted that the two most promising alternative parties in discussions with Quest also required the Southern Star subleases to be disclaimed.

[99] Southern Star advances a number of arguments in relation to the Disclaimers.

[100] Firstly, it argues that the Disclaimers will not result in a viable compromise or arrangement. Southern Star argues that there is no indication that Quest and Primacorp do not wish to continue to have the Residences as part of the student experience for those attending Quest.

[101] I agree that, in the Rent Deferral Reasons, many of my comments (at paras. 23-26, 90) were confirmatory of the importance of the Residences to Quest in respect of its future operations. However, that was then and this is now. The pandemic continues in full force and Quest is necessarily required to make decisions in the face of current circumstances. I agree that it is likely that Quest will seek to continue the student residence experience once the pandemic has receded, however, when that might happen is anyone’s guess.

[102] In the meantime, Quest, under the Primacorp transaction, must make decisions as to its financial capabilities going forward. Maintaining two empty

Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances. It was Primacorp, an arms length purchaser, who has imposed this condition.

[103] Further, the Monitor agrees with Quest that the Disclaimers are necessary to enhance the prospects of Quest making a viable compromise or arrangement in these proceedings. There is no reason to question the Monitor's view as it is apparent that the Monitor has considered all relevant matters.

[104] I agree that the Disclaimers will enhance the prospects of Quest making a viable compromise or arrangement. The Monitor overwhelmingly agrees after a consideration of all the circumstances including those particularly faced by Southern Star as a result.

[105] Secondly, Southern Star argues that Quest delivered the Disclaimers simply to secure a bargaining advantage for Quest and Primacorp toward a re-visitation of the rent deferral issue or to attempt to reduce the rent. I agree that there is some indication that Quest and Primacorp had that in mind; however, that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate. If it were possible to come to an amicable resolution with Southern Star in the context of the Primacorp transaction, I expect Quest would have done so.

[106] Southern Star refers to the statements in *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503 at para. 59, where Justice Veit considered whether certain contracts should be terminated. She was attuned to whether the termination was fair, appropriate and reasonable and whether it arose after good faith negotiations. In this case, there is no evidence to suggest that the parties did not approach the negotiations in good faith. Clearly, it is not my role on this application to assess the reasonableness of the respective positions of Quest, Primacorp and Southern Star in those negotiations. It does appear, however, that Quest and Primacorp have moved toward a middle ground by the withdrawal of the Disclaimers in relation to Lots A-B.

[107] Thirdly, Southern Star places great emphasis on what it says will be the significant hardship it will suffer if the Disclaimers are upheld. Southern Star says that it has spent approximately $41.7 million to construct the Residences.

[108] The monthly mortgage payments to BMO and Fivestone are approximately $220,000. The outstanding balance of the BMO loan facility is $34.4 million. Mr. Hutchison indicates that, without payment of rent by Quest, Southern Star will not be able to make its mortgage payments to BMO. In that event, BMO will be in a position to foreclose on the Ground Leases. Mr. Hutchison has guaranteed the BMO debt, as has another of Mr. Hutchison's companies.

[109] As noted by Quest, any financial consequences to Southern Star will largely depend on what mitigating measures are undertaken. Those could include a re-letting of the Residences or a sale of its interests under the Ground Leases. At present, with no clear indication as to how those matters might evolve, I am unable to conclude with certainty that any hardship suffered by Southern Star would be "significant".

[110] Regardless of any hardship faced by Southern Star, the reality is that Quest has only one viable means by which to advance the restructuring at this time – the Primacorp transaction. Within the confines of that transaction, Primacorp sees no merit in maintaining the Subleases on these two Residences. Apparently, no other interested party expressed an interest in maintaining the Subleases besides Landrex. In light of Landrex's submissions at the conclusion of this hearing on November 16, 2020, I have considered that the Landrex/CapU transaction may have presented a more palatable resolution of the Subleases given the recent LOI between Landrex and Southern Star. However, I conclude that delaying the Primacorp sale, on the prospect that the Landrex/CapU transaction will come about, is not a viable option for the reasons discussed above.

[111] I agree that this decision will visit hardship, even arguably significant hardship, upon Southern Star. However, it is difficult to see that preventing delivery of the Disclaimers would avoid that result in any event. If the Primacorp transaction

does not proceed, there is no transaction and Quest has no financial means to continue past December 2020. The Interim Lender has indicated that it will not advance funds to Quest beyond that date, and specifically, that it has no interest in funding continued rent payments to Southern Star.

[112] In that event, Southern Star will be in the same position post December 2020, with Quest unable to pay the rent for the Residences at that time: see *Target Canada Co. (Re)*, 2015 ONSC 1028 at paras. 27-28.

[113] As the court noted in *Target Canada* at paras. 24-25, the court must give due consideration to the stakeholder group as a whole in assessing whether the Disclaimers are fair and reasonable: *Doman Industries Ltd. (Re)*, 2004 BCSC 733 at para. 33. The price of setting aside the Disclaimers is that the Primacorp transaction will not proceed and a receivership at the behest of the Interim Lender will likely follow. In my view, this is not in the best interests of that larger stakeholder group which, in my view, has primacy here even in the face of the hardship and prejudice caused to Southern Star.

[114] I dismiss Southern Star's application for order that the Subleases of the Residences on Lots C-D not be disclaimed by Quest.

RVO

[115] At the November 3, 2020 hearing, when Quest originally sought the TAVO, Quest was seeking to uphold the Disclaimers of the Subleases. At that time, Southern Star's evidence and submissions were to the effect that, if the Court upheld the Disclaimers, it would have a substantial unsecured claim against the estate. As indicated above, the amount of any claim that Southern Star might advance in the estate is far from clear, given possible mitigation, although there is potential for a significant claim.

[116] This position did not come as a surprise to Quest; however, it appears that Quest did not appreciate the potential magnitude of Southern Star's claim. More importantly, Quest has not fully appreciated that a very unhappy claimant – Southern

Star under the Disclaimers – was not likely to vote in favour of the Plan and that the value of its claim could swamp the class votes to prevent any approval by the creditors. Again, creditor approval of the Plan is a requirement of the Primacorp Transaction.

