Consolidated Court File No. 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3 AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION
TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

BRIEF OF AUTHORITIES OF THE APPLICANTS

June 18, 2021

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TAB 1

Citation: Abou-Rached (In Bankruptcy) 2002 BCSC 1022

Date: 20020708
Docket: 219307VA01
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY

IN THE MATTER OF THE PROPOSAL OF

ROGER GEORGES ABOU-RACHED

Docket: 219301VA01
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY

IN THE MATTER OF THE PROPOSAL OF

R.A.R. INVESTMENTS LTD.

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE ROSS

Appearing in person for the Trustee, Campbell Saunders Ltd.	David A. Gray, M. Nielsen
Counsel for Genesee Enterprises Ltd.	Bruce E. McLeod

Counsel for Jean de Grasse, Robert de Grasse, Andre de Grasse, Claire de Grasse, Frank de Grasse, Eric Boulton, D'Arcy Boulton, Gurdrun Kate Parkes, Kenneth James Parkes, Michael A. Parkes, Greg Findlay, Susan Findlay, Phil Argue, Glenn Morris and Four Weal Ventures Ltd.	Alan E. Keats
Counsel for Roger Abou-Rached & R.A.R. Investments Ltd.	Andrew G. Sandilands
Counsel for Stanley Rodham Investments Ltd., Randers International Ltd., Rosebar Enterprises Limited, Sirmac International Ltd., Veda Consult S.A., Yarold Trading Ltd.	Jennifer L. Harry
Counsel for Georges Abou-Rached, Hilda Abou-Rached, RAR Consulting Ltd., Garmeco Canada International Consulting Engineers Ltd.	Heather M. Ferris
Dates and Place of Hearing:	April 9 to 11, 2002 April 24 to 26, 2002 Vancouver, B.C.

I Introduction

[1] This was a hearing to deal with several matters in relation to two proposals filed under the ***Bankruptcy and Insolvency Act***, RSC 1985 c. B-3 (the "***Act***").

[2] The parties are:

(a) the Trustee, Campbell Saunders Ltd.;

(b) Mr. Abou-Rached and RAR Investments Ltd. ("RAR") who each filed a proposal;

(C) two groups of creditors supporting the proposals:

(i) Stanley Rodham Investments ("SRI"), Randers International Ltd., Rosebar Enterprises Ltd., Sirmac International Ltd., Veda Consult S.A., and Yarold Trading Ltd.; and

(ii) RAR Consulting Ltd. ("RARC"), Garmeco Canada International Consulting Engineers Ltd., Georges Abou-Rached, and Hilda Abou-Rached;

(d) two creditors who are in opposition to the proposal:

(i) Genesee Enterprises Ltd., a judgment creditor ("Genesee"); and

(ii) Jean de Grasse, Robert de Grasse, Andre de Grasse, Claire de Grasse, Frank de Grasse, Eric Boulton, D'Arcy Boulton, Gurdrun Kate Parkes, Kenneth James Parkes, Michael A. Parkes, Greg Findlay, Susan Findlay, Phil Argue, Glenn Morris and Four Weal Ventures Ltd., defendants by counterclaim in litigation involving Genesee as plaintiff (the "Defendants by Counterclaim")

(collectively the "dissenting creditors".)

[3] The matters are:

(a) appeals by the dissenting creditors from the decision of the Trustee to permit certain creditors to vote at the meeting of creditors;

(b) applications for court approval of the Proposals. These are opposed by the dissenting creditors on the grounds that the Proposals do not meet the criteria under s. 59 of the ***Act*** and that facts under s. 173 of the ***Act*** are present;

(c) an application by the dissenting creditors for orders for the cross-examination of several individuals.

[4] On the basis of the reasons that follow, I have approved the Proposals and dismissed the balance of the relief sought.

II BACKGROUND

[5] Mr. Roger Abou-Rached was born in Beirut, Lebanon in 1951. He is an engineer who received his training at the American University in Beirut and at Stanford University in California.

[6] Mr. Abou-Rached's father, George Abou-Rached, is a prominent engineer. He held the position of Dean and Professor of Engineering at the American University in Beirut. In addition, he was involved in engineering projects in the Middle East, Asia and Africa through his company Garmeco International Consultants Ltd. ("Garmeco").

[7] Garmeco employed Roger Abou-Rached as an engineer, at first, in Lebanon. His employment later continued in Canada when the family fled the Lebanese civil war in 1989 and immigrated to this country.

[8] During the time that he was employed by Garmeco, Roger Abou-Rached developed a new construction technology (the "Technology"). The Technology is said to employ "a special reinforced concrete/pre-formed rigid insulation/cold formed metals method of construction" that utilized built-in,

rectangular, hollow, metal section tubing as panel framing members. The system is said to be extremely flexible with respect to the type and quality of interior and exterior finish. It provides greater safety, energy efficiency, sound insulation and resistance to insect infestation. The system is also said to provide an environmentally sound building method potentially using recycled ferrous, plastics and organic fibers.

[9] Mr. Abou-Rached acquired the rights to the Technology from Garmeco. Over the next several years a number of corporate entities became involved in the development. There were, in addition, a series of transactions, which are characterized by Mr. Abou-Rached and the creditors supporting the Proposals as being in relation to continuing efforts to raise funds in pursuit of that development. These transactions were primarily with SRI, an investment group in Europe, several private investors, as well as members of Mr. Abou-Rached's family and related companies.

[10] Mr. Abou-Rached has stated that in excess of $20,000,000 has been invested in the development of the Technology, primarily by SRI, his family and related companies. He stated that in order to obtain these funds, he executed guarantees

and transferred and pledged shares in his companies to the investors.

[11] The transactions are characterized by the dissenting creditors as collusive efforts to prejudice them. In the background and at the root of the issue is litigation between Mr. Abou-Rached and these dissenting creditors, the judgment of which is reported at ***Genesee Enterprises Ltd. v. Abou-Rached***, 2001 BCSC 59 (the "Litigation").

[12] The principal entities in respect of the development of the Technology are described in the Trustee's Report and the reasons of Justice Levine in the Litigation. Mr. Abou-Rached incorporated four companies, holding 100% of the shares of each at the outset. These companies were:

(a) RARC,

(b) R.A.R. International Assets Inc. ("RARI"),

(c) Canadian High-Tech Manufacturing Ltd ("CHT"), and

(d) RAR.

[13] Roger Abou-Rached obtained the rights to the Technology from Garmeco pursuant to an Assignment of Technology effective September 11, 1990 and executed on August 31, 1993. The purchase price was $5,000,000 US. There was a written and executed promissory note from Mr. Abou-Rached in the amount of

$5,000,000 US in favour of Garmeco dated September 12, 1990. In addition, there was an agreement that provided that the debt was to be repaid on a pro-rated basis from net cash flow from dividends paid by CHT to Roger Abou-Rached.

[14] Effective April 1991, by agreement executed August 31, 1993, Mr. Abou-Rached assigned the absolute rights in the Technology to RARC. RARC granted a licence to CHT for the use of the Technology in Canada and a right of first refusal for its use in any other territory in the world.

[15] In May 1993, Roger Abou-Rached transferred 65% of his shares in CHT to a publicly traded company, International Hi-Tech Industries Ltd. (“IHI”) and acquired control of IHI in a “reverse take over” on the Vancouver Stock Exchange. CHT transferred the rights to the Technology in Canada to IHI. IHI is currently developing and marketing the Technology.

[16] In 1990 and 1991, a number of individuals had made investments in various instruments related to CHT. These individuals were either members of the de Grasse family or introduced to Mr. Abou-Rached by the de Grasse family. In late 1991, Jean de Grasse, Robert de Grasse and Mr. Abou-Rached discussed a mechanism by which these investors could convert their investments into equity in CHT. It was substantially agreed that one entity, Genesee, would hold in

trust all of the CHT shares issued to these investors. RAR had an option to buy, on notice given by CHT before November 1, 1996, any or all of the CHT shares held by Genesee for a purchase price calculated according to a formula, payable at Genesee's option, in cash or shares in IHI. This agreement was finally executed in mid-1992 (the "Genesee Agreement").

[17] In late 1993 several individuals who were parties to the Genesee Agreement requested conversion of their shares of CHT pursuant to that agreement. They were informed that the requests could not be honoured because the requests, pursuant to the Agreement, had to be made by Genesee.

[18] Jean de Grasse, as President of Genesee, then gave notice of conversion on their behalf. That notice in turn was refused because it had not been approved by Genesee's Board of Directors.

[19] The Board met, but the requests for conversion were not approved because of a deadlock on the Board. One director, Michael Stephenson, a director of both Genesee and IHI, and on behalf of Hang Guong, the fourth director, refused to approve the conversions.

[20] In the result, an action was commenced in which a claim of oppression and conflict of interest was advanced. In ***De***

Grasse v. Stephenson (9 June 1995), Vancouver A943129 (B.C.S.C.) (the “Petition”), Mr. Stephenson was found to be in a conflict of interest. Genesee was ordered to give notice of the requests for conversion. The requests were issued on July 7, 1995.

[21] The requests were not honoured. Mr. Abou-Rached and RAR claimed that the Genesee Agreement did not provide for the conversion right claimed. The Litigation was commenced. In addition to raising several defences with respect to the Genesee Agreement, the defendants claimed that the Agreement should be rescinded on the basis of fraudulent misrepresentation. Claims of conspiracy and breach of fiduciary duty were also raised by the defendants.

[22] The individuals who had sought conversion through Genesee, the Defendants by Counterclaim, were named in a counterclaim which repeated the allegations raised in the defence.

[23] In June 1995, RARC granted a licence agreement for the international rights to the Technology, excluding Canada, to IHI International Holdings Ltd. (“IHIL”). IHIL is owned 51% by IHI and 49% by Mr. Abou-Rached’s family.

[24] Judgment in the Litigation was pronounced January 9, 2001. The plaintiff, Genesee, was awarded damages of $982,746.94 plus interest. The counterclaim was dismissed. In supplementary reasons for judgment, reported at 2001 BCSC 1172, Justice Levine awarded the plaintiff and the Defendants by Counterclaim special costs.

[25] Following the pronouncement of the reasons for judgment SRI, one of the major creditors of Mr. Abou-Rached and RAR, issued a demand. Mr. Abou-Rached and RAR each then filed a Notice of Intention to File a Proposal, as they were unable to meet their financial obligations as they became due. Mr. Abou-Rached and RAR, after obtaining two extensions from the court, ultimately filed the Proposals on January 7, 2002.

[26] Campbell Saunders Ltd. is the Trustee under the Proposals.

[27] The Proposals were summarized by the Trustee as follows

> ***Option A***
>
> a) An amount totaling $150,000 CDN, to be provided by SRI ($75,000) and the Debtor's parents or other family members ("the family") ($75,000);
>
> b) Common shares in the capital of IHI having a market value of $150,000 as at the date of the initial bankruptcy event, to be provided by SRI ($75,000) and the family ($75,000); and

c) (a) and (b) above are to be delivered to the Trustee no later than 31 days following Court approval.

The shares will be issued in or transferred in the name of the Creditor(s), to be held and distributed by an Authorized Representative agreed upon by the Creditor(s).

The Debtor also agrees that for a period of two years from the date of Court Approval, he shall deliver to the Trustee:

- 5% of any common shares, warrants, options or escrow shares he may receive from or in the capital of IHI; or

- anytime after 120 days following Court approval of the Proposal, provide $100,000 CDN in cash; or

- that number of common shares in the capital of IHI equal to $100,000 CDN.

The future shares delivered to the Trustee shall be issued in the name of the Authorized Representative in trust for the Creditors.

The Authorized Representative shall not sell the common shares and/or future shares at a rate exceeding 2% of the original total number of common shares and/or future shares each day.

Option B

The claim of the Creditors who elect this Option will survive for seven (7) years (or as agreed to by the Debtor and the Creditors).

The Creditors will be entitled to accrue or charge a maximum of 2% interest per annum to the amount of their claim.

With the exception of 2,600,000 stock options in the capital of IHI and 21,684,958 common shares held in escrow in the capital of IHI that are held in the name of Mira Mar Overseas Ltd. and all rights or entitlement accruing in relation thereto (the

"Existing Encumbered Shares"), the Debtor shall for a period not exceeding seven years (or such other period of time as may hereafter be agreed to by the Debtor and the Creditors who elect to Option B of the Proposal) from the date of filing of the initial bankruptcy event, pledge and deliver to the Trustee 30% of any options, warrants, common or preferred shares whether held in escrow or not that the Debtor may receive or be entitled to receive in the capital of IHI from and after the date of the initial bankruptcy event (hereinafter any future right to receive options, warrants, common or preferred shares, whether held in escrow or not shall collectively be referred to as the "Option B Future Shares"). For greater certainty, the Option B Future Shares do not include the existing encumbered shares.

The Option B Future Shares shall be issued in the name of the Authorized Representative in trust for the Creditors and delivered to the Trustee within 30 days of receipt or soon thereafter as may be reasonable.

The Trustee shall forward to the Authorized Representative and the Authorized Representative shall not sell the shares at a rate greater than 2,000 common shares each trading day.

The Authorized Representative shall sell the shares upon receipt of written instructions delivered to it by the Creditors.

If the Creditors' claims are not paid by the last day of the seventh year (or such other period of time as may be agreed to by the Debtor and Creditors), such claim shall be released and shall not be recoverable.

Prior to the Creditors' Meeting, the Debtor will obtain from SRI and the Family irrevocable direction agreeing that they will elect to participate in Option B and waive or release any right or entitlement of the Option A Future Shares that they may have pursuant to any security given by the Debtor prior to the initial bankruptcy event.

> The Debtor will only be obligated to deliver the Option B Future Shares to the Trustee to the extent necessary to repay in full the claims of those creditors who elect Option B.
>
> The Debtor can at any time deliver to the Trustee the sum of money or number of shares in the capital of IHI necessary to repay in full the claims of the Creditors.
>
> Upon delivery the Debtor shall be released and proved discharges.

[28] In the course of these proceedings the Proposals were amended as follows:

- All creditors, except credit cards, banks, Canada Customs and Revenue Agency, and contingent creditors, have agreed to accept Proposal Option B;
- Within 30 days of Court Approval, the Proposal will provide that the Trustee will receive $150,000 cash;
- Within 30 days of Court Approval, the Proposal will provide that the Trustee will receive the shares as stated in Paragraph 15 of the Proposal. Should the Trustee be unable to realize a total of $150,000 within 90 days of Court Approval, the Proposal will provide that the Trustee will receive the additional funds in cash;
- Within 90 days of Court Approval, the Proposal will provide that the Trustee will receive shares to a value of $100,000 and should the Trustee be unable to realize a total of $100,000 within 150 days of Court Approval, the Proposal will provide that the Trustee will receive the additional funds in cash;
- The retainer held by the Trustee in the amount of $27,500, will be applied to the Trustee's fees and Mr. Rached's parents, who provided the

> retainer, will have no claim in the estate for that amount.

[29] The Trustee estimates that, with the amendment, the creditors in Option A will realize at least 15 cents on the dollar for their claims.

[30] The Trustee recommended the Proposals, stating:

> According to the Statement of Affairs, there are no unencumbered assets that would be available to the unsecured creditors in a Bankruptcy scenario. The amount of excess income that would be available is minimal and, in all likelihood, would be less than the Trustee's fees and disbursements.
>
> The only potential recovery available to the Estate would require the voiding of the various transfers, sales and pledges described herein. As indicated in this report, this would require further investigation and, in all likelihood, expensive litigation. The cost of this process would be great and beyond the availability of funds from tangible assets. Any effort in this regard would therefore require funding by the Creditors and there is no certainty that the required funding would be forthcoming. Finally, the conclusion of further investigation may be that all of the transactions are bona fide and for fair consideration.
>
> Accordingly, at this time we are unable to estimate with any degree of certainty the estimated realization in a Bankruptcy scenario. The terms of the Proposal, on the other hand, offer the creditors certainty as to recovery with the right to elect the potential recovery of all of their claims (under Option B) or a portion of their claims (under Option A).

In fact, the situation at the outset of the hearing and prior to the amendment was that recovery under the Proposals would have been in the order of 4 or 5 cents on the dollar.

[31] The meeting of creditors was held on January 28, 2002. In the Proposal of Roger Georges Abou-Rached, the following was the result of the creditors' vote:

For:	48	$13,198,794.64	87.78%
Against:	2	$ 1,837,369.98	12.22%
		$15,036,164.62	

In the Proposal of R.A.R. Investments Ltd., the following was the result of the creditors' vote:

For:	48	$11,542,876.46	86.26%
Against:	2	$ 1,837,369.98	13.74%
		$13,380,846.44	

[32] Creditors Genesee and the Defendants by Counterclaim voted against the Proposals. Their claims were with respect to the judgment arising from the litigation and the award of special costs.