[117] In early November 2020, known unsecured creditor's claims were estimated at approximately $2.3 million. "Restructuring Claims" (which will include any claim of Southern Star under the Disclaimers) were yet unknown.

[118] Initially, Primacorp agreed to fund Quest's Plan in the amount of the lesser of 50% of the claims or $1.35 million. The Monitor now states that there is a "high probability" that Southern Star's claim will be large enough such that Southern Star will control the value of the votes at the creditors meeting. Other major unsecured creditor claims have also since emerged, being that of Dana (estimated $1 million) and the Association for the Advancement of Scholarship (estimated $5 million).

[119] As the Monitor notes, any of these claims could effectively veto the Plan.

[120] Quest and Primacorp were then facing a dilemma. They determined that, while they might succeed on the Disclaimer issue, they could not likely obtain approval of the Plan, a further requirement of the Primacorp PSA, if Southern Star carried through with its suggested negative vote. While Quest could raise arguments in relation to the value of any claim advanced by Southern Star, uncertain and lengthy litigation would likely result; even if Quest was successful, it would be too late to factor into this restructuring.

[121] Quest, with Primacorp's approval, solved this dilemma by revising the TAVO to an RVO. In addition, the Primacorp PSA was amended to delete the conditions precedent requiring creditor and court approval of the Plan. Accordingly, the only condition precedent that remains before closing of the Primacorp transaction is the granting of the RVO.

[122] The Monitor supports this change as necessary in the circumstances in order to allow Quest to complete the Primacorp transaction. The Monitor supports the granting of the RVO.

[123] In its Fifth Report dated November 10, 2020, the Monitor describes the characteristics of the new structure and steps under the RVO, which involves Quest's subsidiary, Guardian Properties Ltd. ("Guardian"):

> RVO Structure & Impact
>
> 2.6 The RVO provides for the following to occur in sequential order on the closing of the Primacorp Transaction:
>
> 2.6.1 A wholly owned subsidiary of Quest, Quest Guardian Properties Ltd. ("Guardian") shall be added as a Petitioner in these CCAA proceedings. Guardian was incorporated on January 25, 2018 and has never carried on any business and has never held any assets or liabilities;
>
> 2.6.2 All of Quest's right, title and interest in and to the Excluded Assets (as defined in the Primacorp PSA and the RVO) shall be transferred to and vested in Guardian;
>
> 2.6.3 All Contracts (other than Approved Contracts), Claims and Liabilities of Quest shall be transferred to Guardian and Quest shall be released from and in respect of all obligations in respect of such Contracts, Claims and Liabilities;
>
> 2.6.4 Primacorp will pay the Purchase Price to the Monitor to the extent of the Secured Charges and all the Secured Claims and the Secured Charges shall be extinguished and cancelled. The Purchase Price will stand in the place of the Purchased Assets;
>
> 2.6.5 All of Quests right, title and interest in the Purchased Assets shall vest in Primacorp free and clear of any security interests, Claims and Liabilities; and,
>
> 2.6.6 Quest will cease to be a Petitioner in these CCAA proceedings leaving Guardian as the sole Petitioner.
>
> 2.7 The RVO contains release provisions similar to those contained in the Plan. Quest, its employees, legal advisors and other representatives, Quest's Governors and Officers, and the Monitor and its legal counsel shall be released from any and all demands and claims relating to, arising out of, or in connection with these CCAA Proceedings. The releases do not apply in the case of wilful misconduct or fraud.
>
> 2.8 As a result of the amendments to the Primacorp Transaction and the RVO, if the RVO is granted:
>
> 2.8.1 There will be no uncertainty as to whether the Primacorp Transaction can close and the condition precedent for the

> approval of the Plan is no longer applicable. As a result, there will be certainty for the go-forward operations of Quest, thereby creating security for the Quest students, faculty and staff leading into the critical enrolment period for the winter term;
>
> 2.8.2 Guardian will become responsible for the obligations under the Southern Star subleases should they not be disclaimed. As Guardian will not have the financial resources to meet those obligations, it is expected that Guardian would default on the Southern Star subleases in January 2021; and
>
> 2.8.3 The Plan, which will now compromise the debts of Guardian, will be funded through the Primacorp Transaction and therefore this aspect of the Primacorp Transaction and the Plan has not changed.

[124] As I will discuss below, the effect and substance of the RVO is to achieve what Quest has originally sought by way of a restructuring in these proceedings; namely, a sale of certain assets to Primacorp and, importantly, Quest continuing as a going concern as an academic institution, in partnership with Primacorp. The only aspect now missing is that, under the RVO, Quest will avoid having to obtain creditor or Court approval of the Plan.

[125] The intention is that the amounts that Primacorp was to fund under the Plan will now be transferred to Guardian to be distributed under Guardian's plan in relation to the Quest's liabilities that are to be transferred to Guardian. Effectively, Guardian will be funded just as it was originally intended that Quest's Plan was to have been funded to resolve those claims.

[126] Southern Star and Dana, as unsecured creditors of Quest, object to the granting of an RVO, contending that it effectively and unfairly negates their right to vote on Quest's Plan under s. 6 of the *CCAA*. They object to the transfer of their claims to Guardian. They say that, although they will have the ability to vote on Guardian's plan, it will effectively mean that they cannot vote to block Quest's restructuring to enable it to continue as a going concern within the context of the Primacorp transaction.

RVO Jurisdiction and Authorities

[127] There is no dispute between the parties that this Court has authority to grant the RVO under its general statutory jurisdiction found in s. 11 of the *CCAA*.

[128] Quest has referred me to a number of decisions across Canada where courts have exercised that jurisdiction to grant an RVO in the context of sale approvals considered under s. 36 of the *CCAA*. I will review those decisions in some detail below to highlight the relevant circumstances.

[129] In *Re T. Eaton Co.* 2000 CarswellOnt 4502, 26 C.C.P.B. 295, the Ontario court granted such an order under its *CCAA* proceedings. There are no written reasons discussing the circumstances in that case. The only brief reference to that structure is found in Claims Officer Houlden's decision in *Eaton's* that addressed an unrelated issue. The agreed statement of facts before the Claims Officer provided:

> 5. The *CCAA* Plan contemplated that all of the assets of Eaton's which were not being retained by Eaton's under the Sears Agreement would be transferred to a new corporation, Distributionco Inc. ("Distributionco"). These assets would then be liquidated by Richter & Partners Inc. ("Richter") in its capacity as court-appointed liquidator of the estate and effects of Distributionco. Richter would then distribute the assets of Distributionco to unsecured creditors and others in accordance with priorities set out in the *CCAA* Plan.
>
> 6. Under the *CCAA* Plan, unsecured creditor claims against Eaton's are converted into a right to participate in distributions in the liquidation of Distributionco based on the amount of the creditor's claim against Eaton's. Accordingly, a critical initial step in the liquidation of Distributionco is the determination of the validity and amount of claims asserted against Eaton's. For this purpose the *CCAA* Plan establishes a Claims Procedure for the resolution of such claims, of which the parties to this matter are aware.

[130] It is unclear as to the basis upon which the court approved this structure in *Eaton's* although, as Southern Star notes, it was a transaction approved within the context of a *CCAA* Plan.

[131] More recently, this structure was approved in *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]). In those *CCAA* proceedings,

an agreement was approved that "effectively" transferred current tax losses and intellectual property to a purchaser. Justice Wilton-Siegel's endorsement stated:

> The Global Settlement contemplates implementation of a corporate reorganization by which the shares of Plasco will be transferred to an acquisition corporation owned by NSPG and CWP and the remaining assets of the applicants will be held by a new corporation, referred to as "New Plasco", which will assume all of the liabilities and obligations of Plasco. I am satisfied that the Court has authority under section 11 of the *CCAA* to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the *CCAA* insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise. For this purpose, I consider that the Global Settlement is analogous to such a plan in the context of these particular proceedings. …

[132] Justice Gouin granted an RVO in the *CCAA* proceedings of *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]). There are no written reasons from the court; however, the motion materials disclose that, under the transaction, the purchasers acquired substantially all the debtor's assets by purchasing 100% of the shares of one debtor company (SDCI, which held the acquired assets). In consideration, the purchaser released certain liabilities owed by the debtors and agreed to assume others.

[133] In *Stornoway Diamond*, to ensure the purchaser acquired the assets free and clear of all encumbrances, the debtors incorporated a new subsidiary (Newco), added Newco as an applicant in the *CCAA* proceedings, and transferred all liabilities, obligations, and unacquired assets of SDCI to Newco. The debtor's motion referred to this transaction as the only viable alternative to preserve the going concern value of the debtor. The debtor noted that the equity and "non-operational related unsecured claims" had no value. As in the RVO sought here, the court's order included familiar aspects found in sanction orders, including releases.

[134] An RVO was also approved in the *CCAA* proceedings of *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]). Approval was sought in the context of preserving valuable cannabis licenses. Justice Hainey's brief endorsement indicates that the relief was unopposed. The court

approved a sale of substantially all of the debtor's assets to the successful bidder under a share purchase agreement after a sales and investment solicitation process.

[135] Other information before me regarding the *Wayland Group* transaction is found in the applicant's factum. The factum refers to both *Plasco Energy* and *Stornoway Diamond*, while also referring to ss. 11 and 36(3) of the *CCAA* as the jurisdictional basis for the relief. The applicants argued that transferring certain assets and liabilities of the debtors into a "newco" would ensure that the purchaser acquired the underlying assets of the target company free and clear of all claims and encumbrances and allow the business to continue as a going-concern. They asserted that this was the "only way" to complete the sale to realize the value in the assets; it was also argued that this transaction was in the best interests of stakeholders and did not prejudice major creditors. In *Wayland Group*, the transaction value was only sufficient to repay the interim lender and perhaps some amount for the first secured creditor.

[136] The Ontario court again approved a similar RVO transaction in the *CCAA* proceedings of *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]). Justice Hainey granted the RVO while again indicating in a brief endorsement that the relief was unopposed. The share sale preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business. The purchaser was a related party who was making a credit bid for the assets.

[137] In *Comark Holdings*, the purchaser acquired all the issued and outstanding shares of the primary *CCAA* debtor and agreed to pay out all the secured debt and priority claims. The excluded assets, agreements, liabilities and encumbrances were transferred to another entity that became a debtor in the *CCAA* proceedings, with the result that the *CCAA* debtor held its assets free and clear of all claims and encumbrances and was then removed from the *CCAA* proceedings. The purchaser and the primary *CCAA* debtor then amalgamated. The new *CCAA* debtor (Newco) was authorized to make an assignment into bankruptcy. The monitor, along with the

principal secured creditors, including the interim lender, supported the transactions. As in *Plasco Energy*, *Stornoway Diamond* and *Wayland Group*, the debtors in *Comark Holdings* argued that this was the "only option" to preserve the business, that the value in that business would be lost in a liquidation and that the transaction was in the best interests of the stakeholders generally.

[138] Justice Conway granted an RVO in the *CCAA* proceedings of *Beleave Inc.* (September 18, 2020), Toronto, CV-20-00642097-00CL (Ont. S.C.J. [Comm. List]). As in *Wayland Group*, the preservation of valuable cannabis licenses were at stake. The motion was supported by the monitor and unopposed. Justice Conway stated in her brief endorsement:

> The Applicants seek approval of the transaction whereby . . . (the Purchaser) will acquire the operating business of the Applicants. The structure of the transaction is partly by share sale and partly by asset sale. The reason for the structure is to accommodate the licensing requirements of Health Canada. The order is structured as a reverse vesting order, in which excluded liabilities and assets will be transferred to "Residualco", which will then become one of the Applicants in the *CCAA* proceedings. Reverse vesting orders have been approved by the courts in other cases: see *Re Stornoway Diamond Corporation* . . . and *Re Wayland Group Corp*. . . .
>
> The transaction is the culmination of a stalking horse sales process approved by the court. The motion is unopposed. The Monitor recommends and supports the transaction in its Fourth Report. In particular, the Monitor states that the proposed transaction is economically superior to the estimated liquidation value of the Beleave Group's assets and operations, will allow the Purchaser to maintain operations and use of the Cannabis licenses and will provide for continued employment for a majority of the existing employees. In my view, the transaction satisfies s. 36(3) of the *CCAA* and the *Soundair* test and should be approved.