[33] Following the meeting of creditors, a series of appeals were brought. Registrar Sainty, in reasons dated April 3, 2002, with respect to one appeal, allowed the unsecured claim of the Defendants by Counterclaim at 70% rather than the 50% allowed by the Trustee in the RAR proposal. Accordingly, the

dollars voted against that Proposal were increased, but not by enough to change the outcome of the vote.

III. APPEAL FROM THE TRUSTEE'S DECISION TO ALLOW CERTAIN CREDITORS TO VOTE ON THE PROPOSALS

[34] The dissenting creditors appealed against the Trustee's decision to permit certain creditors to vote on the Proposals. First, the dissenting creditors submit that the Trustee erred in allowing the claims of Ka Po Cheung, Larry Coston, and the Five Small Creditors; namely, Han Hoang, IACS Technologies Inc., Thinh Le, Nhan Thi Le and Hong Dinh Le.

[35] Han Hoang is a former director of Genesee. The dissenting creditors asserted that, following the ruling of Justice Henderson in the Petition, Ms. Hoang avoided attending the directors meeting of Genesee, which was required in order to permit Genesee to formally request conversion of the shares, and thereby assisted Mr. Abou-Rached and RAR in their opposition to the conversion requests.

[36] Ms. Hoang submitted three proofs of claim in Mr. Abou-Rached's Proposal, for $1,000, $1,500 and $300,000. The $1,000 claim arises from a cheque of Ms. Hoang in the amount of $5,000, said to represent five $1,000 loans from the Five Small Creditors. She was only permitted to vote with respect to the first two claims as the Trustee concluded that the

large claim was a contingent claim. In the RAR Proposal, Ms. Hoang claims $1,000 and $300,000. The Trustee's decision with respect to voting was the same with respect to that Proposal.

[37] Ko Po Cheung filed a proof of claim in the Proposal of Mr. Abou-Rached in the amount of $2,159.12, Larry Coston filed a proof of claim in the amount of $1,500, The Five Small Creditors filed proofs of claim in the amount of $1,000 each.

[38] The dissenting creditors' complaints with respect to these claims are that:

- There is no evidence that any consideration was given for the promissory notes provided by Mr. Abou-Rached and RAR.
- There is no evidence that Ms. Hoang received $1,000 each from IACS Technologies Inc., Thinh Le, Nhan Thi Le and Hong Dinh Le in relation to the $5,000 cheque.
- The $5,000 cheque is made out to I.H.I. Holdings Ltd. The Promissory Note is signed by Mr. Abou-Rached on behalf of both himself and RAR with no explanation.
- The timing of the debt is questionable. It arises shortly after judgment in the Litigation. Prior to that, there was no debt between the Small Five Creditors and CHT.

[39] In addition, they note that Mr. Coston voted on behalf of 27 creditors with similar cheques and promissory notes filed as proofs of claim or invoices and agreements to pay.

Moreover, he was observed at the meeting soliciting the assistance of Mr. Abou-Rached and his counsel in filling out the forms.

[40] The Trustee submits that the proofs of claim had been reviewed by both the Trustee and representative from the office of the Superintendent of Bankruptcy. They concluded that the claims were sufficient. He submits further that a promissory note is evidence of a debt and noted that there were warnings with respect to false filings on the proof of claim forms. These claims were for amounts smaller than the potential fines. He observed that the documentation with respect to these claims was in fact more extensive than that frequently encountered in bankruptcy proceedings.

[41] Upon a review of the evidence and submissions, I have concluded, for the reasons as stated by the Trustee, that the creditors Cheung, Coston, Hoang, IACS, Thinh Le, Nhan Thi Le and Hong Dinh Le have, on the balance of probabilities, and based on the evidence before me, have established that they have claims provable in the proposal.

[42] The dissenting creditors also appeal the decision of the Trustee to allow SRI to vote on the proposals. The dissenting creditors submitted that SRI was not dealing at arms length, and that the debts claimed were not *bona fide*.

[43] Section 109(6) of the ***Act*** provides:

> **Creditor not dealing at arm's length** - Except as otherwise provided by this Act, a creditor is not entitled to vote at any meeting of creditors if the creditor did not, at all times within the period beginning on the day that is one year before the date of the initial bankruptcy event in respect of the debtor and ending on the date of the bankruptcy, both dates included, deal with the debtor at arm's length.

[44] The question of what is meant by arms length, for purposes of the ***Act***, is dealt with in ss. 3 and 4, which provide:

> 3.(1) **Reviewable transaction** - for the purposes of this Act, a person who has entered into a transaction with another person otherwise than at arm's length shall be deemed to have entered into a reviewable transaction.
>
> (2) **Question of fact** - It is a question of fact whether persons not related to one another within the meaning of section 4 were at a particular time dealing with each other at arm's length.
>
> (3) **Presumption** - Persons related to each other within the meaning of section 4 shall be deemed not to deal with each other at arm's length while so related.
>
> 4.(1) **Definitions** - In this section
>
> "related group" means a group of persons each member of which is related to every other member of the group;
>
> "unrelated group" means a group of persons that is not a related group.

(2) **Definition of "related persons"** - For the purposes of this Act, persons are related to each other and are "related persons" if they are

(a) individuals connected by blood relationship, marriage, common-law partnership or adoption;

(b) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii); or

(c) two corporations

(i) controlled by the same person or group of persons,

(ii) each of which is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

(iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other corporation,

(iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

(v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other corporation, or

(vi) one of which is controlled by an unrelated group each member of which is related

to at least one member of an unrelated group that controls the other corporation.

(3) **Relationships** - For the purposes of this section,

(a) where two corporations are related to the same corporation within the meaning of subsection (2), they shall be deemed to be related to each other;

(b) where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by whom the corporation is in fact controlled;

(c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, shares in a corporation, or to control the voting rights of shares in a corporation, shall, except where the contract provides that the right is not exercisable until the death of an individual designated therein, be deemed to have the same position in relation to the control of the corporation as if he owned the shares;

d) where a person owns shares in two or more corporations, he shall, as shareholder of one of the corporations, be deemed to be related to himself as shareholder of each of the other corporations;

(e) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

(f) persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship or adoption to the other;

> (f.1)persons are connected by common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship or adoption to the other; and
>
> (g) persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is connected by blood relationship, otherwise than as a brother or a sister to the other.

[45] There is no evidence before me that SRI is a related person with respect to either Mr. Abou-Rached or RAR within the meaning of section 4 of the ***Act***.

[46] The next question is whether SRI is, in any event, not dealing at arm's length with Mr. Abou-Rached or RAR. This is a question of fact. The test articulated in ***Re Tremblay*** (1980), 36 C.B.R. (N.S.) 111 (Que. S.C) at 112 is:

> ...a transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reason of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than

> adequate, normal or fair market value, the transaction in question is not at arm's length.

[47] While considerable time was spent in submissions with respect to this issue, there is, in my view, no evidence before me of bonds of dependence, control, influence or moral pressure between Mr. Abou-Rached and SRI such that the ordinary rules of supply and demand are not operative. The dissenting creditors have not satisfied me on a balance of probabilities that SRI and Mr. Abou-Rached were not dealing at arm’s length.

[48] The dissenting creditors submit that the debts of SRI and the Group of Five; namely, Randers International Ltd., Rosebar Enterprises Limited, Sirmac International Ltd., Veda consult S.A. and Yarold Trading Ltd. are not *bona fide,* but rather represent a collusive effort on the part of Mr. Abou-Rached and the creditors to deprive the dissenting creditors of the fruits of the judgment in the Litigation. This argument is premised upon the assumption that virtually every transaction entered into by Mr. Abou-Rached or his associated companies since the first attempt at conversion was in fact directed to this collusive end. There is, however, no evidence before me in support of this fundamental assumption.

[49] There is another, and perhaps simpler, explanation for the transactions; namely, that the investors were investing in the development of the Technology. The Technology is a real innovation, apparently of some promise. The dissenting creditors, whatever their current views of Mr. Abou-Rached, believed in the promise of the Technology, at least at the outset. They invested in the development of the Technology. There is no reason to believe that other investors would not and did not have the same faith in the Technology as that of the dissenting creditors.

[50] There is also no evidence that funds were diverted or used for some other purpose, although in fairness to the dissenting creditors, they do question whether and to what extent the funds represented by some of the proofs of claim were advanced at all. Again, however, there is no evidence before me that funds were not advanced.

[51] The Trustee drew some comfort from the fact that the majority of these transactions occurred before judgment was pronounced in the Litigation and that the basic nature and kind of documentation of the transactions was similar from the very outset.

[52] The dissenting creditors submit that there is reason to question the dates of many of the transactions. However,

while the transactions may be questionable, there is no evidence before me which would support a conclusion that the transactions did not occur as reflected in the documents.

[53] The dissenting creditors also submit that the date of judgment is not the critical date, but rather the key point is the date of the first request for conversion. However, that date is very close to the inception of the whole enterprise. Thus the period during which the dissenting creditors allege these collusive transactions occurred covers effectively the entire period during which investors were being sought to develop the Technology. Again there is no evidence before me that the impugned transactions were other than what they purport to be.

[54] In short, I am unable to conclude that the transactions criticized by the dissenting creditors are other than *bona fide*.

[55] Finally, the dissenting creditors rely upon s. 111 of the ***Act***. That section provides:

> 111. **Creditor secured by bill or note** - A creditor shall not vote in respect of any claim on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and who is not a bankrupt, as a security in his hands and to estimate the value thereof and for the purposes of

> voting, but not for the purposes of dividend, to deduct it from his claim.

[56] The submission with respect to s. 111 was that, with respect to the claim of the Five Small Creditors, IHI was primarily liable for the debt and the debtor was a guarantor, secondarily liable. Since IHI is not a bankrupt or filing a proposal, when the IHI amount is deducted, the value of the claim is reduced to zero.

[57] A similar argument was made with respect to all but the first $1.5 million of the SRI claim. The loan was made, it was submitted, to RARC, which is neither a party to the Proposals nor a bankrupt. It is the primary debtor and RAR was merely the guarantor. The amount to which the non-bankrupt party, RARC, is liable should therefore be subtracted from the claim for voting purposes.

[58] Counsel were not able to provide any authorities commenting upon the interpretation of this provision of the ***Act***.

[59] Counsel for SRI and the Group of Five submitted that, pursuant to s. 179(2) of the ***Bills of Exchange Act***, the relevant promissory notes are, in fact, joint and several promissory notes in that the notes bear the words “I promise to pay” and are signed by two or more people.

[60] Second, SRI submitted that s. 111 does not require the reduction of any claim by reason of cross guarantees. Where there is a guarantee, the guaranteed amount can be claimed in full. The Trustee also submitted that, in his experience, this represents the practice.

[61] Finally, counsel notes that SRI did in fact estimate the value of its security and subtract it from the amount of its claim. Its full claim was $18,812,876.46 from which it deducted $7,425,000 representing the security it holds.

[62] I have concluded that the disputed claims are evidenced by loan agreements and promissory notes. The promissory notes are joint and several notes. The value of security held by the creditor has been deducted from the claims. There is no basis on which to disallow these claims from voting with respect to the proposal.

[63] Accordingly, the appeals from the Trustee's decision to permit these creditors to vote with respect to the Proposals is dismissed.

IV. REVIEW OF THE PROPOSALS PURSUANT TO SECTION 59 OF THE *ACT*

[64] The process with respect to court approval of a proposal is set out in s. 59 of the ***Act*** which provides in part:

> (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.

[65] The court is not bound to approve a proposal even if it has an unqualified recommendation of the Trustee and the overwhelming support of creditors, see ***In re Orchid Fashions Inc.*** (1961), 2 C.B.R. (N.S.) 103 (Que. S.C.). However, where, as here, a proposal has been approved by a large majority of creditors and recommended by the Trustee, substantial deference will be given to their views.

[66] For example, the Court in ***Re Gustafson Pontiac Buick Cadillac GMC Ltd.*** (1995), 30 C.B.R. (3d) 280 (Sask. Q.B.) cited the following passage from Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed., (Toronto: Carswell, 1993) in refusing to reject a proposal approved by a majority of creditors: "If, however, a large majority of creditors, i.e., substantially in excess of the statutory majority, have voted for acceptance of a proposal, it will take strong reasons for the court to substitute its judgment for that of the creditors".

[67] In determining whether to approve a proposal, the court must consider the wishes and interests of the creditors, the conduct and interest of the debtor, the interests of the public and future creditors and the requirements of commercial morality, see ***Re Lofchik*** (1998), 1 C.B.R. (4th) 245 (Ont. Gen. Div.).

A. Are the Terms of the Proposal Reasonable?

[68] The first question to be addressed is whether the terms of the proposal are reasonable. Reasonable in this context has been determined to mean that the proposal must have a reasonable possibility of being successfully completed in accordance with its terms. In addition, the proposal must meet the requirements of commercial morality and must maintain the integrity of the bankruptcy system, see ***Re Lofchik***, *supra*.

[69] The onus is on the Trustee and the creditors who support the proposal to establish that the proposal is reasonable, see ***Re McNamara*** (1984), 53 C.B.R. (N.S.) 240 (Ont. S.C.).

[70] The Trustee in this case concluded that there were no unencumbered assets of any value which could be ascertained that would be available to unsecured creditors in the event of a bankruptcy. The amount of excess income was minimal and likely less than the Trustee’s fees and disbursements.

[71] The Proposals provide for certain recovery for the unsecured creditors. There is a guaranteed payment by means of an infusion of cash.

[72] The dissenting creditors submit that the Proposals are simply another attempt by the debtors to avoid honouring the judgment debt owed to Genesee and the costs awarded to the Defendants by Counterclaim in the Litigation. They submit that the proposals are not reasonable. The factors on which they rely include: the past conduct of the debtor, the reviewable transactions, the limited recovery provided by the proposal, and the fact that the proposals would preclude full investigation of the reviewable transactions. They add to this the fact that the proposal requires them to release the debtors with respect to any claims under the ***Act*** and any claims of fraudulent preferences, conveyance, settlement or trust.

[73] It is clear that the proposal has a reasonable prospect of succeeding according to its terms. For the reasons cited by the Trustee, it is in the interests of the creditors.

[74] The debtors have minimal assets. The Proposals contemplate an injection of cash and shares at a guaranteed value such that payments under the Proposals will be secured.

[75] The assets which are the subjects of the allegedly fraudulent dispositions are, in any event, encumbered beyond their market value in favor of secured creditors.

[76] Reprehensible conduct on the part of the debtor has been considered a basis for concluding that a discharge or proposal is not reasonable. In ***Re Touhey***, [1995] O.J. No. 2337, one such case, a discharge was refused. The grounds for refusal were summarized in the headnote as follows:

> ...At the date of bankruptcy the bankrupt was not insolvent, and the evidence established that he declared bankruptcy solely to avoid the $100,000 debt resulting from the judgment. The bankrupt never made any payment to the creditors, nor did he ever attempt to settle with them. With the income available to him over such a long period of time it was inconceivable that the bankrupt actually had no personal assets. He had inappropriate expenses in light of his obligations. The bankrupt attempted to flaunt the system and his behaviour was reprehensible. He did not merit a discharge.

[77] In the present case, Justice Levine found Mr. Abou-Rached's conduct in the Litigation to be worthy of rebuke. I have concluded that that conduct fell within the scope of s. 173(f) of the ***Act***. However, I have not concluded, nor did the Trustee, that the Proposals were filed solely to avoid the judgment; that other s. 173 facts have been made out; or that there has been other reprehensible conduct such as dissipation or diversion of assets. Without for a moment condoning Mr.

Abou-Rached's conduct in the course of the Litigation, I have nonetheless concluded that the requirements of commercial morality do not necessitate a refusal to approve the Proposals. I find the Proposals to be reasonable.

B. Are the Proposals Calculated to Benefit the General Body of Creditors?

[78] Courts have refused to approve proposals on this basis where, for example, the proposal serves the interests of persons other than the creditors; where there has not been full disclosure of the assets of the debtor and the encumbrances against those assets; where the proposal, by it terms, is bound to fail; or where the Trustee is able to delegate his duties to a group of the creditors, see ***Houlden & Morawetz, 2001 Annotated, Bankruptcy & Insolvency Act*** at para. E15(10)(c); ***Re Lofchik***, *supra*.