[139] In *Beleave*, the RVO included releases of claims similar to that granted in other RVO decisions. These provisions were also consistent generally with sanction orders and are similar to the relief sought by Quest here.

[140] Even more recently, the Alberta court approved an RVO structure in the *CCAA* proceedings of *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.Q.B.). Justice Eidsvik approved the RVO structure as part of a sale approval. No written reasons of the court are available, however, the monitor's bench brief discloses the relevant facts.

[141] As in the above cases, the transaction addressed in *JMB Crushing* arose from a sale and investment solicitation process that yielded only one offer, with the RVO described as a critical component. The underlying intention was to preserve the value of the paid up capital and regulatory permits in the *CCAA* debtor.

[142] In *JMB Crushing*, the monitor relied on the orders granted in *Plasco Energy*, *Stornoway Diamond*, *Wayland Group* and *Beleave*, arguing that the RVO structure was justified in those circumstances:

> 24. In recent *CCAA* proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to "cleanse" the debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized reverse vesting orders to achieve such objectives.
>
> 25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same *CCAA* proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be "laying in the weeds"; and, (ii) allow the purchaser to make use of the debtor company's tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.

[143] In *JMB Crushing*, the monitor further justified the RVO structure in asserting that the debtor's secured creditors would suffer a shortfall even with such measures. The monitor stated that the unsecured creditors had no economic interest in the transaction and there was no reasonable prospect of any recovery to them. The debtor did not intend to undertake a claims process or present a plan to its unsecured creditors.

[144] By pure coincidence, another and perhaps more compelling authority came to the attention of the parties during this hearing.

[145] On November 11, 2020, the Québec Court of Appeal dismissed an application for leave to appeal the granting of an RVO by Gouin J. of the Québec Superior Court on October 15, 2020: *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218; leave to appeal denied *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488. The Court of Appeal's decision is in English; Gouin J.'s decision is in French and no English translation was available. As such, all references to *Nemaska Lithium* will be to the QCCA.

[146] All counsel agree that Gouin J.'s decision in *Nemaska Lithium* is the first time a Canadian court has granted an RVO in contested *CCAA* proceedings.

[147] In *Nemaska Lithium* (at para. 5), the court stated that the RVO allowed the purchaser to carry on the operations of the Nemaska Lithium entitles (mining in James Bay) by maintaining existing permits, licenses and authorizations. This goal was accomplished via a credit bid for the shares in Nemaska Lithium in return for assumption of the secured debt. At para. 22, the court refers to the intention of the "residual companies" to later present a plan of arrangement to the "remaining creditors", but the details are not disclosed.

[148] In denying leave to appeal in *Nemaska Lithium*, the court stated that an appeal would hinder the progress of the proceedings. More relevant to this application were the court's comments on the legitimacy of the position of the only objecting creditor, Cantore, and the court's rejection that it was appropriate to allow Cantore to exercise a veto in the restructuring:

> [38] As it turns out, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at $8,160 million out of a total value of provable claims of $200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors'' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?
>
> [39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in the first instance.

[149] Similar to Cantore's position in the *Nemaska Lithium* restructuring, Southern Star and Dana's objections to the RVO are grounded in the assertion it will negate their effective veto on the Plan (and hence the Primacorp transaction) by which they seek to leverage further concessions. For obvious reasons, those concessions can only come about at a cost to other stakeholders, whose interests remain to be addressed.

Discussion

[150] Quest, with the support of the Monitor, submits that the Primacorp transaction satisfies s. 36 of the *CCAA* and that the Court should grant the RVO pursuant to ss. 11 and 36 of the *CCAA*.

[151] As with the structures approved in the above *CCAA* proceedings, the RVO has certain aspects that Southern Star says are objectionable. Those include primarily: (i) the addition of Guardian as a petitioner in the *CCAA* proceeding; (ii) the vesting of the Excluded Liabilities and Excluded Contracts in Guardian; (iii) Quest's exit from this *CCAA* proceeding; and (iv) the release of Quest in respect of the Excluded Liabilities and Excluded Contracts.

[152] Essentially, unsecured claims against Quest and minor assets are transferred to Guardian and Quest continues as a going concern after having transferred the bulk of its assets to Primacorp free and clear of any encumbrances (save for certain Retained Liabilities). Quest no longer requires approval of the Plan by the creditors and the Court to complete the Primacorp transaction.

[153] At para. 19, the QCCA in *Nemaska Lithium* referred to Gouin J.'s comment that s. 36 of the *CCAA* allows the court a broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding. Justice Gouin considered that approving an RVO structure was such an innovative solution. Indeed, this is the history of *CCAA* jurisprudence under the court's broad statutory discretion and court approval of innovative solutions continues to this time.

[154] That said, the ability of a *CCAA* court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the *CCAA*: *Century Services*.

[155] I find further support for Quest's position in the recent comments of the Court in *Callidus.* The Court was there addressing a different issue – whether a *CCAA* judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is "acting for an improper purpose" – but the Court's comments on the exercise of jurisdiction under the *CCAA* ring true in relation to the RVO structure:

> [49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).
>
> [50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:
>
>> Good faith
>>
>> 18.6(1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>>
>> Good faith — powers of court
>>
>> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>>
>> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)
>
> . . .
>
> [65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, <u>*CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction</u>

a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

. . .

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). . . .

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

. . .

[70] . . . The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

. . .

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . *If the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute*.

> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))
>
> In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.
>
> [76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.
>
> [Underline emphasis added; italic emphasis in original.]

[156] Quest is not seeking to bar Southern Star or Dana from voting on the Plan. It is seeking approval of a structure that would result in Guardian submitting its own plan to the unsecured creditors, which would include Southern Star and Dana, at which time they are generally free to vote their "self-interest" subject to any relevant constraint (for example, if the court finds that they are voting for an improper purpose): *Callidus* at para. 24 and 56.

[157] There is no provision in the *CCAA* that prohibits an RVO structure. As is usually the case in *CCAA* matters, the court must ensure that any relief is "appropriate" in the circumstances and that all stakeholders are treated as fairly and reasonably "as the circumstances permit": *Century Services* at para. 70.

[158] As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. As was noted by Gouin J. in *Nemaska Lithium* (at para. 12), it is not up to the Court to dictate the terms and conditions that are included in an offer. Primacorp has presumably made the best offer that it is prepared to make in the circumstances – that is the offer the Court must consider.