[79] In the case of these Proposals, the Trustee and supporting creditors note that the Proposals provide for an evenhanded distribution. The claims of the family have not been included; nor have claims of related parties. There has been, it is submitted, full disclosure of assets and encumbrances. Moreover, it is submitted that the recovery is greater under the Proposals than it would be in the event of a bankruptcy.

[80] The dissenting creditors submit that the Proposals are not in the interests of the creditors. They rely upon the arguments advanced in connection with the reasonableness of the proposal.

[81] In addition, they submit that there has not been proper disclosure of the debtors' assets. Two matters in particular are raised in this connection:

> (a) the disposition of personal assets valued by Mr. Abou-Rached in 1995 at $700,000;
>
> (b) certain payments or income of the debtor;

[82] With respect to the latter, the Trustee notes that he was aware of the payments or income. The Proposals are not dependent upon the cash flow of the debtors. They are funded by an infusion of cash from third parties. Hence the income has no effect upon the viability of the Proposals. In addition, the amounts at issue are modest.

[83] With respect to the personal assets, the Trustee was aware of the issue and considered it in coming to his opinion. He was of the view, first, that the assets had been accounted for, and second, that their realizable value was not anywhere near $700,000.

[84] For the reasons enumerated by the Trustee and in the earlier discussion with respect to reasonableness, I have concluded that the Proposals are in the interests of the creditors.

V. ARE ANY OF THE FACTS ENUMERATED IN SECTION 172 MADE OUT AGAINST THE DEBTORS?

[85] Section 59(3) of the ***Act*** provides:

> Where any of the facts mentioned in s. 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payments of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

[86] In this case, the dissenting creditors submit that the Proposals should not be approved because s. 173 facts are present and the Proposals do not provide for recovery of fifty cents on the dollar.

[87] The following provisions of s. 173 of the ***Act*** are at issue in these proceedings:

> 173.(1) The facts referred to in section 172 are:
>
> (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured

> liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;
>
> ...
>
> (d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;
>
> ...
>
> (f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;
>
> ...
>
> (k) the bankrupt has been guilty of any fraud or fraudulent breach of trust;

A. Value less than fifty cents on the dollar

[88] It is common ground that the debtors' assets are less than fifty cents on the dollar of the unsecured liabilities. The question, therefore, is whether this shortfall has arisen from circumstances for which the bankrupt cannot justly be held responsible.

[89] The Trustee concluded that the debtors were not responsible for the shortfall of the assets. His report states:

> 1. In order to raise money to finance the operations of IHI and to develop the technology licensed to IHI, the Debtor was required to

pledge all of his interest in IHI as well as guarantee (directly and indirectly) various investments made by others in IHI;

2. A downturn in the stock market, and a decrease in the trading price of shares in IHI in the stock market made it more difficult to raise funds for the ongoing operations of IHI and the Debtor continued to incur further financial obligations;

3. A Judgment was pronounced and a legal action commenced against the Debtor, R.A.R. Investments Ltd. ("RAR") and CHT. The legal action that led to the Judgment was ongoing for approximately four and one-half years and throughout that time, the Debtor steadfastly believed the Plaintiff's claim would be dismissed in its entirety. A significant portion of that claim resulted in a Judgment being pronounced against the Debtor and RAR. The Debtor had not expected any part of the Plaintiff's claim to be successful. The amount of that Judgement was approximately $975,000 (excluding costs);

4. One of the Debtor's major Creditors made demand upon learning of the said Judgment; and

5. Although an appeal of the Judgment has been filed, the Debtor concluded that it would be in the best interest of his Creditors and himself if his remaining sources of funds and energy were directed to payment of all of his Creditors rather than to prosecuting the appeal.

[90] The dissenting creditors, relying on ***Re Forsberg*** (2001), 26 C.B.R. (4th) 204 (Sask. Q.B.), submit that Mr. Abou-Rached is responsible for the shortfall in assets because he provided guarantees in circumstances in which he knew that he did not have sufficient assets to satisfy the guarantees.

[91] Counsel for Mr. Abou-Rached disputes this claim noting that, although the majority of the shares had not yet been released from escrow, Mr. Abou-Rached held some 25,000,000 shares in IHI. Between 1995 and 1999, the median share price was $2.41 (see ***Genesee Enterprises Ltd.***, *supra*, at p. 337). Thus, at the time he provided the guarantees, he had assets to support the guarantees given.

[92] I have concluded that the dissenting creditors have not established that the debtors are responsible for the shortfall in the value of their assets.

B. Has the debtor failed to account satisfactorily for any loss of assets or for any deficiency of assets?

[93] The submissions with respect to this allegation have been dealt with above. In order for the dissenting creditors to make out this allegation, they must rely upon the values set out by Mr. Abou-Rached in earlier statements of net worth that he prepared. Mr. Abou-Rached deposed that these values were overstated. I put little weight on this assertion; however, the Trustee was of the same opinion, in other words, that the net worth statements upon which the dissenting creditors rely, do not reflect the realizable value of the assets.

[94] I have concluded that the dissenting creditors have not established that the debtor has not given a satisfactory account for loss of assets or deficiency of assets.

C. Has the debtor put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him?

[95] The dissenting creditors submit that the reasons of Justice Levine in the Litigation establish that this fact has been made out. That the action was properly brought is established by the fact that the plaintiff enjoyed substantial success, being awarded damages of $982,746.94 plus court order interest. However, it must also be noted that the plaintiff's success was not complete; the recovery was substantially less than the amount claimed.

[96] Justice Levine made extensive findings with respect to Mr. Abou-Rached's credibility and conduct in the Litigation. First, with respect to credibility:

> Mr. Abou-Rached accuses Robert de Grasse in particular of fabricating evidence, including documents, and stealing documents relevant to the proof of the defendants' case. He claims that Jean de Grasse and the other defendants by counterclaim either misstated the facts or failed to accurately recall them.
>
> ...
>
> In general, however, I find myself skeptical about the credibility of the evidence of Mr. Abou-Rached

> with respect to many of the details of events, documents or transactions.

[97] After a second hearing to deal with costs, Justice Levine ordered special costs to the plaintiff of its claim for 45 of the 49 days of trial, special costs to the plaintiff and the Defendants by Counterclaims of defending the counterclaim . Her reasons state:

> [6] This litigation is almost a case-study on the factors that the courts have considered in awarding special costs. I have no trouble finding that the conduct of the defendants was "reprehensible, deserving of reproof or rebuke", and in some cases, "scandalous and outrageous" (***Garcia v. Crestbrook Forest Industries Ltd.*** (1997), 9 B.C.L.R. (3d) 242 at 249 (C.A.)).
>
> [7] The conduct of the defendants that I find justifies an order of special costs includes improper allegations of fraud, unlawful conspiracy, breach of fiduciary duty and criminal conduct; improper conduct during the proceedings; and improper motive for bringing the proceedings.
>
> ***(a) Improper allegations of fraud, unlawful conspiracy, breach of fiduciary duty and criminal conduct***
>
> [8] The allegations of criminal conduct included a claim that the plaintiff was claiming interest in excess of the criminal rate set by the ***Criminal Code***. This allegation was withdrawn on the eve of trial.
>
> [9] At examination for discovery and during his testimony at trial, Mr. Abou-Rached accused Robert de Grasse of forging Mr. Abou-Rached's signature on documents, preparing false documents and stealing documents from the defendants. He accused plaintiff's counsel of obstruction of justice,

including witness tampering. There was no evidence to support any of these claims.

[10] The defendants' claims of fraudulent misrepresentation, unlawful conspiracy and breach of fiduciary duty were all dismissed. The evidence simply did not support them. The defendants repeatedly failed to give the plaintiff and defendants by counterclaim particulars of the alleged fraud, conspiracy, breach of fiduciary duty, or damages, and failed to provide any particulars of damages in their closing submissions at trial.

...

[13] The defendants conducted themselves improperly during the proceedings in a number of ways.

[14] Firstly, the defendants did not disclose documents in the manner required by the ***Rules of Court***, standards of practice, or in response to court orders. In ***Clayburn Industries v. Piper*** (1998), 62 B.C.L.R. (3d) 24 at 51 (S.C.), the failure to produce documents was a significant factor in determining that special costs were appropriate.

...

[16] Some documents were produced in part only (for example, one page of several of a memorandum) and documents which would have been in the defendants' possession and control were never produced (such as the executed Genesee Agreement for each investor, letters sent to prospective investors in CHT and employment records of Robert de Grasse). The defendants produced documents that supported their case (such as the "Fadel Agreement" and a document with handwritten notes purporting to confirm Mr. Abou-Rached's conversations with Robert de Grasse concerning this agreement), but did not produce those which contradicted it (such as the "Gougassian agreement").

[17] Secondly, Mr. Abou-Rached, the key witness for the defendants, was deliberately non-responsive during both examination for discovery and at trial. I commented on Mr. Abou-Rached's testimony in my

reasons for judgment at paras. 31 through 38, and need not repeat those comments here.

[18] Thirdly, some of Mr. Abou-Rached's testimony was obviously fabricated. These include his claim that he discussed the terms of the "Fadel Agreement" with Robert de Grasse and the document containing the handwritten notes purporting to record that conversation; his continual denial that he signed or read documents that were supportive of the plaintiff and DCCs; and his reference to a chart setting out the value of an investment in Genesee which he purportedly discussed with Jean de Grasse and Robert de Grasse. The testimony of Sandy Lucas and Robert de Grasse regarding documents purportedly signed by Sheik Fadel must lead to the conclusion that at least some of those were signed by Mr. Abou-Rached, which he denied.

[19] I am prepared to accept that some of Mr. Abou-Rached's fabrications were not deliberate or dishonest lies, but resulted from his belief in the strength of his case. On the other hand, some of his testimony was too contrived, particularly with respect to his relationship (personal and business) with Sheik Fadel, to accept as anything other than calculated to deceive the court.

[20] Fourthly, Mr. Abou-Rached's behavior during examination for discovery and at trial was often inappropriate to the point of accurately being described as "outrageous" or "scandalous". Mr. Abou-Rached insulted the DCCs, who were also witnesses for the plaintiff, and counsel. As already noted, he accused plaintiff's counsel of obstruction of justice and witness tampering, and questioned the competence of counsel for the plaintiff and DCCs.

(c) Improper motive

[21] The defendants' conduct throughout these proceedings indicates that they sought to delay and hinder the plaintiff from recovering its claim under the Genesee Agreement and to harass the DCCs.

[22] The defendants' claims that the parties had entered into a collateral "Investment Agreement", in

addition to the claims of fraudulent misrepresentation, conspiracy and breach of fiduciary duty, had the direct effect of prolonging the trial so that the entire history of the parties´ relationship, in particular that of Mr. Abou-Rached, Jean de Grasse and Robert de Grasse, could be explored in great detail. All of these claims were dismissed.

[23] The claims against the 13 DCCs other than Jean de Grasse and Robert de Grasse were particularly without merit, and were all but abandoned halfway through the trial. These DCCs had attempted to have their cases resolved by an aborted Rule 18A application, but the defendants refused to cooperate. They then sought to have their evidence admitted by affidavit, which the defendants again resisted. In ordering the 13 DCCs to attend the trial to be cross-examined, I noted that if their evidence proved not to be controversial or did not materially add to the information in the affidavits, costs could be ordered to remedy the situation (see Rules 40(50) and (51)). The 13 DCCs, other than Jean de Grasse and Robert de Grasse, are entitled to their costs of attending the trial, which their counsel has advised total $8,548.47.

[24] As I pointed out in my reasons for judgment, most of the evidence about Shiek Fadel, his existence and role in the Genesee Agreement, was interesting but unnecessary. The only issue (other than Mr. Abou-Rached's credibility) that related to Shiek Fadel was whether the Fadel Agreement amended the Genesee Agreement. I found no legal basis for that part of the defendants' claim. The pre-trial applications, evidence and argument on this issue unduly prolonged the trial in support of a clearly unmeritorious claim.

[25] The defendants delayed and hindered these proceedings by refusing to comply with the rules relating to document disclosure, as outlined above. Mr. Abou-Rached's non-responsiveness on examination for discovery and at trial prolonged both pre-trial proceedings and the trial, increasing the expense for all parties.

...

> [28] Mr. Abou-Rached took an interest in the ability of the plaintiff and DCCs to afford this litigation. He admitted at trial that he commented at his examination for discovery that he wondered how the DCCs were financing the litigation and that someone must be paying their legal expenses. At trial, he said that the plaintiff and DCCs could not afford to litigate.
>
> [29] Some of the factors described above could support, on their own, an award of special costs. Taken together, I find that this is an appropriate case to exercise my discretion and order that the plaintiff and DCCs recover special costs.

[98] The Trustee relied upon Mr. Abou-Rached's professed conviction in the merits of his defence in support of his conclusion that the facts in s. 173(f) were not made out.

[99] Counsel for Mr. Abou-Rached and RAR submits that the defence cannot be said to have been frivolous or vexatious because it was substantially successful in that the plaintiff obtained judgment, but for significantly less than the original claim.

[100] Counsel conceded that the claim against the Defendants by Counterclaim was frivolous and vexatious, but submits that since the counterclaim was a claim advanced by the debtors, it fell under s. 173 (g) of the ***Act*** and not 173(f). Section 173(g) has a three month time limitation period from the original bankruptcy event. In this case, the

original bankruptcy event was October 1, 2001. Accordingly, the counterclaim falls outside the limitation period and s. 173(g) therefore also does not apply.

[101] I have concluded that the dissenting creditors have established the s. 173(f) facts in that the conduct of the defence was frivolous and vexatious. It is clear from Justice Levine's reasons and disposition with respect to costs, and from a review of the pleadings in the action, that the distinction between the defence and the prosecution of the counterclaim urged upon me cannot be supported.

[102] Moreover, the scope of the section embraces the conduct of the litigation, hence neither the debtor's belief in the merits of his position, nor the fact that he enjoyed a measure of success in the outcome is a complete answer, see ***Re Paskauskas*** (1995), 36 C.B.R. (3d) 288 (Ont. Gen. Div.) and ***Re Touhey***, *supra*. Here there is reprehensible conduct including deliberate deceit and delay, and a finding of improper motive. This is, in my view, clearly sufficient evidence to support a finding of a frivolous or vexatious defence under the section.

D. Have the debtors been guilty of fraud or fraudulent breach of trust?

[103] The dissenting creditors alleged that the following transactions were fraudulent dispositions of property:

(a) in late 1999 and early 2000, Roger Abou-Rached transferred 2,733,333 IHI shares to Garmeco (Lebanon) at a value of $0.75 per share.

(b) In mid 2001, Roger Abou-Rached transferred to his parents for no, or alternatively inadequate consideration, all his interests in Lebanese real estate that he had variously valued in the past at $1.8 million or in excess of $4 million (USD).

(c) In August, 2000, R.A.R. transferred its interests in commercial property on West 10th Avenue, Vancouver, B.C. to a numbered company wholly owned by Roger Abou-Rached's mother.

(d) In late 1999 and 2000 Roger Abou-Rached transferred or pledged all his interests in R.A.R. and in R.A.R. Consulting Ltd. to his parents' companies or to a group of foreign corporations represented by Marco Becker.

(e) Roger Abou-Rached has not accounted for the transfer of personal property estimated by him to be worth $700,000 in 1995. (This claim is dealt with earlier in these reasons).

1. IHI Shares

[104] The essence of this claim is that Mr. Abou-Rached, on the eve of the trial of the Litigation, transferred 2 million IHI shares to Garmeco Lebanon. In February 2000, a further 733,333 shares were transferred. Mr. Abou-Rached testified that these transfers went to repay the $5 million debt owed to Garmeco Lebanon incurred from the purchase of the Technology. However, counsel submits that the money was to be repaid only from cash flow or dividends.

[105] The documents in relation to the agreement to transfer the Technology are as follows:

(a) Assignment of Technology signed August 31, 1993, effective September 11, 1990;

(b) Letter dated September 12, 1990 from Garmeco to Wild Horse Industries Ltd (later IHI). This document states in part:

> As well, Garmeco and Garmeco Int'l acknowledge the transfer of the technology of the building system developed by Roger Abou-Rached while employed by Garmeco Int'l which will be utilized by Canadian HI-TECH Manufacturing Ltd.. In return for the transfer of this technology to Mr. Roger Abou-Rached, he will provide remuneration for the direct expenses incurred by Garmeco Int'l (i.e. employee wages, materials, purchase of equipment and computers, purchase of software, software development, consultation, etc.) during the research and development of the technology. The remuneration from Mr. Roger Abou-Rached to Garmeco Int'l will comprise of $5,000,000 US Dollars and will be paid on a prorata basis based on the following formula: $100,000 of every $1,000,000 of net cash flow from Canadian Hi-Tech Manufacturing Ltd. dividends to Roger Abou-Rached.

(c) a promissory note dated September 12, 1990 which provides in part:

> FOR VALUE RECEIVED THE UNDERSIGNED HEREBY ACKNOWLEDGES ITSELF INDEBTED AND PROMISES TO PAY THE ABOVE PRINCIPAL SUM, ON DEMAND, TO OR TO THE ORDER OF GARMECO INTERNATIONAL CONS. (LEB) (THE "HOLDER") AND/OR ANY OF ITS NOMINEE AND/OR ANY ASSOCIATES

> AND/OR ANY AFFILIATED PERSONS OR ENTITIES THE HOLDER MAY DIRECT IN WRITING.
>
> THE UNDERSIGNED MAY PAY THIS NOTE IN WHOLE OR IN PART WITHOUT NOTICE WITH 10% DISCOUNT TO BE CALCULATED AFTER THE WHOLE PRINCIPAL SUM IS PAID & PRIOR TO THE HOLDER SENDING ANY DEMAND NOTICE FOR PAYMENT OF THE ABOVE PRINCIPAL SUM IN FULL OR IN PART.

[106] In response, counsel submit that there is no remedy under the ***Act*** with respect to this transaction because:

> (a) it is not a settlement pursuant to s. 91(1) of the ***Act*** as it was not a gift, nor was any beneficial interest retained and it was to repay a debt;
>
> (b) the initial bankruptcy event for both debtors was October 1, 2001 when the Notices of Intention to File Proposals were filed. The transactions fall outside the relevant limitation periods for review under the Act.

[107] It is further submitted that the transactions are not reviewable under the Provincial legislation because there is no evidence that the transfers were made to delay or hinder creditors, or that they were made when the debtor was in insolvent circumstances. Moreover, it is submitted that the transfers were made for valuable consideration.

2. Lebanon Properties

[108] Mr. Abou-Rached held interests in Lebanese real estate. The dissenting creditors assert that this real estate, valued in 1992 by Mr. Abou-Rached at $1,800,000, was transferred to his parents in the summer of 2001 for inadequate consideration. They asserted in addition that no transfer documents had been produced.

[109] In response, it was asserted that the agreement to transfer the real estate was made on September 29, 1997. The consent of SRI was required for the transfer. Thus, there was a binding agreement to transfer the property well before the relevant limitation period, made at a time when the debtor was not insolvent.

[110] It was further submitted that the transfer was made for fair and reasonable consideration. There was no evidence that it was made with an intent to hinder, delay or defraud creditors.

[111] The registration of the transfer was not made until mid-2001; however, the reason for the delay in the registration was the negotiation to secure SRI’s consent to the transfer.

3. RARC and RARI shares

[112] The dissenting creditors also question a series of transactions which occurred at the beginning of the trial of the Litigation in which Mr. Abou-Rached transferred his interests in RARC and RARI to various companies, mainly SRI and five companies represented by Mr. Marco Becker, the principal representative of SRI. Mr. Abou-Rached transferred his interests in RARC to his parent's companies, Garmeco Canada and Garmeco Lebanon.

[113] All pledges and transfers are subject to Mr. Abou-Rached recovering the shares on payment of an appropriate sum. The shareholders are obliged to maintain Mr. Abou-Rached as manager and director.

[114] In response, it is submitted that these transfers were all made for fair consideration at a time when Mr. Abou-Rached was not insolvent. The transactions were not made with the intention to hinder or defeat creditors. They occurred outside the relevant limitation periods under the ***Act***. In short, it is submitted that these are not reviewable transactions under the ***Act*** or under Provincial legislation.

4. 1096 West 10th Ave. Property

[115] The final disputed transaction is in reference to the property located at 1096 West 10th Avenue, Vancouver. The

dissenting creditors assert that RAR granted a second mortgage on the property to a numbered company wholly owned by Hilda Abou-Rached, 434088 B.C. Ltd. In June 1995, following the hearing of the Petition before Henderson J., Abou-Rached increased the value of the second mortgage from $400,000 to $1 million. Roger Abou-Rached has not explained or accounted for the increase.

[116] RAR transferred the property to 434088 B.C. Ltd. August 2000, shortly after the conclusion of the Genesee trial. The reported consideration of $1,250,000 has not been documented. The consideration falls short of the value of $3,000,000 given by Abou-Rached in 1995.

[117] In response, it is submitted that the property was owned by RARI not by Mr. Abou-Rached. In 1995, Hilda Abou-Rached, Mr. Abou-Rached’s mother, purchased 434088 B.C. Ltd. (the "Company") for the amount due on the mortgage of the 1096 property when Mr. Abou-Rached could not refinance. At the time, Robert de Grasse was a director of the Company.

[118] In August 2000, the property was transferred to the Company. The consideration was:

(a) the assignment of the liability under the existing mortgages; namely $700,000 to CIBC Mortgage Corporation, $600,000 to the Company and $1,500,000 to SRI,

(b) $50,000 for chattels, and

(c) payment of a fee of $100,000 to SRI to permit assignment of the mortgage.

[119] The value of the property at the time of the transfer was approximately $735,000. The property has an assessed value of $330,000.

[120] It was submitted that the transaction was for fair consideration and is not a reviewable transaction. The debtor was not in insolvent circumstances when the transaction was entered into. Nor is there evidence that the transfer was made with the intent to defeat, hinder, delay or defraud creditors to give the Company a preference.

[121] The Trustee reviewed these and other transactions and concluded:

> Further information and review is required before the Trustee can draw any definitive conclusions as to whether or not any particular transaction constitutes a settlement or fraudulent preference under the provisions of the ***Bankruptcy and Insolvency Act***. It is our preliminary view, however, certain transactions may be reviewable and warrant further investigation. To properly evaluate these transactions, an extensive forensic investigation or audit would be required and

> judicial consideration of the matters may be required. The time involved, expense, and risk of this process would be significant to the creditors. Moreover, if on completion of the forensic investigation or audit the inspectors and/or the creditors were of the view that one or more transactions were potentially voidable and they wished to challenge the validity of these transactions in Court, we are advised that any such challenges would be vigorously defended by the various secured and/or related parties. Therefore, although there may be an unknown recovery, there may also be a significant loss.

[122] The jurisprudence in this province, binding upon me, is clear that, with respect to the factors enumerated in s. 173, an allegation of fraud or breach of trust can only be found where there had been a conviction or a finding of fraud by a judgment in a criminal or civil court, see ***Herd v. Thompson*** (1989), 77 C.B.R. (N.S.) 209 (B.C.C.A.). There has been no such finding in this case.

[123] The dissenting creditors submit that the ***Act*** is a federal statute and is to be applied consistently across Canada. There are jurisdictions in which a prior civil or criminal finding of fraud is not required. All jurisdictions require proof of fraud to have been met on at least the civil standard.

[124] I am bound to follow the British Columbia jurisprudence and since there is no prior finding of fraud,

that is the end of the matter. However, even if I were not so bound, I am satisfied that fraud has not been established on the evidence before me.

[125] Questions arise with respect to the transactions in relation to their timing, the parties, and the underlying motivation. Mr. Abou-Rached's conduct in the Litigation was such as to give rise to questions in relation to any and all of his dealings. However, a substantial gulf separates questions and suspicions from a finding of fraud.

[126] The dissenting creditors then submit, in the alternative, that if I conclude that there are “grounds for concern”, the concern should form a basis upon which to conclude that the Proposals are not reasonable.

[127] In the face of the Trustee’s report and the approval of the majority of creditors, I am of the view that more than suspicion or grounds for concern must be shown in order for the Proposals to be found not to be reasonable. On a review of all of the circumstances, I remain satisfied that the Proposals are reasonable within the meaning of s. 59 of the ***Act***.

VI. ORDER FOR CROSS-EXAMINATION

[128] In the further alternative, the dissenting creditors seek orders, pursuant to s. 163(2) of the ***Act*** to cross examine some fifteen individuals.

[129] Section 163(2) provides:

> On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.
>
> (emphasis added)

[130] Counsel for SRI submits that sufficient cause has not been shown so as to justify the order sought. She relies upon ***Re Hartland Pipeline Services Ltd. v. Jones*** (2000), 18 C.B.R. (4th) 28 (Alta. Q.B.), a decision in which two secured creditors sought cross-examination on an affidavit of a principal of the bankrupt company after the trustee had conducted an examination under section 163(1). In that

decision, Paperny J. approved of the following passage from ***Re NsC Diesel Power Inc.*** (1997), 49 C.B.R. (3d) 213 (N.S.S.C.):

> There must be some demonstrated connection between evidence, if any, of something being amiss and the ability of the named person to shed some light on it as it relates to the administration of the estate.

[131] Counsel also made reference to the following statement from the Nova Scotia Court of Appeal in ***Re NsC Diesel Power Inc.*** (1998), 6 CBR (4^{th}) 96.

> The wording of s. 163(2) of the Act that requires an applicant to show sufficient cause to warrant the order being granted requires that the applicant put forth factual information in affidavit form or in sworn testimony that would disclose something more than a desire to go on a fishing expedition.

[132] I have concluded that the material before me does not meet the threshold of sufficient cause. In my view the application suffers from the same lack of focus identified in ***Re R.L. Coolsaet of Canada Ltd.*** (1996), 45 C.B.R. (3d) 30 (Ont. Gen. Div.) at 33, namely, "...a request in such broad terms suggests a lack of focus and a speculation that in a plethora of examinations some information may be forthcoming on which to frame an action."

[133] The application for cross-examination is denied.

VII. REASONABLE SECURITY

[134] The final issue, a fact pursuant to s. 173 having been proved, is whether the Proposal should be approved. It is common ground that the Proposals do not provide reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims. The question is whether, pursuant to s. 59(3) of the ***Act***, the court is prepared to grant approval on the basis of some lesser recovery.

[135] Given that the Proposals are viable and secured and given the paucity of assets of the debtors otherwise available to the creditors, I am prepared to exercise my discretion under s. 59(3) and approve the Proposals as amended.

VII. DISPOSITION

[136] In the result, the Proposals of Mr. Abou-Rached and RAR, as amended, are approved. The appeals from the decision of the Trustee are dismissed. The application for cross-examination is dismissed.

"C. Ross, J."
The Honourable Madam Justice C. Ross

TAB 2

COURT FILE NO.: 03-CL-004932
DATE: 20040809

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

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

AND IN THE MATTER OF SECTION 191 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Sean Dunphy* and *Shana Ivall*, for Air Canada

Peter J. Osborne and *Monique Jilesen*, for Ernst & Young Inc., Monitor

Larry Steinberg, for CUPE

Hugh O'Reilly, for IAMAW

Gregory Azeff, for GECAS

Howard A. Gorman, for the Ad Hoc Unsecured Creditors Committee

Lyle Kanee, for CAW

HEARD: August 9, 2004

E N D O R S E M E N T

(CUPE Appeal)

[1] CUPE appealed the decision of July 30, 2004, rendered by Geoffrey Morawetz as Claims Officer ("CO") with respect to CUPE's pay equity claim. At the end of the hearing today I dismissed the appeal and promised written reasons. These are those written reasons.

[2] At paragraphs 36 and 37 of his reasons, the CO stated:

> (36) CUPE's pay equity claim is a contingent claim in that it has not been successful on its merits as of the date of the commencement of Air Canada's CCAA proceedings. The contingency in question is the resolution of the pay equity complaint process underway before the Tribunal (and possibly the courts via appeals of the Tribunal's decision). As with any contingent claim, there are two fundamental aspects to the determination of the claim; namely, (i) as assessment of the happening of the contingency in question; and (ii) the quantification of the claim. If CUPE successfully discharges its onus of establishing that there is some basis to presuppose the happening of the contingency, a reasonable value must then be established for the claim (and it is common in practice to discount the aggregate value of the claim in a "best case" scenario by some reasonable percentage that reflects the risk that a less optimistic scenario may in fact result). For the reasons that follow, I find that CUPE has failed to provide any evidence to substantiate the happening of the contingency in question and that the quantification of CUPE's contingent claim would in any event be negligible.
>
> (37) There is, in these proceedings, a Claims Procedure Order of Farley J. dated September 18, 2003, as amended by Order of Farley J. dated July 9, 2004, which provides that all creditors (including CUPE with respect to its pay equity claim for the Relevant Period) must prove their claims in accordance with the procedures set out therein. In short, CUPE has to prove its claim now, and not at some future date, and the failure to do so results in CUPE being barred from asserting such a claim at a future date. If CUPE fails to adduce sufficient evidence to substantiate its contingent pay equity claim at the present time, it is not open to CUPE to assert that some weight ought to be given to the likelihood or possibility that it may, in the future, be able to adduce sufficient evidence so as to prove its claim in respect of the Relevant Period. That is to say, I cannot conclude that there is a 50% chance (or 40%, or 30%, etc.) that CUPE will be able to substantiate its claim in the future if it has not already done so in these proceedings and that some percentage of the value of its pay equity claim ought to be allowed at this time. CUPE cannot on the one hand admit that it has no evidence to substantiate its claim at the present time and on the other hand seek to have a claim admitted by the Monitor nonetheless on the basis that it might at some date find evidence to substantiate its claim. The merits of CUPE's contingent pay equity claim must be established in these proceedings.

He went on to observe at paragraph 39:

> (39) To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

Further at paragraph 40, the CO stated:

> (40) … As noted by counsel to Air Canada, there are three pre-requisite elements of a human rights complaint, without which there is no claim: (i) difference in wages; (ii) within the same establishment; and (iii) the performance of work of equal value as between the groups in question. … But, with respect to the third criterion, I agree with Air Canada that there is no evidence before me to indicate that the work performed by Flight Attendants is of equal value to the work performed by the Comparative Groups, which is the very basis of CUPE's claim. It is entirely unclear that there is any principled basis of comparison between Flight Attendants and the Comparative Groups and, in any event, no evidence before me that the outcome of such comparison establishes that there is work of equal value being performed.

[3] CUPE submitted that notwithstanding my views in *Re Olympia & York Developments Ltd.*, [1994] O.J. No. 1335 (Gen. Div.), that I should follow the Alberta practice as set out by Paperny, J. in *Re Canadian Airlines Corp.*, [2001] A.J. No. 226 (Q.B.) of hearing this matter on a *de novo* basis as opposed to a true appeal. Even if I were to agree with that notwithstanding the difference in practice related to Alberta Masters, I would observe that on the basis of the record before me, I would have come up with the same conclusions as the CO save and except as to what I might describe as wholehearted acceptance of his views at paragraph 46 when he describes "the intuitive appeal of Air Canada's argument with respect to the manner in which wages are determined". It is clear from his reference later in that paragraph to "yet another reason" that this argument of Air Canada was not a determinative feature. Indeed it may well be that the CO merely intended paragraph 46 to be simply a point which could be characterized as a buttressing observation on a check of reasonability, not that there is an obligation to do so to provide a foundation for a pay equity claim. Collective bargaining is a process of give and take. Secondly I would not be of the view that as per his observation in paragraph 47 that CUPE had an obligation to lead evidence as to:

> (b) more importantly, that the wage gap cannot be explained, in full or in part, by factors other than system gender discrimination (such as consideration of the factors set out in section 11(2) of the CHRA).

While it would seem to me that CUPE was not under any positive obligation to provide such evidence (that seemingly being Air Canada's role if it wished to do so), again that observation by the CO is not in my view determinative of the wage gap question.

[4] See also my views in *Re Air Canada (Corporate Travel Management CTM Inc.)* and *Re Air Canada (Always Travel Inc.)* matters released August 3 and 5, 2004 respectively relying on the Court of Appeal decision in *Shelson* v. *Gowling Lafleur Henderson LLP*, [2004] O.J. No. 850 (C.A.) released March 9, 2004 at paragraph 20 relating to deference notwithstanding that a matter may be decided originally on a paper record.