[159] I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is

receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved.

[160] Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable “assets” that could be not transferred.

[161] Akin to the tax losses, permits and licences that could not be transferred in those RVO cases, is Quest’s ability to confer degrees under its statutory authority under s. 4(2) of the *Sea to Sky Act*, S.B.C. 2002, c. 54 (the "*Sea to Sky Act*"). Quest cannot sell its ability to grant degrees under s. 4(2) of the *Sea to Sky Act*. Nor can any purchaser acquire the right to grant degrees indirectly through a purchase of the shares in Quest. Pursuant to s. 2 of the *Sea to Sky Act*, Quest is a corporation “composed of the members of the board” and no shareholders exist. Pursuant to s. 1 of the *Sea to Sky Act*, the “board” means the board of governors of the university.

[162] It is a critical requirement under the Primacorp transaction that Quest remain a viable entity to continue its operations and, in particular, continue to grant degrees. That is a significant component of the Primacorp transaction and the value that Primacorp is prepared to pay under the transaction reflects that component. In other words, the stakeholders are receiving a benefit from this transaction by which Primacorp ensures that Quest continues after exiting these *CCAA* proceedings.

[163] At para. 38, the court in *Nemaska Lithium* asked:

> . . . whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

[164] I acknowledge the negative consequences that arise particularly for Southern Star if the Primacorp transaction is approved, although there is significant uncertainty about the extent of any loss that may be suffered. Dana’s unsecured claim has little, if any value, outside of the benefits of the Primacorp transaction.

[165] In that light, I would ask Southern Star and Dana a similar question to that of the QCCA—to what end is your veto if Quest's Plan is put presented for creditor approval?

[166] Both creditors potentially hold the sword of Damocles over the head of the significant broad stakeholder group who stand to benefit from the Primacorp transaction. Recently, Southern Star has secured further benefits by the withdrawal of two of the Disclaimers. Both objecting creditors have nothing to lose at this point in this dangerous game of chicken with Primacorp, with only the oversight of this Court to oversee this strategy. By any stretch, no one is blinking at this point, while significant other interests hang in the balance.

[167] The Monitor's comments in its Fifth Report as to the jeopardy to those other interests are apt:

> 2.15 The Monitor has considered the competing interests of Southern Star and the interests of Quest's other stakeholders. In the Monitor's view, the Primacorp Transaction should not be jeopardized by the lack of agreement between Southern Star and Primacorp. Southern Star can mitigate its financial hardship by entering into an agreement with Primacorp for use of some or all of the residences. By contrast, Quest's other stakeholders have no ability to mitigate their potential losses in the event that the Primacorp Transaction does not close. They are reliant on the completion of the Primacorp Transaction or face significant losses themselves should it not complete.

[168] In my view, in the vein of the Court's discussion in *Callidus*, these are unique and exceptional circumstances where the Court may grant the relief by allowing Quest to employ the RVO structure within the context of this sale transaction.

[169] Southern Star and Dana seek to effectively block the only reasonable outcome here by insisting that they must approve of Quest's Plan in conjunction with the sale. However, creditor approval of a sale is not required under s. 36 of the *CCAA*.

[170] The granting of the RVO in these circumstances is in accordance with the remedial purposes of the *CCAA*. To use the words of Dr. Sarra, quoted above in

Callidus, I conclude that Southern Star and Dana are working actively against the goals of the *CCAA* by their opposition to the RVO.

[171] I do not consider that an RVO structure would be generally employed or approved in a *CCAA* restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the *CCAA*.

[172] Here, in these complex and unique circumstances, I conclude that it is appropriate to exercise my discretion to allow the RVO structure. Quest seeks this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. I have considered the balance between the competing interests at play. This transaction is unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group, a group that includes Southern Star and Dana.

[173] The structure also allows Quest to continue its operations in partnership with Primacorp, a result that will avoid the devastating social and economic consequences that will be visited upon the stakeholders if this transaction is not approved. Ironically, the continuation of Quest's operations will also benefit Southern Star in the future through the continued payment of rent for two of the Residences. Other potential benefits may also arise if Southern Star and Quest are later able to come to terms once the pandemic has receded and students return to campus.

THE PRIMACORP TRANSACTION

[174] Quest applies for the granting of the RVO in favour of Primacorp pursuant to s. 36(1) of the *CCAA*.

[175] Section 36(1) of the CCAA allows the court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) of the *CCAA* lists the relevant non-exhaustive factors to be considered:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[176] The well-known considerations identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are consistent with and overlap many of the s. 36(3) factors: see *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at para. 25, referring to various authorities such as *Canwest Publishing Inc. (Re)*, 2010 ONSC 2870 at para. 13. Those considerations include: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and, (iv) whether there has been any unfairness in the sales process.

[177] More generally, in analyzing whether a transaction should be approved, taking into consideration the s. 36(3) and *Soundair* factors, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable: *Veris Gold* at para. 23.

[178] I conclude that the s. 36(3) and *Soundair* factors all favour approving the Primacorp transaction and granting the RVO. Specifically:

a) The process leading to the Primacorp transaction has been lengthy and exhaustive. The Monitor has overseen that entire process;

b) Quest ‘s Restructuring committee and its Board of Governors have sought and obtained professional advice throughout the *CCAA* process toward finding a suitable academic partner and/or a purchaser/developer for Quest’s lands;

c) No stakeholder objects to the proposition that the sales process was conducted in an appropriate, fair and reasonable manner;

d) The Primacorp transaction will see the repayment of Quest’s secured creditors, now totalling approximately $42.2 million in what has been an increasingly pressurized environment to do so after long standing defaults;

e) Since August 7, 2020, the Interim Lender and VF, Quest’s major secured creditors, have been kept apprised of developments. They both support the Primacorp transaction. In addition, other secured creditors have been involved throughout these proceedings and support the transaction;

f) There has been significant community and stakeholder involvement throughout the sales process;

g) The Primacorp transaction will ensure that Quest continues as a going concern, by continuing operations as a post-secondary institution in Squamish. This will result in continuing benefits to the broad stakeholder group. This includes faculty, staff, students, secured and unsecured creditors, suppliers, landlords and the community generally;