[5] The onus is on a claimant to prove its claim. As discussed in paragraph 38 of his reasons, the CO required that "CUPE must demonstrate that its claim is not too speculative or remote, but it need not establish that success is probable". He went on to say at paragraph 39:

> (39) In the present case, I am satisfied for the reasons set out below that CUPE's claim has not been proven. The claim is remote and speculative as there is no evidence to substantiate that the claim has any merit. To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

It seems to me to be an unreasonable analysis of his reasoning that would allow CUPE to advance at paragraph 46 of its factum:

> (46) To require scientific certainty is to set up inappropriate roadblocks to the goal of the CHRA, namely to remedy discrimination…

The fact of the matter is that CUPE provided <u>no evidence</u> as to the particular case involving Air Canada (and the "merged Canadian Airlines" question) as to the third criterion.

[6] It is indeed troubling that a *Canadian Human Rights Act /* pay equity case could rattle around the Commission, the Tribunal and the courts for 14 years and for this Court to be advised that it is likely to take another decade before this matter can be adjudicated to the end under that legislation. However, that process is not the one which is required to be followed in the determination of a claim under the CCAA. Contingent unliquidated claims are determined under the CCAA claims process even in the most complicated of litigation and even though a claim may not have been actually initiated in a court or otherwise. I do not wish or intend to minimize the hurdles and hoops which may be involved in the payment equity litigation in the established "ordinary course", but I would observe that if CUPE had provided an acceptable expert report on job evaluation, even if in "simplified form" (as opposed to no evidence), then Air Canada would have had to respond to that evidence. Would that report have had to be precise (apparently to the degree envisaged by parties in pay equity disputes)? The simple answer to that is that is not necessary in a CCAA claims process.

[7] The appeal is dismissed. While that claim as agreed between Air Canada and CUPE only deals with the monetary aspect of the claim up to September 30, 2004, I would trust that with respect to the process otherwise continuing, that with respect to the determination of this

as with any other human rights issue (which the Supreme Court of Canada has determined should be regarded as a quasi-constitutional right) such determination can be accomplished with cooperation in very significantly less time than a further decade. The resolution of such an important question demands nothing less.

J.M. Farley

Released: August 9, 2004

TAB 3

1998 CarswellOnt 2053
Ontario Court of Justice, General Division (In Bankruptcy)

Booth, Re

1998 CarswellOnt 2053, 4 C.B.R. (4th) 45, 69 O.T.C. 210, 79 A.C.W.S. (3d) 888

In the Matter of the Proposal of Gary Arthur Booth, of the Village of Lakefield, Peterborough County, in the Province of Ontario, Lawyer

Registrar Ferron

Judgment: May 21, 1998
Docket: 31-342019

Counsel: *Brian Pritchard*, for the Trustee BDO Dunwoody Limited.

Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.ii Reasonable terms
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Pt. III, Div. I — pursuant to

***Registrar Ferron*:**

1 Gary Arthur Booth, a lawyer, has filed a proposal under division I of part III of the *Bankruptcy and Insolvency Act*. The trustee's report, reflecting the bankrupts sworn statement of affairs, indicate the debtor's assets to be in the value of $10,000.00 which the trustee in his report thinks might fetch between $5,000.00 and $9,000.00 in a bankruptcy situation. The debtor's declared unsecured debts are $118,900.00 most of which is made up of arrears of income tax.

2 The debtor's amended proposal which has been accepted by creditors provides for payments to creditors of $416.66 per month for 48 months. In addition, he is to pay 25% of his income over $40,000.00. I note that only one creditor attended the creditor's meeting.

3 Notwithstanding the terms of the proposal, the debtor's cash flow statement indicates a combined family income of $3,665.00 and a surplus of only $8.00. This, again is reflected in the trustee's report.

4 When this application came before the court on Apri 1, 1998, I questioned the ability of the debtor to carry out the terms of the proposal. In response the trustee has filed a supplementary report to which is annexed an unaudited financial statements showing net income from the debtor's practice of $24,256.00. How this statement is meant to assist the application is puzzling since it only confirms the inability of the bankrupt to carry out the terms of the proposal when one considers his disbursements in his cash flow statement. I suppose, to get around the difficulty the following statement is found in the supplementary report, "that the debtor did indicate that he has had discussions with his family with respect to meeting the terms of the proposal and he further indicated that in the event that he was unable to make the payments as set out in the proposal from his income, his immediate family would assist him in fulfilling the terms of same. "Immediate family" in this context must mean, siblings, parents, etc, but not his spouse; her net monthly income is only $965.00 (included in the family income referred to).

5 There is of course, based on the material filed in court, no hope of the debtor fulfilling the terms of the proposal and he will have to, presumably, from the very beginning turn to his immediate family for the payments required under the proposal. The material does not indicate that this information was given to creditors; if it had been provided, it is inconceivable that they would have accepted a proposal which indicated no possibility of being carried out. I note the debtor has not made the statement which was made by the trustee, directly nor have the members of the "immediate family" bound themselves to the creditors to pay the proposal in the event of default.

6 The court is authorized to approve only proposals which are reasonable and calculated to benefit the general body of creditors. "Reasonable" means that on a dispassionate view, the court is satisfied that the things proposed can, in fact, be carried out. The court, in other words, reviews the terms of the proposal in order to ensure that creditors have not, in their enthusiasm or lack of attention approved a proposal which is bound to fail.

7 This proposal by its very terms is bound to fail and cannot therefore be said to be reasonable, or calculated to benefit the creditors. The proposal cannot be approved.

Application dismissed.

CITATION: In the matter of the Proposal of Innovative Coating Systems Inc., 2017 ONSC 3070
COURT FILE NO.: 35/2185695
DATE: 20170519

ONTARIO SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY and INSOLVENCY

In the matter of the Proposal of Innovative Coating Systems Inc., a company duly incorporated under the laws of the Province of Ontario, having its head office in the town of Tecumseh, County of Essex and Province of Ontario, (Bankrupt/Moving Party)	Benjamin Blay, for Innovative Coating Systems Inc. Thomas Robson, for Business Development Bank Sean Zeitz, for Eli Mogil, lawyer for Uni-Select Eastern Inc. John Leslie, for Proposal Trustee, S. Funtig & Associates Inc. Timothy Hogan, for Royal Bank of Canada **HEARD:** May 12, 2017

GARSON J.

Introduction

[1] Innovative Coating Systems Inc. ("the debtor") brings an application for approval of its proposal, dated December 5, 2016 accepted by creditors at a meeting of January 18, 2017, pursuant to s. 58 of the *Bankruptcy and Insolvency Act* ("BIA"). The debtor also seeks directions from this court regarding next steps.

[2] Uni-Select Eastern Inc. ("Uni-Select") and the Business Development Bank of Canada ("BDC"), secured creditors of the debtor, oppose the proposal because it contains a release of the guarantors.

[3] Wayne Brady ("Brady"), the principal of the debtor, executed personal guarantees in favour of both Uni-Select and BDC.

[4] For the reasons that follow and in accordance with s. 59(2) of the BIA, I am of the opinion that the terms of the proposal are not calculated to benefit the general body of creditors and accordingly refuse to approve the proposal.

Preliminary Matters

[5] Royal Bank of Canada, a secured creditor and senior lender of the debtor and the holder of a personal guarantee by Brady, takes no position on the motion on the basis that they are not affected by the proposal and their security, including the guarantee of Brady, is unaffected by its terms.

[6] Pursuant to s. 187(a) of the BIA and unopposed by the parties, BDC is granted leave to amend its Proof of Claim to extend to both Loan No. 060562-02 and No. 60562-04.

Background and Facts

[7] Innovative, an industrial coatings and chemical company in Tecumseh, Ontario, filed a Notice of Intention to File a Proposal under the BIA.

[8] S. Funtig and Associates Inc., in its capacity as trustee ("the Trustee"), prepared a proposal, including a clause in the proposal that released guarantors from liability from future actions.

[9] Uni-Select, a secured creditor that supplied auto parts and services to the debtor, also holds a guarantee from Brady and his numbered corporation ("2067195").

[10] Upon counsel for Uni-Select realizing how this clause would compromise their ability to pursue Brady, they reached out to the Trustee to request that the first creditor's meeting scheduled for December 28, 2016 be adjourned. It was rescheduled for January 18, 2017 at 10:00 a.m.

[11] Due to an administrative error, no one from counsel for Uni-Select attended at this meeting. The Trustee delayed the start of the meeting for 20 minutes to allow time for counsel for Uni-Select to attend by phone. No one appeared either in person or by phone.

[12] BDC executed a proxy in favour of the proposal.

[13] Having determined sufficient voting letters and proxies were received from both secured and unsecured creditors to form a quorum, the meeting was held and the proposal was passed by 100 percent of creditors of both classes that voted at the meeting. The Trustee, Brady and counsel for the debtor were the only persons in attendance at the meeting. The Trustee exercised proxies or relied on voting letters to form a quorum.

[14] Counsel for Uni-Select emailed the Trustee the day after the meeting inquiring about whether the proposal had been updated. She was then advised of the outcome of the meeting and the fact the Trustee called the Official Receiver's Office which confirmed the process they followed was correct.

[15] Both Uni-Select and BDC now appear before this court and oppose the proposal.

Positions of the Parties

[16] The Trustee seeks approval of the proposal and argues he acted honestly and in good faith and in accordance with the requirements of the BIA. He submits the proposal is reasonable in the circumstances and that his release of Brady as guarantor is as a *quid pro quo* for the assistance Brady will offer in liquidating the assets of the debtor which will ultimately benefit the general body of creditors.

[17] BDC candidly admits that it erred by misconstruing the meaning of the proposal and not initially understanding that it contained a release of the guarantee BDC personally holds against Brady. BDC argues that it is entitled to change its position before this court and now opposes the proposal because it will not benefit them as a secured creditor.

[18] Uni-Select goes further and argues that the proposal is drafted in a way that is misleading and violates the principles of the BIA and of commercial morality required in the drafting of such documents. Uni-Select suggests that the proposal does not benefit them as the largest secured creditor but rather enures to the benefit of Brady. They oppose the proposal and submit their earlier omission in failing to attend the creditor's meeting does not affect their ability to oppose approval of the proposal by this court.

Discussion

[19] Section 59(1) of the BIA provides that the court shall, before approving the proposal, hear from the debtor.

[20] In *Re Eagle Mining Ltd*., 1999 CarswellOnt 1291, (Gen. Div.) the court made clear that there is no impediment to a creditor taking different positions at a creditor's meeting and before the court. Ultimately, it is the court that must determine whether the proposal benefits the general body of creditors.

[21] Accordingly, the fact that BDC earlier voted to support the proposal is of no consequence given the position they now take.

[22] Section 59(2) of the BIA provides that if the terms of the proposal are not reasonable nor calculated to benefit the general body of creditors, the court shall refuse to approve the proposal.

[23] In *Re Kitchener Frame Ltd.*, 2012 ONSC 234 (SCJ), Morawetz J. at para. 19 confirms the three-pronged test under s. 59(2) that the proposal:

(i) is reasonable;

(ii) is calculated to benefit the general body of creditors; and

(iii) is made in good faith.

[24] This test includes consideration of whether the terms of the proposal meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system: *Re Kitchener* at para. 22. I will address each part of the test separately.

(i) Reasonableness

[25] None of the parties contest the reasonableness of the terms of the proposal, save and accept the release of Brady as guarantor.

(ii) Calculated to Benefit the General Body of Creditors

[26] Uni-Select and BDC combine to represent 100 percent of the secured creditors under the proposal. Uni-Select has a claim for $254,765.82 and BDC has a claim for $130,636.40. They constitute more than two-thirds of the admitted claims.

[27] There is little doubt that if approved, this proposal would potentially harm and prejudice both Uni-Select and BDC to the extent that their personal guarantees would be compromised. After all, one of the primary purposes of a personal guarantee is to permit the creditor to look to the guarantor when the principal debtor defaults – precisely the situation before this court.

[28] The Trustee suggests the release of Brady as guarantor is both permissible and reasonable in the circumstances. I disagree.

[29] In *ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, the Ontario Court of Appeal outlined the requirements that must be satisfied to justify a third-party release (in the context of a plan under the CCAA). In *Re Kitchener*, Morawetz J. applied these criteria in the context of approving a proposal under the BIA. They include:

(a) the parties to be released are necessary and essential to the restructuring of the debtor;

(b) the claims to be released are rationally related to the purpose of the proposal and necessary for it;

(c) the proposal cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the proposal; and

(e) the proposal will benefit not only the debtor companies but creditors generally.

[30] I have difficulty accepting that the criteria have been met. There is little to satisfy me that the release is necessary or essential to the liquidation of the debtor's assets. Although the affidavit of Brady suggests he would be unwilling to assist with the liquidation in the absence of being released from his guarantees, this assertion rings hollow. Common sense dictates that it is in the best interests of Brady to maximize every dollar of potential earnings from the proposal. After all, each dollar achieved is one less dollar of potential personal liability. In the end, he would be ill-advised to let such potential returns slip away due to his unwillingness to assist with the liquidation.

[31] I am also not satisfied that the release of Brady's personal guarantees are neither rationally related to the purpose of the proposal or necessary for it.

[32] As referenced above, the proposal can succeed without his release, given the inherent self-interest he has in maximizing the liquidation of the assets.

[33] As both Uni-Select and BDC point out, this proposal benefits neither of them and compromises their guarantees.

[34] I place little weight on the fact that Uni-Select failed to attend the rescheduled creditors meeting and BDC wishes to retract its vote. Section 59(2) provides each creditor with a fresh opportunity to make submissions on the proposal. Their administrative error, inadvertence or oversight speaks to the reason this matter is before the court but not to whether they meet the test under s. 59(2).

[35] There is no need for a *quid pro quo* for Brady in these circumstances.

(iii) <u>Good Faith</u>

[36] I agree with the submissions of Uni-Select that the terms of the proposal are drafted in a way that does not clearly disclose that the personal guarantees of Brady and 2067195 are being compromised. These releases should have been front and centre. In Article 2.2, the proposal states that it affects

> …all claims existing against Innovative.

[37] There is no mention of Brady's personal guarantees nor of the *quid pro quo* analysis.

[38] The accompanying letter to the proposal at Tab 1(d) of the Responding Motion Record is also silent as to Brady's personal guarantees.

[39] Although I do not accept the characterization of the proposal as intentionally misleading, I agree that the breadth of the release was tucked away in Article 3.4 in a manner that caused BDC to initially misread the proposal and misunderstand the implications with respect to the guarantees. Simply put, the proposal was not drafted in a manner that properly reflects the interest of creditors and the requirements of commercial morality and integrity. Rather, it is a carefully tailored proposal that appears to better serve the interests of Brady, but is not calculated to benefit the general body of creditors: *Re*

Lofchik, 1998 CarswellOnt 194 (Gen. Div.) and *Re Sumner Co. (1984) Ltd.*, 1987 CarswellNB 26 (NBQB).

[40] At the end of the day, a court must be satisfied that the creditors are getting more advantage from the terms and the proposal than would arise from a bankruptcy. I am not so satisfied on the record before me.

[41] The Trustee should have expressly and clearly stated both within the terms of the proposal and the covering letter that the proposal benefits Brady and 2067195 and he should have done an analysis of the extent of such benefits.

[42] I am aware of a very limited power under the BIA to make alterations or amendments to a proposal. However, none of the parties has sought this remedy and it is not appropriate to grant same in these circumstances.

Conclusion

[43] For the above reasons the proposal shall not be approved. In light of the provisions of s. 61(2)(a) of the BIA and with the consent of the parties, leave is granted to the debtor to file an amended proposal if it so chooses with the deemed release removed therefrom with costs payable by the debtor, Brady, 2067195 and the Trustee on a joint and several basis. In accordance with the requirements of the BIA, the amended proposal shall be filed within ten days.

Costs

[44] Uni-Select seeks costs on a partial-indemnity scale of $14,336.59, inclusive of HST and disbursements. Uni-Select suggests Brady ought to be jointly and severally liable for such costs because this type of conduct stood to personally benefit Brady and the Trustee's conduct in not disclosing same in a more prominent manner ought to be sanctioned with costs.

[45] BDC seeks costs of $7,203.55 on a partial indemnity scale, inclusive of HST and disbursements.

[46] Innovative seeks costs of $5,030.31 on a partial indemnity scale, inclusive of HST and disbursements.

[47] I agree with Innovative that this motion would not have been necessary if Uni-Select had not missed the meeting that was rescheduled at its request. Similarly, had BDC not misread the proposal, they would have cast their vote in a manner that would have obviated the need for this motion.

[48] Further, BDC served no factum or cases in advance and showed up on the day of the motion with a single case in hand.

[49] Although the Trustee also bears some responsibility for this motion, but for the actions or inactions of Uni-Select and BDC, this court appearance would not have taken place. In all of the circumstances, this is one of those rare occasions where the court will exercise its discretion to award no costs.

"Justice M. A. Garson"

Justice M. A. Garson

Released: May 19, 2017

CITATION: In the matter of the Proposal of Innovative Coating Systems Inc., 2017 ONSC 3070
COURT FILE NO.: 35/2185695
DATE: 20170519

ONTARIO

SUPERIOR COURT OF JUSTICE IN BANKRUPTCY and INSOLVENCY

BETWEEN:

In the matter of the Proposal of Innovative Coating Systems Inc., A company duly incorporated under the laws of the Province of Ontario, having its head office in the town of Tecumseh, County of Essex and Province of Ontario, (Bankrupt/Moving Party)

REASONS FOR JUDGMENT

Justice M. A. Garson

Released: May 19, 2017

TAB 4

Court of Queen's Bench of Alberta

Citation: Magnus One Energy Corp. (Re), 2009 ABQB 200

Date: 20090402
Docket: BE01 080637; BE01 080668
Registry: Calgary

Docket: BE01 080637

In the Matter of the Proposal of
Magnus One Energy Corp.

- and -

Docket: BE01 080668

In the Matter of the Proposal of
Magnus Energy Inc.

Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] Magnus Energy Inc. ("Magnus Energy") and Magnus One Energy Corp. ("Magnus One") apply for approval by the Court of their proposals filed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 and accepted by the required majority of their creditors. Two creditors, Pedro's Services Ltd. ("Pedro") and Taber Water Disposals Inc. ("Taber"), oppose the application on the basis that Magnus Energy and Magnus One have not acted in good faith and that factors set out under section 173 of the *Bankruptcy and Insolvency Act* can be established against them.

Facts

[2] Magnus Energy and Magnus One were oil and gas exploration and development companies engaged in operations primarily in Alberta and Saskatchewan. Magnus One is a wholly-owned subsidiary of Magnus Energy. They each filed a Notice of Intention to make a

Proposal under the *Bankruptcy and Insolvency Act* on June 18, 2008, naming RSM Richter Inc. as Trustee.

[3] The Magnus companies are no longer operating. Their assets available for distribution to creditors consist of cash on hand and minor accounts receivable. No value has been attributed to any of their undeveloped oil and gas properties.

[4] The parent company of Magnus Energy, Questerre Energy Corporation, holds security over all of the assets of Magnus Energy and Magnus One. As of August 31, 2008, the secured indebtedness owing to Questerre was approximately $4.3 million.

[5] Magnus Energy and Magnus One each filed a Proposal with the Official Receiver on September 5, 2008, and these Proposals were accepted by 91.7% of the creditors of Magnus Energy (22 out of 24 creditors) and 92.3% of the creditors of Magnus One (24 out of 26 creditors). The only creditors who voted against the Proposals were Pedro and Taber, who are controlled by the same principal. Pedro and Taber claim as unsecured creditors of both Magnus Energy and Magnus One pursuant to a default judgment obtained on November 14, 2007 in the amount of $50,557.32.

[6] Under the Proposals, Questerre agrees to be treated as an unsecured creditor for the purpose of most of its claim. Unsecured creditors would receive the lesser of $2,500 and the full amount of their claim plus a pro rata amount of remaining funds.

[7] At the meetings of creditors, the Trustee advised of ongoing discussions with the Energy Resources Conservation Board over abandonment liabilities relating to the wells drilled by the debtors and the priority of such contingent claims over other debts, and advised that Questerre had agreed to deal with such abandonment costs so that any claim by the ERCB would not impact the amount available for distribution under the Proposals. Counsel for Pedro raised the following matters at the meetings:

a) that the Trustee had not obtained a legal opinion on the validity of Questerre's security over the assets of the debtor companies, pointing out that litigation relating to the enforceability and priority of that security as against execution creditors was stayed as a result of the filing of the Notices of Intention. The Trustee responded that a legal opinion on the validity of the security had been obtained by Brookfield and K2, the previous secured creditors that had subsequently been bought out by Questerre, that he was satisfied with such opinion and did not believe that the expense of obtaining a further opinion was justifiable;
b) that the Trustee should closely scrutinize and segregate the debtors' legal costs and Questerre's legal costs as they had the same counsel. The Trustee noted that he did not believe this to be an issue, but agreed to do so; and
c) that counsel understood that more than $3 million of the unsecured debt of the debtors (excluding debt owed to Questerre) had been paid in full since February,

> 2008. The Trustee explained that the $3 million paid to creditors was incurred subsequent to Questerre's acquisition of Magnus Energy's debt, was paid by Questerre and went to the funding of flow-through share obligations. The Trustee was thus satisfied that no creditor had been preferred.

[8] Pedro and Taber's counsel also alleged at the meeting that at the time Magnus One's assets were transferred to Questerre, all of Magnus One's shares were under seizure, and it was their position that a sale could not be authorized and that the transaction was reviewable. The Trustee responded that he was of the view that the seizure of shares would not have prevented the transaction from occurring as Questerre as secured creditor could have affected the transfer of assets through the appointment of a receiver or by seizing the assets.

[9] The Trustee in its report to the Court on this approval application gives the opinion that the Proposals are advantageous for the creditors because they result in a greater distribution to the unsecured creditors, as there would be no distribution to unsecured creditors in a bankruptcy scenario.

Analysis

[10] Prior to approving a Proposal, the Court must be satisfied that:

I) the terms of the Proposal are reasonable,
ii) the terms of the Proposal are calculated to benefit the general body of creditors, and
iii) the Proposal is made in good faith.

[11] The Court must consider, not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality. I am not bound to approve the Proposals even though they have been recommended by the Trustee and given the overwhelming support of creditors, but substantial defence should be afforded to these views: The 2009 *Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz and Sarra, at page 264, citing *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.); *Re Sumner Co.* (1984) Ltd. (1987), 64 C.B.R. (N.S.) 218 (NB Q.B.) ; *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); Re *National Fruit Exchange Inc*. (1948), 29 C.B.R. 125 (Que. S.C.); *Re Man With Axe Ltd.* (No. 1) (1961), 2 C.B.R. (N.S.) 12 (Man. Q.B.).; Re *Abou-Rached* (2002), 5 C.B.R. (4th) 165, 2002 CarswellBC 1642 (B.C. S.C.).; *Re Garrity* [2006] A.J. No. 890 (Q.B.).

[12] It is not suggested that the formalities of the *Bankruptcy and Insolvency Act*. have not been complied with nor that the Proposals do not have a reasonable possibility of being successfully completed in accordance with their terms.

[13] Pedro and Taber submit that the Proposals should not be approved because the debtor companies have not acted in good faith and that there are facts as set out under section 173 of the *Bankruptcy and Insolvency Act* that can be established against them.

[14] Firstly, these creditors allege that they were not given proper notice of a plan of arrangement involving Magnus Energy and Questerre that received final approval of the Court on October 31, 2007. Pursuant to that plan of arrangement, Magnus Energy shares were transferred to Questerre in return for Questerre shares. The final order provides that the Court is satisfied that service of the application was effected in accordance with the interim order, which required that the application, meeting materials and the interim order be served on Magnus Energy shareholders, its directors and auditors. There was no requirement to serve creditors. The affidavit of the President of Magnus Energy that supported the application for an initial order states that no creditors of Magnus Energy would be adversely affected by the arrangement, as they would continue to hold rights as creditors, and that neither Magnus nor Questerre had entered into the arrangement for the purpose of hindering, delaying or defrauding creditors. Pedro and Taber were thus not entitled to notice of the arrangement, although it appears from comments of their counsel that they were aware of it in any event.

[15] With respect to the arrangement, Pedro and Taber suggest that a press release that gave specific details of the plan of arrangement and the Court approval process was somehow flawed because it referred to the arrangement as a “merger”. This complaint is unfounded, as the press release is quite specific with respect to the arrangement details.

[16] Pedro and Taber also allege that no proper disclosure of the insolvent situation of the Magnus entities was made to the Court at the time the arrangement was approved. However, it is clear from the record that the Court had before it at both the interim and final order stage the Information Circular that was sent to Magnus shareholders that would have included disclosure as mandated by securities regulation, including reference to financial statements that would disclose the details of secured debt.

[17] The principal of Pedro and Taber also states that he is “not aware” if Magnus or Questerre disclosed to the Court the fact that “Questerre intended to assert in due course a security position over other creditors.” It is, however, also clear from the record that it was a condition of the arrangement that all secured debt of Magnus would be paid or satisfied.

[18] The gist of the objection by Pedro and Taber appears to be that Questerre took an assignment of Magnus Energy’s secured debt on October 16, 2007, which they allege resulted in abuse. The specifics of that alleged abuse are as follows:

[19] A. Following the plan of arrangement and assignment of secured debt, in January, 2008, Pedro and Taber registered writs of enforcement against Magnus Energy and Magnus One, and served various garnishee summons from January 17, 2008 to February 21, 2008. On February 12, 2008 Questerre demanded payment of its secured debt and issued a Notice of Intention to Enforce Security to Magnus Energy and Magnus One in the amount of indebtedness then

outstanding, roughly $17 million. Questerre as secured creditor claimed priority over any funds realized by Pedro and Taber through their garnishee summons on the basis that Questerre's security interest had been registered in the Personal Property Registry on December 19, 2007, before Pedro and Taber's writ of enforcement.

[20] Pedro and Taber complain that the question of who was entitled to funds paid into Court pursuant to the garnishees was stayed by the debtors' Notices of Intention. A decision by the debtor companies to exercise their legitimate rights to attempt to resolve their debts through the proposal mechanisms of the *Bankruptcy and Insolvency Act* cannot be considered bad faith.

[21] B. On March 19, 2008, Magnus Energy and Magnus One transferred oil and gas assets to Questerre in partial satisfaction of the roughly $22 million of secured debt that was at that time owed to Questerre. The transfer satisfied debt to the extent of $19.5 million, leaving $2,226.618 owing to Questerre. An independent valuation of the assets was obtained, and the Trustee advised that the property transferred was valued at about $17.5 million by such report. To be conservative, the secured debt was debited at the higher amount of $19.5 million.

[22] On March 18, 2008, as instructed by Pedro and Taber, a bailiff attended at the registered office of the Magnus companies and the offices of counsel for Questerre and left a Notice of Seizure of the shares of Magnus One "pursuant to Section 51 of the *[Securities Transfer Act]* and Section 57 (2) [of an unspecified Act]". Section 57(2) of the *Civil Enforcement Act* provides that an agency may seize "the interest of an enforcement debtor" in a security issued by a private company by serving a notice of seizure on the issuer at its chief executive office. Section 57(4) provides that the interest of an enforcement debtor in a security seized is subject to a prior security interest, the seizure does not affect the prior security interest, and the ability of the agency to deal with the security is limited to those rights and powers that the enforcement debtor would have had but for the seizure. The security held by Questerre over the assets of Magnus Energy appears to extend to all of the property of Magnus Energy, including the shares of Magnus One.

[23] The attempted seizure thus gives rise to a number of issues relating to validity and priority that were not addressed in the submissions made at the hearing before me, but nevertheless, Pedro and Taber submit that the assignment of properties to Questerre can and should be attacked by the Trustee because no approval by the shareholders of Magnus One to a sale of substantially all of the property of the corporation was obtained as required by the *Business Corporation Act*, as Magnus Energy was not in a position to consent to a special resolution authorizing the sale because the shares were under seizure. Even if I was satisfied that the seizure had been validly executed and was unaffected by s. 57(4) of the *Civil Enforcement Act*, the party who would be entitled to raise an objection to the conveyance of assets would be the bailiff, pursuant to section 57.1 of the *Civil Enforcement Act*, and no such objection is in evidence.

C. Pedro and Taber also submit, as they did at the creditor meetings, that the debtors paid roughly 3.5 million to various creditors when other payables were left unpaid, giving rise to

undue preferences. A press release issued by Questerre on November 2, 2007 after the arrangement had been completed indicates that Questerre would be using proceeds of a private placement of securities to fund the flow-through commitments of Magnus, including Magnus' share of drilling costs committed with respect to a particular well.

[24] The Trustee explains that Questerre loaned the money in question to the Magnus companies so that they could meet their flow-through share obligations. He is satisfied that the payments were made in order to preserve an asset of the companies and that only creditors providing new work were paid. He is therefore satisfied that there was no significant undue preference of creditors.

[25] Pedro and Taber submit that the disclosure relating to the Proposals is deficient because they speculate that the reason Questerre is willing to give up its secured creditors status in order to benefit the unsecured creditors is that there must be significant undisclosed tax losses that are of great benefit to Questerre and that the extent of that benefit should be disclosed. The Trustee agrees that there may be some tax losses totalling roughly $2 million, but submits that it is sheer speculation at this time as to whether these losses may be available to Questerre for use in the future. I am satisfied that the issue of the possible use of tax losses is not information so material that it makes the disclosure to creditors or the Court in these applications deficient.

[26] Pedro and Taber also submit that it is obvious that the remaining assets of the Magnus companies are not of a value equal to fifty cents on the dollar on the amount of their unsecured liabilities as set out in s. 173(1)(a) of the *Bankruptcy and Insolvency Act* and that I must thus refuse to approve the Proposals without reasonable security. I am satisfied by the evidence of the conveyance of assets to Questerre to reduce secured debt that this state of affairs has arisen from circumstances for which the Magnus companies cannot justly be held responsible, and therefore, section 173.(1)(a) does not require me to order security. In coming to this determination, I take into account Questerre's agreement to be treated as an unsecured creditor for the remainder of its debt.

[27] I therefore do not find either lack of good faith or proof of facts under section 173 that would preclude the approval of these Proposals. I am satisfied that the terms of the Proposals are reasonable, that they are calculated to benefit the general body of creditors, and that no creditors are being unduly prejudiced. There is nothing in the evidence before me that calls into question the integrity of the process or the requirements of commercial morality. It is persuasive that Questerre is willing to forego the remainder of its secured position and to take on the potentially material contingent claim for reclamation and abondment liabilities in order to allow Proposals with some recovery to the unsecured creditors, and I am persuaded that the situation is substantially better for unsecured creditors than it would be under a general bankruptcy. I therefore approve the Proposals. If the parties wish to make representation with respect to costs, they may do so.

Heard on the 27th day of January, 2009.
Dated at the City of Calgary, Alberta this 2nd day of April, 2009.

B.E. Romaine
J.C.Q.B.A.

Appearances:

John L. Ircandia
Borden Ladner Gervais LLP
for the Applicant

James R. Farrington
Krushel Farrington
for Pedro's Services Ltd. and
Taber Water Disposal Inc.

TAB 5

Ontario Supreme Court
Mayer, Re
Date: 1994-03-03

Re proposal of Joseph Moise Mayer

Ontario Court of Justice (General Division) [In Bankruptcy] Registrar Ferron

Decision – March 3, 1994.

Kenneth H. Page, for insolvent.

(Doc. 31-279696)

[1] March 3, 1994. Registrar FERRON: – The application for the approval of the proposal of Joseph Moise Mayer came before the Court on February, 1994 and has been adjourned on two occasions for further information.

[2] In order to affirm a proposal, the Court must be satisfied that the proposal is:

1. reasonable;

2. calculated to benefit the general body of creditors; and

3. made in good faith.

[3] The first two provisions are statutory, while the third is implied. The Bankruptcy Court is a court of equity. An insolvent person asking for the Court's approval of a plan must do so in good faith requires full disclosure. There has not been full disclosure by the insolvent person in this application.

[4] The central provision of the proposal requires the acceptance by creditors in full payment of claims of the insolvent person's equity in "the premises in which the debtor resides".

[5] Nowhere, not in the proposal, not in the Trustee's report to creditors (where the property is called "family home" and "principal residence"), and not in the report to the Court is it disclosed that:

1. the premises which is to fund the proposal is held with the insolvent person's spouse; (the statement of affairs does make reference to a half interest in three properties including the

property referred to in the proposal; that is ambiguous and might not be appreciated by the creditors); or

2. the property is encumbered by two mortgages, a charge in favour of Revenue Canada, and a charge for a line of credit; or

3. that municipal taxes of $24,000 for arrears are owing.

[6] Moreover, there was no appraisal for the property available to creditors or, initially, to the Court, so that the Creditors can have no idea of what equity might be available, assuming there is an equity available to creditors.

[7] When this matter came on before the Court initially, I directed counsel's attention to the omission of the appraisal, and I now have before me what is called an "appraisal". That appraisal consists of a two-line letter signed by sales representatives of a real estate company. The letter is addressed "To whom it may concern" and suggests that the property has a value of "about $750,000 in today's marketplace". The property, I am advised, has been on the market for some considerable time without result and one can only speculate that the property is overpriced. In any event, I repeat, no creditor has seen that appraisal.