h) The broader stakeholder interests must be balanced against those who will be negatively affected by the transaction, such as Southern Star under the Disclaimers, although no viable offer has emerged that does not include the Disclaimers;

i) Quest's Board of Governors have exercised their business judgment and determined that the Primacorp transaction is the best option to fulfil the goals of Quest's restructuring;

j) The Primacorp transaction will fund a Plan for unsecured creditors;

k) The Primacorp transaction provides Quest with significant benefits in terms of its future operations. These include the $20 million working capital facility and Primacorp support for Quest's marketing, recruiting and operations to allow it to continue as a post-secondary institution into the future;

l) No other or better offer or proposal has emerged that can be considered superior to the Primacorp transaction;

m) The Monitor is satisfied that the consideration to be received from Primacorp is reasonable and fair, taking into account the market value of the assets and the other unique factors of these proceedings;

n) The Monitor is of the view that this transaction will yield a greater benefit to the stakeholders than might be achieved in a liquidation or bankruptcy;

o) Any delay of approval is likely to lead to ruinous consequences after December 2020, when Quest will be out of funds and the Interim Lender will be in a position to commence a receivership and liquidation of Quest's assets; and

p) Simply, Quest has run out of time to find a restructuring solution and the Primacorp transaction presently stands as the *only* viable option to avoid the devastating social and economic consequences to its stakeholders if a liquidation results.

CONCLUSIONS

[179] I grant the RVO as sought by Quest, and as supported by the Monitor.

[180] The Primacorp transaction is the best option available that maximizes recovery for Quest’s creditors and preserves Quest’s university operations. Allowing Quest to continue as a university will benefit all stakeholders, including Quest’s current and former employees, current and future students of Quest and the community generally. The RVO structure is an appropriate means to accomplish this result in these unique and exceptional circumstances.

“Fitzpatrick J.”

TAB 15

CITATION: Target Canada Co. (Re), 2015 ONSC 1028
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-02-18

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, John MacDonald* and *Shawn Irving*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

William Sasso, *Sharon Strosberg* and *Jacqueline Horvat*, Proposed Representative Counsel for the Pharmacy Franchisee Association of Canada

Susan Philpott, Employee Representative Counsel for employees of the Applicants

Alan Mark, *Melaney Wagner*, *Graham Smith* and *Francy Kussner*, for the Monitor, Alvarez & Marsal Inc.

J. Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC

Andrew Hodhod, for Bell Canada

Harvey Chaiton, for the Directors and Officers

HEARD: February 11, 2015

RELEASED: February 18, 2015

ENDORSEMENT

[1] The Pharmacy Franchisee Association of Canada ("PFAC") brought this motion for the following relief:

a. appointing PFAC as the representative of the Pharmacists and Franchisees (collectively, the "Pharmacists") under the Pharmacy Franchise Agreements ("Franchise Agreements");

b. appointing Sutts, Strosberg LLP as the Pharmacists' Representative Counsel (the "Representative Counsel");

c. appointing BDO Canada ("BDO") as the Pharmacists' financial advisor;

d. directing that the Pharmacists' reasonable legal and other professional expenses be paid from the estate of the Target Canada Entities with appropriate administrative charges to secure payment;

e. directing that the "Disclaimer of Franchise Agreements" dated January 26, 2015 by the Franchisor, Target Pharmacy Franchising LP ("Target Pharmacy") be set aside;

f. declaring that the Franchise Agreements and/or related agreements may not be disclaimed without court order; and

g. directing that Target Pharmacy cannot deny the Pharmacists access to premises, discontinue supplies or otherwise interfere with a Pharmacist's operations without that Pharmacist's consent or a court order.

[2] On January 26, 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements and related agreements to each of the Pharmacists operating the pharmacies at 93 locations across Canada (outside Quebec), seeking to shut down these pharmacies in the Target Canada store locations within 30 days.

[3] The Pharmacists ask the court to deny Target Pharmacy's Disclaimer of the Franchise Agreements because (i) the Disclaimers will not enhance the prospects of a viable arrangement being made; and (ii) the Pharmacists will suffer significant financial hardship as a consequence of the disclaimer, with insolvency and/or bankruptcy awaiting many of them.

[4] Under the proposed wind-down, Target Pharmacy is not responsible for pharmacy shut-down costs. Instead, the Pharmacists are responsible for (i) the payment of salaries, severance pay and other obligations to their own employees, suppliers and contractors; (ii) the relocation costs of their pharmacies; and (iii) the continuation of services to their patients in accordance with professional standards.

[5] The Pharmacists recognize that they face numerous challenges as a result of Target store closures. In relocating, or winding-down pharmacy operations, the Pharmacists are required to comply with applicable legislation, regulations and standards governing the conduct of pharmacists in Canada, including such matters as: notice of pharmacy closure; notice of intention to open a new pharmacy; the safe-guarding of personal health records; providing notice to patients respecting their personal health information; and safeguarding and disposing of narcotics and controlled substances.

[6] The Pharmacists seem to accept that when a Target store closes, the pharmacy within that store will also close. They state that they require "breathing space" that may be afforded to them by an order that the Franchise Agreements are not to be disclaimed at this time. They ask the court to direct Target Pharmacy and its Affiliates not to deny them access to their licenced space or otherwise interfere with the Pharmacist's operations without the consent of or on terms directed by the court. Practically speaking, the Pharmacists want to postpone the effect of the disclaimer in the hope of obtaining a continuation of support payments from Target Canada for an unspecified time.

[7] There is no doubt that the closure or pending closure of Target Canada is causing and will cause significant dislocation for a number of parties. For the most part, Target Employees will lose their jobs. Representative Counsel have been appointed to assist employees in a process that includes an Employee Trust.

[8] The closure of Target Canada also impacts suppliers to Target, especially sole suppliers. The insolvency of Target Canada and its filing under the *Companies' Creditors Arrangement Act* (CCAA) has no doubt resulted in Target defaulting on a number of contractual relationships. These suppliers will have claims against Target Canada that will be filed in due course.