[8] Even if the property were to sell for $750,000, the funds available for purposes of the proposal would be only $73,000 and when one deducts the selling commission, the additional interest accruing on the encumbrances, legal costs both of the proposal and of the sale of the property and the Trustee's fees, the amount available to creditors would be minimal.

[9] Moreover, the property has been on the market for some considerable time without results. The property may never sell for its so called appraised value. The proposal provides for no cut off date so that creditors may never be paid. In addition, if the property is sold for less than $750,000 the dividend to creditors would be reduced even more.

[10] The statutory report of the Trustee to the Court on the application for the approval of the proposal is deficient. Statutory Form Number 42, "Report of Trustee on Proposal", paragraph 9, provides by way of direction to the Trustee: "Set out assets in detail, giving the value as carried on the books of the Debtor and the Trustee's estimate in each case of the realizable value thereof."

[11] Neither the Creditors nor the Court has been given the information required by the statute with which to gauge the value of the insolvent person's plan. That information which is available reveals the proposal not calculated to benefit the general body of creditors.

[12] Accordingly, the statement in the Trustee's Report to Creditors (Section 51(1)), viz under the heading "Recommendations and Summary", viz, "Based on a review of the condensed statement of assets and liabilities, it is estimated that there would be less of a distribution to Creditors in a bankruptcy scenario. Accordingly, the proposal produces a higher realization for Creditors", is incorrect and misleading. Since there is no appraisal there can be no estimate, and the statement in the report is of no value. It is skewed unfairly in favour of the insolvent person and cannot be supported.

[13] Nor is the Trustee entitled to make the statement under the heading, "Financial Position and Evaluation of Assets" simply because he cannot know what the assets will realize on bankruptcy for the same reason that he cannot know what will be available to Creditors in the proposal.

[14] Moreover, the Creditors have not been advised that they would be able to get at least as much and probably more in a bankruptcy of the Debtor as opposed to the proposal.

[15] In bankruptcy, the exact same asset, that is the principal residence, would be available to them, and the encumbrance to Revenue Canada for arrears of taxes would presumably abate, so that on that basis alone, the bankruptcy is more advantageous to Creditors than a proposal.

[16] In addition, on bankruptcy creditors would obtain the following assets which are not available on the proposal:

1. After acquired assets, that is contributions from the Debtor's income; and

2. The mortgage receivable and automobile referred to in the statement of affairs; and

3. The Debtor's accounts receivable, that is, the OHIP payments owing to the doctor at the date of bankruptcy; and

4. Assets not encumbered or the equity therein.

[17] The admitted combined net income of the insolvent person, a doctor, and his spouse, is $7,690 per month, from which a payment order would probably be obtainable in a bankruptcy. In particular, the insolvent person's statement of earnings carries an item of disbursements entitled "Mortgage and Loans" – $6,547 per month. In bankruptcy, the "Loan" portion of that payment would probably be available to Creditors. The Trustee's report to the Court states, "The Debtor's main assets are mostly encumbered" which indicates that there are other than "main assets" and these are not encumbered. Such assets would be available to creditors. The above information was not given or made available to Creditors.

[18] It is clear that a plan to be approved by the Court must be more advantageous to Creditors than would be the case in a bankruptcy. See *Re Allen Theatres Ltd.* (1922), 3 C.B.R. 147 (Ont. S.C.) and *Re Rideau Carleton Raceway Holdings Ltd.* (1971), 15 C.B.R. (N.S.) 72 (Ont. S.C.) at 75. The proposal submitted does not meet that test.

[19] Finally, I note that of the thirteen Creditors with declared liabilities of $277,000, only one attended the Creditors' meeting. The proposal was approved by that Creditor and by one proxy which the Trustee voted in favour of the proposal. This is hardly an overwhelming or representative showing of creditors. How much of this rather dismal showing can be attributed to the paucity of information made available to Creditors is conjecture, but the Court must, notwithstanding, protect Creditors from themselves. See Honsberger, "Debt Restructuring", page 8-64.

[20] The proposal cannot be approved and is accordingly rejected.

Approval denied.

TAB 6

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

Cases Cited

By Deschamps J.

Distinguished: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **referred to:** *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624.

By McLachlin C.J. (dissenting)

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

Statutes and Regulations Cited

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, c. A-1.01.

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 9.

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12.

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.

Jurisprudence

Citée par la juge Deschamps

Distinction d'avec l'arrêt : *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **arrêts mentionnés :** *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624.

Citée par la juge en chef McLachlin (dissidente)

Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) c. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

Lois et règlements cités

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, ch. A-1.01.

Code civil du Québec, L.Q. 1991, ch. 64, art. 1497, 1508, 1513.

Environmental Protection Act, S.N.L. 2002, ch. E-14.2, art. 99, 102(3).

Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des

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.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 "claim provable in bankruptcy", "creditor", 14.06(8), 121(1), (2), 135(1.1).

Civil Code of Québec, S.Q. 1991, c. 64, arts. 1497, 1508, 1513.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(1) "claim", 11, 11.1, 11.8(5), (7), (8), (9), 12(1), (2).

Environmental Protection Act, S.N.L. 2002, c. E-14.2, ss. 99, 102(3).

Treaties and Other International Instruments

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.

Authors Cited

Baird, Douglas G., and Thomas H. Jackson. "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199.

Canada. House of Commons. *Evidence of the Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996.

Hohfeld, Wesley Newcomb. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, new ed. by David Campbell and Philip Thomas, eds. Burlington, Vt.: Ashgate, 2001.

MacCormick, D. N. "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart*. Oxford: Clarendon Press, 1977, 189.

Saxe, Dianne. "Trustees' and Receivers' Environmental Liability Update" (1998), 49 C.B.R. (3d) 138.

APPEAL from a judgment of the Quebec Court of Appeal (Chamberland J.A.), 2010 QCCA 965, 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, [2010] Q.J. No. 4579 (QL), 2010 CarswellQue 4782, dismissing the appellant's motion for leave to appeal a decision of Gascon J., 2010 QCCS 1261, 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, [2010] Q.J. No. 4006 (QL), 2010 CarswellQue 2812. Appeal dismissed, McLachlin C.J. and LeBel J. dissenting.

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

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.

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.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 2 « créancier », « réclamation prouvable en matière de faillite », 14.06(8), 121(1), (2), 135(1.1).

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 2(1) « réclamation », 11, 11.1, 11.8(5), (7), (8), (9), 12(1), (2).

Traités et autres instruments internationaux

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 nº 2.

Doctrine et autres documents cités

Baird, Douglas G., and Thomas H. Jackson. « Comment : *Kovacs* and Toxic Wastes in Bankruptcy » (1984), 36 *Stan. L. Rev.* 1199.

Canada. Chambre des communes. *Témoignages du Comité permanent de l'industrie*, nº 16, 2e sess., 35e lég., 11 juin 1996.

Hohfeld, Wesley Newcomb. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, new ed. by David Campbell and Philip Thomas, eds. Burlington, Vt. : Ashgate, 2001.

MacCormick, D. N. « Rights in Legislation », in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society : Essays in Honour of H. L. A. Hart*. Oxford : Clarendon Press, 1977, 189.

Saxe, Dianne. « Trustees' and Receivers' Environmental Liability Update » (1998), 49 C.B.R. (3d) 138.

POURVOI contre une décision de la Cour d'appel du Québec (le juge Chamberland), 2010 QCCA 965, 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, [2010] Q.J. No. 4579 (QL), 2010 CarswellQue 4782, qui a rejeté la requête de l'appelante pour permission d'en appeler d'un jugement du juge Gascon, 2010 QCCS 1261, 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, [2010] Q.J. No. 4006 (QL), 2010 CarswellQue 2812. Pourvoi rejeté, la juge en chef McLachlin et le juge LeBel sont dissidents.

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.

I. Facts and Procedural History

[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.

[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.

[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.

[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*,

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. Faits et historique judiciaire

[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] 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] 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] 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.

[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).

[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.

[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.

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] 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] 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 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.

[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] 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.

[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. Positions of the Parties

II. Thèses des 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

[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).

[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.

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

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 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. 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?

[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.

[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,

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] 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] 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.

[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*.

IV. Claims Under the *CCAA*

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

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] 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. Réclamations sous le régime de la *LACC*

[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.

[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.

[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 indebtedness, liability or obligation of any kind 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; . . .

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] 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] 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 dette, tout engagement ou toute obligation d'un genre quelconque 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, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

[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, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

[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*, nº 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.

[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.

[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

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] 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] 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.

[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.

[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.

[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.

[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

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] 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] 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] 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] 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.

[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

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] 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.

[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.

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.

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] 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] 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.

[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.

[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

[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] 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] 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

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.

[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] 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.

[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.

2. The Proceedings Below

[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).

[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.

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

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

[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. Les décisions des juridictions inférieures

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

[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.]

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] 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."

[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] 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)).

[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*?

[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*?

[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

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

[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] 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.

[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.

[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.

[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.

[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

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] 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] 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] 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] 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 every likelihood to a certainty 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 fortement probable et presque certain 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.

[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".

5. The Result in This Case

[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.

[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.

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

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] 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. L'issue du présent pourvoi

[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] 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] 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.

[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.

[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.

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

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] 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] 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] 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. Yet, had he formulated the

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^{o} 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. Or, s'il avait formulé la question

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.

[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.

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

Appeal dismissed with costs, McLachlin C.J. *and* LeBel J. *dissenting.*

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

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

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

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

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

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

Pourvoi rejeté avec dépens, la juge en chef McLachlin *et le juge* LeBel *sont dissidents.*

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

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

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

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 7

Citation: Nalcor Energy v. Grant Thornton 2015 NBQB 020
Date: 20150121

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

F/M/47/2014

BETWEEN:

NALCOR ENERGY,

Plaintiff

- and –

GRANT THORNTON POIRIER LIMITED

Defendant

Date of Hearing:	December 3, 2014
Date of Decision:	January 21, 2015
Before:	Justice Terrence J. Morrison
At:	Fredericton, New Brunswick
Appearances:	Stephen Kingston, Benjamin Durnford and Shivani Chopra, for Nalcor Energy;
	John E. Bujold, for Grant Thornton Poirier Limited;
	Robert M. Creamer, Q.C. and Frank McBrearty, for Great Western Forestry Ltd.;
	Craig J. Hill, for Western Surety Company;
	Hugh J. Cameron, for TCE Capital Corporation

D E C I S I O N

Morrison, J.

I. INTRODUCTION

[1] Great Western Forestry Ltd. ("GWF") filed a notice of intention to make a proposal to creditors (the "Proposal") pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, Chapter B-3 (the "*BIA*"). Matthew Munro of Grant Thornton Poirier Limited ("Grant Thornton") was named the proposal administrator/trustee (the "Proposal Trustee"). Nalcor Energy ("Nalcor") submitted a proof of claim to the Proposal Trustee. At a meeting of creditors held on July 11, 2014, Mr. Munro, acting in the capacity as chair of the meeting, rejected Nalcor's proof of claim for purposes of voting on the Proposal pursuant to section 108(1) of the *BIA*. The chair rejected Nalcor's Proof of Claim on the basis that it was contingent and unliquidated.

[2] This is an application by Nalcor for an order reversing the chair's ruling rejecting Nalcor's Proof of Claim for purposes of voting on the Proposal. This is an appeal pursuant to section 108 of the *BIA*.

II. FACTS

[3] The following summary of the facts is a compilation of the facts outlined in the various briefs submitted by the parties. I have borrowed extensively from the briefs and I have largely reproduced them verbatim. The essential facts are not in dispute. Where there are factual controversies I have specifically identified them.

[4] Nalcor is the proponent of an undertaking known as the Muskrat Falls Project, a project being developed to exploit the hydroelectric potential of Muskrat Falls on the Churchill River in the Labrador portion of the Province of Newfoundland and Labrador at a reported capital cost of $7.4 billion. On March 11, 2013, Nalcor and GWF, which engages in the business of harvesting and clearing timber, entered into a contract which provides that GWF will supply the personnel, equipment and services necessary to clear a right-of-way from the site of the Muskrat Falls Project to the site of existing hydroelectric generation facilities located at Churchill Falls, Labrador (the "Contract"). The projected value of the Contract is $33,283,323.00.

[5] On November 15, 2013, Nalcor issued a Notice of Termination to GWF under the Contract. Among other things, the Notice of Termination cited GWF's failure to meet the Contract schedule as the basis for termination. That same day, Nalcor entered into a letter agreement with a different company to complete GWF's work under the Contract.

[6] On February 10, 2014 GWF filed a Notice of Intention to Make a Proposal pursuant to subsection 50.4(1) of the *BIA*. The respondent was retained to act as the Proposal Trustee.

[7] On February 11, 2014 GWF filed a Statement of Claim in the Supreme Court of Newfoundland and Labrador Trial Division (General) claiming against Nalcor, amongst other damages to be later valued, special damages in excess of eleven million dollars ($11,000,000.00) and a mechanics lien in excess of nine million dollars ($9,000,000.00) (the "Litigation"). On March 2, 2014 a copy of the Statement of Claim was served on Nalcor.

[8] On May 27, 2014 Nalcor presented a Proof of Claim to the Proposal Trustee listing an unsecured claim in the amount of $20,100,000.00. which was superseded by a Re-stated Proof of Claim filed on July 8, 2014 (the "Proof of Claim") setting out a claim in the amount of $18,672,151.64.

[9] On June 3, 2014, Nalcor filed a Defence in the Litigation.

[10] On June 6, 2014 GWF submitted its Proposal indicating that unsecured creditors were to be paid out of the "Net proceeds of Settlement or Final Judgment" in the Litigation.

[11] On June 13, 2014 the Proposal Trustee recommended acceptance of the Proposal.

[12] On June 30, 2014 the Proposal Trustee also advised Nalcor that in order to assess its claim further it would be required to provide more substantive evidence to support the claim.

[13] On July 7, 2014 Nalcor submitted to the Proposal Trustee various documents including Change Orders, Payment Certificates, the Contract, an Executive Summary and a copy of its Defence filed in the Litigation in support of its claim of $18,672,151.64.

[14] On July 8, 2014 the Proposal Trustee received Nalcor's Re-stated Proof of Claim and the applicant's Proxy/Voting Letter indicating it would be voting against the acceptance of the Proposal.

[15] On July 10, 2014 there was a telephone conversation between Nalcor's legal counsel and the Chair. Nalcor's legal counsel asserts that in that conversation he was advised by the Chair that he intended to proceed under section 108(3) of the *BIA*. The substance of the conversation was confirmed in an email from Nalcor's counsel to the Chair on the same date (Record, pages 32 and 483). There was no response to the email. In his affidavit, the Chair denies there was any understanding or assurances made that he would proceed

under section 108(3) only that he was considering certain sections of the *BIA* (Record, page 511).

[16] On July 11, 2014, the first meeting of GWF's creditors (the "Creditors' Meeting") was held in Fredericton. Matthew Munro of Grant Thornton served as the Chair of the meeting. At the meeting, the Chair rejected Nalcor's Proof of Claim for the purpose of voting at the meeting pursuant to section 108(1) of the *BIA*.

[17] The Chair provided oral reasons for his decision to disallow Nalcor's Proof of Claim, as evidenced in the minutes of the meeting. Later that day, the Chair also provided Nalcor with written reasons for his decision. In his reasons, the Chair explained that the Proof of Claim was disallowed because:

> i. The claim is contingent upon the outcome of an action as to whether the Termination of the Contract between Nalcor Energy and Great Western Forestry Ltd. was proper and legal for which no final decision has been rendered by a Court of Law, and
>
> ii. The amount of the claim has not been adjudicated in a Court of Law and is therefore unliquidated.

[18] It is common ground that had Nalcor been permitted to vote at the Creditors' Meeting the Proposal would have been defeated and GWF automatically placed into bankruptcy.

III. PRELIMINARY ISSUE

[19] At the outset of the hearing counsel sought a determination whether this application would proceed by way of trial *de novo* or on the existing record. Nalcor argued that the matter should proceed as a rehearing (trial *de novo*). Grant Thornton argued that appeals under section 108 of the *BIA* should be based on the record.