[9] The closure of Target Canada also affects the Pharmacists. The insolvency of Target and its filing under the CCAA has resulted in Target defaulting on its contractual relationships with the Pharmacists. Target wishes to disclaim the Franchise Agreements. The Monitor approved the proposed disclaimer and, as noted, disclaimer notices were sent on January 26, 2015.

[10] The Pharmacists are challenging the disclaimer and seek an order under s. 32(2) of the CCAA that the Franchise Agreements not be disclaimed. Section 32(4) of the CCAA references a section 32(2) order and provides:

> **Factors to be considered** – In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[11] The reality that the Target stores will be closing provides, in my view, the starting point to analyze the issue being brought forward by the Pharmacists.

[12] Following the closing of a particular Target Store, it is unrealistic for the Pharmacist to carry on the operation of the pharmacy. As noted by counsel to the Applicants, as soon as operations cease at a particular location, the store will "go dark" and there will no longer be employee or security support that would permit the Franchisees to continue to operate. Further, counsel to the Applicants submits it would not be either commercially reasonable or practical for the Franchisees to continue to operate in a closed store, nor would it be reasonable or in the interests of stakeholders to require these locations to remain open in order to serve the interests of the Franchisees.

[13] It is in this context that the issue of the disclaimer has to be considered.

[14] Counsel to the Pharmacists seem to appreciate the reality of the situation, as reflected in the following references in their factum.

> 49. It is cold comfort for the Pharmacists to be advised that their losses in relation to the disclaimer of the Franchise Agreement are provable claims in the CCAA proceedings. The Pharmacists must pay their employees now. It is problematic that a provable claim may result in the possible recovery of some part of those payments, at a future uncertain date, if the funds are available in the Target Pharmacy Estate.
>
> 50. Evidence that simply provides that a debtor company will be more profitable with the disclaimer contracts is insufficient. Setting aside the disclaimers in this case will provide the Pharmacists with flexibility and time to make informed decisions and carry out their own relocation and/or wind-down in a manner that causes the least amount of damages to themselves and those who depend on them. …
>
> 53. Respectfully, such disclaimer should not be permitted until the court receives an independent report of the circumstances of each of the Pharmacists and directs the orderly wind-down and/or relocation of such operations on terms that are fair and reasonable. …
>
> 55. In no respect is the 30-day termination of the Franchise Agreements fair, reasonable and equitable to the Pharmacists, their employees and the public they serve. For many Pharmacists, it minimizes their capacity to relocate, [and] will leave them without funds to pay their employees, or the capacity to meet their ongoing obligations to their patients.

[15] It seems to me, having considered these submissions, that the Pharmacists recognize that it is inevitable that the pharmacies will be shut down.

[16] With respect to the factors to be considered as set out in s. 32(4), the disclaimer notices were approved by the Monitor. The Pharmacists complain that no reasons were provided in the notice approved by the Monitor. However, there is no requirement in s. 32(1) for the Monitor to provide reasons for its approval. This is reflected in Form 4 – Notice by Debtor Company to Disclaim or Resiliate an Agreement.

[17] However, the absence of reasons does not lead necessarily to the conclusion that the Monitor did not consider certain factors prior to providing its approval.

[18] The Monitor has made reference to the issues affecting the pharmacies in its Reports.

[19] The pharmacies were specifically the subject of comment in the Monitor's First Report at sections 8.2 – 8.5, and in the Second Report at section 6. Section 6.1 (h) of the Second Report specifically comments on the disclaimer notices. A summary of the reasons is provided at section 6.2.

[20] The information contained in the Monitor's reports establishes that there was communication as between Target Canada, the Monitor and the Franchisees such that it was clear that the stores were being closed. Specific reference to the communication is set out in the Monitor's Report at section 6.1(f), which in turn references the second Wong affidavit, filed by the Applicants.

[21] I am satisfied that the Monitor considered a number of relevant factors prior to approving the disclaimer notices.

[22] With respect to the second factor to be considered, namely whether the disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company, the Applicants have indicated they may be filing a plan of arrangement. I note that a plan may be required to ensure an orderly distribution of assets to the creditors.

[23] The Applicants seek to achieve an orderly wind-down and maximization of realizations to the benefit of all unsecured creditors. It seems to me that if the disclaimers are set aside it would delay this process because it would extend the time period for Target Canada to make payments to one group of creditors (the Pharmacists) to the detriment of the creditors generally. Further, in the absence of an effective disclaimer, the Target Entities will continue to incur significant ongoing administrative costs which would be detrimental to the estate and all stakeholders.

[24] The interests of all creditors must be taken into account. In this case, store closures and liquidation are inevitable. The Applicants should focus on an asset realization and a maximization of return to creditors on a timely basis. Setting aside the disclaimer might provide limited assistance to the Pharmacists, but it would come at the expense of other creditors. This is not a desirable outcome. I expressed similar views in *Timminco Ltd.*, *Re*, 2012 ONSC 4471 at paragraph 62 as follows:

> [62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[25] I am satisfied that the disclaimer will be beneficial to the creditors generally because it will enable the Applicants to move forward with their liquidation plan without a further delay to accommodate the Pharmacists.

[26] The third factor is whether the disclaimer would likely cause significant financial hardship to a party to the agreement. This factor is addressed by Counsel to the Monitor at paragraph 27 of its factum.

> 27. On its own terms the CCAA effectively imposes a high threshold, beyond economic or financial loss, for the consideration under section 32(4): there must be evidence of financial *hardship*, it must be *significant* financial hardship, and it must be *likely* to be caused by the disclaimer. Financial loss or damage, without more, is not sufficient, in the Monitor's submission. It appears that Section 32 itself recognizes the distinction, providing expressly in ss. 32(7) that where a party suffers "a loss" in relation to the disclaimer the consequence is that such party "is considered to have a provable claim." (emphasis in original)

[27] In these circumstances, the pharmacies will inevitably close in the very near future whether or not the Franchise Agreements are disclaimed. I accept the submission of counsel to the Monitor to the effect that no Franchisee has adduced evidence that disallowing the Disclaimer and continuing to operate in otherwise dark, vacated premises would improve its financial circumstances.

[28] The situation facing the Pharmacists is not pleasant. However, in my view, setting aside the disclaimer will not improve their situation. Extending the time before the disclaimers take effect has the consequence of requiring Target Canada to allocate additional assets to the Pharmacists in priority to other unsecured creditors. This is not a desirable outcome.

[29] The Target Canada Entities, in consultation and with the support of the Monitor, have offered a degree of accommodation to the Pharmacists. The details are set out at paragraphs 64-66 of the affidavit of Mark Wong sworn February 16, 2015:

> 64. As outlined above, in consultation with and with the support of the Monitor, on February 9, 2015 the Target Canada Entities' legal advisors delivered an accommodation to PFAC's counsel intended to address the primary concern expressed by PFAC, namely that franchisees require additional time to transfer patient files and drug inventory and to relocate their respective pharmacy

> businesses. Under the terms of the accommodation, TCC will permit the pharmacists to continue to operate at their respective existing TCC locations until the earlier of March 30, 2015 and three days following written notice by TCC to the pharmacist of the anticipated store closure at such pharmacist's location. The accommodation provides that the Notices of Disclaimer will continue in effect and the franchise agreements will be disclaimed on February 25, 2015, but the pharmacists will be entitled to remain on the premises for an additional period of time.
>
> 64. Under the terms of the accommodation, pharmacists will be able to continue operating in TCC stores for longer than the 30-day period contemplated. Depending on the date the Agent decides to vacate certain TCC stores, many pharmacists may be able to continue operating for 60 days or more following delivery of the Notices of Disclaimer and approximately 75 days following the date of the Initial Order. As I described above, at any time after the third anniversary of the opening date of the pharmacy, TCC Pharmacy would have the right to terminate the franchise agreement for any reason on 60 days' notice.
>
> 66. The March 30, 2015 date indicated in the accommodation made by Target Canada Entities is intended to be a reasonable compromise whereby pharmacist franchisees will get additional time to transfer patient files and inventory and relocate their businesses, while at the same time permitting the Target Canada Entities to undertake the orderly wind down of TCC pharmacy operations and the TCC retail stores as a whole. As I described above, in order to accommodate the continued operations of the pharmacies during the wind down process, TCC Pharmacy and TCC have not yet delivered notices of disclaimer to a number of third-party providers such as McKesson, Kroll and others, which TCC Pharmacy has maintained at considerable cost. The March 30, 2015 outside date for the operation of all TCC pharmacies will allow TCC Pharmacy to time the delivery of disclaimer notices to these third-party providers so as to avoid incurring additional unnecessary costs. The certainty provided by the firm outside date is also to the benefit of the pharmacies themselves, each of whom will be required to win down their operations and make alternate arrangements in the very short term as a result of the imminent closures of TCC retail stores.

[30] In the circumstances of this case, this accommodation represents, in my view, a constructive, practical and equitable approach to address a difficult issue.

[31] Having considered the factors set out in section 32(4) of the CCAA, the motion of PFAC for a direction that the disclaimer of the Franchise Agreements be set aside is dismissed, together with ancilliary relief related to the disclaimers. It is not necessary to address the standing issue raised by the Monitor.

[32] I turn now to the request of PFAC that it be appointed representative of the Franchisees and that Sutts, Strosberg LLP be appointed as the Pharmacists' Representative Counsel, and BDO as the Pharmacists' financial advisor.

[33] In view of my decision relating to the disclaimers, the scope of legal and financial services required by the Pharmacists may be limited. However, there are many transitional issues that remain to be addressed. First and foremost is dealing with the patient records and ensuring uninterrupted delivery of prescription drugs to all such patients. There is also interaction required between Target Pharmacy, the Franchisees, and the regulators, concerning the relocation or shut down of pharmacies and the return of certain products to suppliers. This is not a simple case where the Franchisee receiving the disclaimer notice can simply walk away from the scene. From a professional and regulatory standpoint, they still have to participate in the process.

[34] In addressing these transition issues and recognizing that similar circumstances exist for the Franchisees, there would appear to be some benefit in having a limited form of representation for the Franchisees. This would assist in ensuring that a consistent approach is followed not only in the wind-down or relocation aspect of the process, but also in the claims process. In my view, the estate could benefit if this process was coordinated.

[35] The Monitor and the Applicants would have a single point of contact which would likely result in a reduction in administrative time and costs during the liquidation and the claims process. I am satisfied that PFAC has the support of the majority of franchisees. PFAC is appointed as the Representative of the Pharmacists. Sutts, Strosberg LLP is appointed Representative Counsel and BDO is appointed as the Pharmacists financial advisor.

[36] The funding of this representational role is to be limited. The Applicants are to make available up to $100,000, inclusive of disbursements and HST, to PFAC to be used for legal and financial advisory services to be provided by Sutts, Strosberg, as Representative Counsel and BDO as financial advisor in these proceedings. PFAC can provide copies of invoices to the Monitor, who can arrange for payment of same. Any surplus funds at the conclusion of the representation are to be returned to the Applicants. The contribution to PFAC can be used only to cover legal and financial advisory services provided to date in these proceedings as well as to assist on the going forward matters, subject to the following parameters.

[37] Such assistance is to be limited to:

a. corresponding with the regulators concerning the wind-down process and the relocation process;

b. return of inventory; and

c. participating in the claims process.

[38] If the individual franchisees decide not to participate in PFAC, they should not expect any further accommodation in a financial sense.

[39] In arriving at this accommodation, I have taken into account that this limited funding will provide benefits to the Applicants under CCAA protection insofar as the legal and financial advisory services provided by Representative Counsel and BDO should reduce the overall administrative cost to the estate and will avoid a multiplicity of legal retainers. The representation and funding will also benefit the franchisees so that they can effectively shut-down or relocate their business and prepare any resulting claim in the CCAA proceedings.

[40] Given the limited nature of the Applicants' financial contribution, an administrative charge is not, in my view, required.

[41] In the result, PFAC's motion for representation status is granted, with limitations set out above. The motion in respect of the disclaimers is dismissed.

R.S.J. Geoffrey Morawetz

Date: February 18, 2015

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT* ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **LAURENTIAN UNIVERSITY OF SUDBURY**

Court of Appeal File No. M52471

COURT OF APPEAL FOR ONTARIO

BOOK OF AUTHORITIES OF
THE RESPONDING PARTY,
LAURENTIAN UNIVERSITY OF SUDBURY

(Motion for Leave to Appeal Disclaimer Order)

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