[20] There are conflicting lines of authority on this issue. In *Alberta Permit Pro Inc. (Re)* 2011 ABQB 141 the Court concluded that appeals pursuant to section 108 of the *BIA* should proceed by way of "appeal de novo" rather than an "appeal on the record". In *Trans Global Communications Group Inc. (Re)* [2009] A.J. No. 352 the Court acknowledged and reviewed the two lines of authority on the issue and concluded that, except in circumstances where restricting the hearing to the record would result in injustice, appeals of this nature should not be heard *de novo*.

[21] In this case, I could see no compelling reason to open the matter up to issues which were not before the Chair at the time of his rejection of Nalcor's Proof of Claim and which did not form part of his reasons for rejection. Accordingly, I ruled that the hearing would proceed as an appeal on the record.

IV. STANDARD OF REVIEW

[22] All of the parties, except Grant Thornton, agree that the applicable standard of review is that of correctness. In *Re Galaxy Sports Inc.* 2004 BCCA 284 the Court concluded that a Chair's decision rejecting a proof of claim under section 108 attracts a correctness standard on appeal:

> On a consideration of all the "contextual" factors mandated by the "pragmatic and functional" approach, I see no reason to disagree with the long-standing principle enunciated in Re McCoubrey, supra, which requires the application of a "correctness" standard where compliance with a "mandatory" provision (which I would equate to a question of law or statutory compliance) is involved, and the application of a "reasonableness" standard where the determination of a factual matter or an exercise of true discretion is called for. In the former category, I would place the chair's decision under s. 108 rejecting a proof of claim for voting purposes and the trustee's decision disallowing a proof of claim under ss. 124 and 135(2). In the latter category, I would place the trustee's role in valuing contingent and unliquidated claims under s. 135(1.1). This general approach conforms with the objective, which I see as implicit in the BIA, of enabling debtors to have their proposals voted upon expeditiously and permitting creditors to have their rights and claims determined in a business-like manner, while at the same time providing a meaningful appeal to a court of law on questions that clearly affect legal rights, engage the relative expertise of judges, and set precedents for other cases.

[23] The standard of review in this matter is that of correctness.

V. ANALYSIS AND DECISION

[24] At the outset I will deal with the factual controversy identified in paragraph 15 above. It is difficult to make findings with respect to controverted facts based solely on affidavits.

However, the Chair's affidavit evidence seems to me to be more plausible. In my view, it is likely that Nalcor's counsel misunderstood his conversation with the Chair. In any event, nothing turns on it. Nalcor did not alter its conduct in reliance on the conversation and therefore suffered no prejudice. Furthermore, the conversation had no bearing or influence on the outcome of the Creditors' Meeting.

[25] It is common ground that the Proposal Trustee did not determine whether Nalcor's claim is a provable claim pursuant to section 135(1.1) of the *BIA*. Nalcor argues that if the Proposal Trustee believed that its claim was of a contingent and/or unliquidated nature he should have valued the claim pursuant to section 135(1.1). Failing that, the Chair was obligated to proceed under section 108(3) and mark the Nalcor Proof of Claim as "objected to" and allow Nalcor to vote on the Proposal. Nalcor further argues that, even if the Chair had the discretion to proceed under section 108(1), his ruling that Nalcor's claim is contingent and/or unliquidated is wrong and must be overturned for failing to meet the correctness standard.

A. Was the Chair obligated to proceed under section 108(3)?

[26] Section 108 of the *BIA* provides as follows:

> 108.(1) **Chair may admit or reject proof** – The chair of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

> (2) **Accept as proof** – Notwithstanding anything in this Act, the chair may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.
>
> (3) **In case of doubt** – Where the chair 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.

[27] Nalcor urges me to follow the approach advocated by Veit, J. in *Alberta Permit Pro*, supra. In that case the chair of a meeting of creditors denied a claimant, Wood Buffalo, the right to vote on a proposal because its proxy and claim were deficient and also because the Chair ruled the claim to be contingent and unliquidated. Wood Buffalo argued that its vote be marked as "objected" but be allowed under section 108(3) of the *BIA*. The Chair refused to proceed under section 108(3). The Court concluded that the Chair should have marked the claim "objected" and allowed Wood Buffalo to vote. Veit, J. stated at paragraph 64:

> However, where claims are relatively complicated, it stands to reason that the Trustee would come to the conclusion that it does not have the time, or the means, to assess the claim and that it should resort to the provisions of s. 108(3). It appears to me that a potentially useful guide to a Trustee is the case law which has developed around the issue of summary judgments: a Trustee is, in effect, called upon to make a summary judgment in respect of the claims advanced. In circumstances where it is not possible to make a summary judgment, the Trustee should take advantage of the statutory mechanism offered, mark a claim "objected", but allow the putative creditor to vote. In the circumstances here, it is difficult to credit that the Trustee would have had sufficient information to categorically state that Wood Buffalo's claim was denied; Wood Buffalo should have been allowed to vote, and the vote should have been marked "objected".

[28] In my view, the plain reading of section 108 provides the Chair with several options as to how to proceed with proofs of claim at a meeting of creditors. One of those options is section 108(1). As counsel for TCE Capital Corporation succinctly stated in argument:

> I did not have time to make this complicated. I submit that the Chair was able to use section 108(1) and therefore the only issue is whether he was correct.

I agree.

[29] In any event, there is persuasive authority that the Chair's use of section 108(1) over the "mark and park" provisions of section 108(3) is the appropriate course of action in the circumstances of this case. Counsel for the respondent referred me to two decisions, the circumstances and issues of which are similar to the present case: *Re Port Chevrolet Oldsmobile Ltd.,* 2002 BCSC 1874 (affirmed 2004 BCCA 37) and *Re 2713250 Canada Inc.*, 2011 QCCS 6119.

[30] In *Port Chevrolet* the Canada Customs and Revenue Agency ("CCRA") submitted a claim for $15,864,279.83 based on an assessment against the debtor which was under appeal. The debtor had negotiated a proposal with its other creditors which was approved by the Trustee. At the creditors' meeting the Trustee disallowed CCRA's claim on the ground that it was contingent being based on an unresolved assessment currently under appeal and disallowed CCRA's vote on the proposal. CCRA appealed. In upholding the Trustee's decision Neilson, J. stated at paragraph 41:

> 41 I find the circumstances here quite different. The debtor is not yet bankrupt. It was a profitable business with over 50 employees before the assessment and is now diligently pursuing a proposal under the *Bankruptcy and Insolvency Act*, which is the only course left open to it to avoid a bankruptcy and continue to operate, in the face of an assessment that it claims is invalid. Neither the debtor nor the trustee are seeking to avoid the appeal procedures outlined in the *Excise Tax Act*. Instead, the debtor is vigorously pursuing them. The problem is that those procedures could not be completed before the first creditors' meeting. Port has evidently convinced the trustee that there is merit to its objection. Even CCRA's representative, Mr. O'Connell, has conceded to the trustee that one possible outcome of Port's challenge may be a nil value to CCRA's claim.

[31] And at paragraphs 45 and 46:

> 45 In the circumstances I have described, I am satisfied that the trustee had the power to classify CCRA's claim as contingent. As Port's counsel points out, to hold otherwise could permit CCRA to issue a substantial but erroneous assessment against an innocent and profitable debtor and put it into bankruptcy and out of business before the validity of the assessment can be determined under the appropriate process provided by the *Excise Tax Act*. That cannot be the intent of either the *Excise Tax Act* or the *Bankruptcy and Insolvency Act*.
>
> 46 There is no evidence of prejudice to CCRA in permitting Port to continue to operate pending resolution of the appeal process under the *Excise Tax Act*, which I am told may take up to a year. CCRA, during that period, is entitled to receive the lion's share of the profits set aside for unsecured creditors under the proposal. On the other hand, there is substantial prejudice to Port, its employees and its other creditors if it is prematurely forced into bankruptcy on the strength of an assessment that may be successfully challenged.

[32] The case of *2713250 Canada* is another involving an unresolved tax dispute. In that case Revenue Quebec issued two Notices of Assessment against the debtor totaling $30,652,071.00 which the debtor contested. Under the applicable law the tax assessments were presumed valid and the amounts claimed were immediately payable. As a result, the debtor became insolvent and filed a notice of intention to file a proposal under the *BIA*. The trustee concluded that Revenue Quebec's claim was contingent. At the first meeting of creditors the Chair declared the Revenue Quebec claim as being inadmissible

for the purposes of voting pursuant to section 108(1) of the *BIA*. The evidence was clear that Revenue Quebec would have voted against the proposal if permitted resulting in the automatic bankruptcy of the debtor. On the issue of the applicability of section 108(1) of the *BIA* Gascon, J. (now of the Supreme Court of Canada) stated at paragraphs 50 and 51:

> 50 Similarly, this is not a case where the chair doubted that the proof of claim should be admitted or rejected under section 108(3) BIA. As the Trustee expressed at the hearing, in its opinion, **it is clear that RQ's proof of claim is inadmissible for the purposes of voting due to its contingent and unliquidated character and the impossibility of assessing it in the circumstances which prevailed at the time of the meeting.**
>
> 51 In other words, the Trustee has neither accepted, nor rejected RQ's proof of claim. It has simply not recognized it for the purposes of voting at the meeting. The relevant meeting minutes and the Trustee's testimony at hearing are unequivocal. (emphasis added)

[33] And at paragraph 75:

> 75 In making the decision contested by RQ, **the Trustee exercised a power conferred by section 108(1) *BIA*,** in its role as chair of the meeting of creditors. This being said, **the Court should only intervene in the presence of an error of law or a palpable and overriding error of fact.** (emphasis added)

[34] And at paragraphs 79 and 80:

> 79 These parameters set out, we note that **section 108(1) *BIA* allows the chair to declare a claim as being inadmissible for the purposes of voting. The wording of the section explicitly states this.**
>
> 80 In this case, the Trustee, in its capacity as chair of the meeting of creditors, **has correctly exercised this power.** It gave reasons for its decision. Its report on the proposal and the minutes of the meetings held October 4, 2010 and February 17, 2011 makes proof of this. (emphasis added)

[35] A compelling argument for applying the approach used in *2713250 Canada* and *Port Chevrolet* is found at paragraphs 41 and 42 of the Pre-Hearing Brief filed on behalf of Western Surety Company:

> 41. There are several similarities between the case at bar and the two cases summarized above. In all three scenarios:
>
> i. the debtor is not yet bankrupt;
>
> ii. the proposal has the overwhelming support of almost all creditors;
>
> iii. the claim in question has been challenged (in good faith) in a court of law;
>
> iv. the debtor is actively pursuing the court challenge and the proposal;
>
> v. the contested claim is larger than the claim of any other creditor;
>
> vi. the contested claim is impossible to evaluate at the time of the first meeting of creditors;
>
> vii. the creditor in question was the only creditor (or one of the only creditors) who intended to vote against the proposal;
>
> viii. allowing the creditor in question to vote would have triggered an automatic bankruptcy; and
>
> ix. the creditor in question was the only creditor who stood to benefit from the failure of the proposal.
>
> 42. Because the similarities are so stark, the Chair's decision to disallow Nalcor's claim for the purpose of voting pursuant to s. 108(1) should be upheld, as it was in *Port Chevrolet* and *Re 2713250 Canada Inc*.

[36] The cases of *2713250 Canada* and *Port Chevrolet* on the one hand, and *Alberta Permit Pro* on the other, reveal a stark contrast in approaches. I am not bound by any of these decisions. However, and with the greatest respect, I find the reasoning in *2713250 Canada* more compelling than that in *Alberta Permit Pro*. Furthermore, the

persuasiveness of the *2713250 Canada* decision is enhanced due to the striking factual similarities to the present case. Adopting the reasoning in that case, I conclude that it was appropriate for the Chair to proceed under section 108(1) of the *BIA*.

B. Did the Chair err in rejecting Nalcor's Proof of Claim on the basis of it being contingent and/or unliquidated?

[37] At the meeting of creditors the Chair rejected Nalcor's Proof of Claim for the purposes of voting at the meeting for the following reasons:

> i. The claim is contingent upon the outcome of an action as to whether the Termination of the Contract between Nalcor Energy and Great Western Forestry Ltd. was proper and legal for which no final decision has been rendered by a Court of Law, and
>
> ii. The amount of the claim has not been adjudicated in a Court of Law and is therefore unliquidated.

[38] The question becomes whether the Chair was correct in his characterization of Nalcor's claim as contingent and/or unliquidated.

(i) <u>Contingent</u>

[39] In Houlden, Morawetz & Sarra, 2014 *Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2014) at G-37(2) a contingent claim is described as follows:

> A contingent claim is a claim that may or may not ever ripen into a debt, according as some future event does or does not happen: *Gardner v. Newton* (1916), 29 D.L.R. 276, 10 W.W.R. 51, 26 Man. R. 251 (K.B.).

[40] In *Vanderpol v. The Queen* (2002), 31 C.B.R. (4th) 118 at paragraph 10 it states:

> …In *Wawang Forest Products Ltd. v. The Queen*, the Court observed:
>
> The generally accepted test for determining whether a liability is contingent comes from *Winter and Others (Executors of Sir Arthur Munro Sutherland (deceased)) v. Inland Revenue Commissioners*, [1963] A.C. 235 (H.L.), in which Lord Guest said this (at page 262):
>
> I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen.
>
> …
>
> Returning to the *Winter* test, the correct question to ask, in determining whether a legal obligation is contingent at a particular point in time, is whether the legal obligation has come into existence at that time, or whether no obligation will come into existence until the occurrence of an event that may not occur.
>
> The fact is that the assessment created a legal obligation which was in existence at the point of time the proof of claim was filed.

[41] Earlier cases indicate that there must be an element of probability of liability otherwise the claim will be considered contingent. However, Nalcor's counsel referred to several authorities that suggest the claimant need not establish that success is probable (*Re Air Canada* (2004) 2 C.B.R. (5th) 23; *Oil Lift Technology Inc. v. Deloitte & Touche Inc.* [2012] A.J. No. 548). The mere fact that the claim is founded on pending litigation is not, in itself, determinative of the issue (*Re Wiebe* 1995, 30 C.B.R. (3rd) 109; *Oil Lift Technology Inc. v. Deloitte & Touche Inc.*, supra). However, the authorities are

consistent and clear that the claimant must establish that the claim is not "too speculative or remote".

[42] Nalcor's counsel relies on *Newfoundland and Labrador v. AbitibiBowater Inc.* 2012 S.C.C. 67 where the Court stated at paragraph 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.

[43] In *AbitibiBowater* the issue before the Court was whether an environmental protection order issued by the Province would ripen into a monetary claim. Under the applicable legislation, if the Province undertook remediation it was entitled to recover the costs of the same from the person against whom the protection order was issued. The Court concluded that the first two elements referenced above were satisfied thus the issue became whether the possibility of a monetary claim arising from the protection order was "too remote or speculative". If there was sufficient certainty of a monetary claim then it could be included in the insolvency process. The motions judge adjudicating the claim pursuant to the *Companies' Creditors Arrangement Act* ("*CCAA*") concluded that it was "most likely" that the Province would perform the remediation work and thus have a monetary claim to recover the remediation costs. In affirming the judge's decision the Supreme Court of Canada stated that the analysis must be grounded on the specific facts

of each case. The Court then went on to take exception to the threshold of "likelihood" applied by the motions judge. At paragraph 61 Deschamps, J. (for the majority) stated:

> 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 the 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. (emphasis added)

[44] In my view, the "sufficiently certain" threshold applied in *AbitibiBowater* is really a restatement of the test applied in the preponderance of authorities: Is the claim too speculative or remote?

[45] Returning to the three elements set out in *AbitibiBowater*, Nalcor argues that it meets all three elements insofar as:

1. There is a debt, liability or obligation;

2. That the obligation predated the proposal; and

3. It is possible to assign a monetary value to the obligation.

Nalcor argues that all three elements are satisfied. I disagree.

[46] Insofar as Nalcor's Proof of Claim depends on its success in the Litigation and the Litigation is based on the Contract, I am prepared to accept, for the purposes of argument,

that Nalcor's claim predates the Proposal. The remaining two elements (whether there is an existing debt, liability or obligation and whether that obligation is capable of being assigned a value) go to the heart of whether Nalcor's claim is contingent and/or unliquidated. The very issue in the Litigation is whether GWF defaulted under the Contract. Can it be said that Nalcor's success on this issue at trial is not "too speculative or remote" or, put another way, is its success in the Litigation "sufficiently certain"? In my view, the answer to this question is no.

[47] Nalcor maintains that the obligation or debt owing by GWF to Nalcor crystalized upon GWF's default. Nalcor refers to Article 24.6 of the Contract which provides that all costs incurred by Nalcor arising out of "lawful exercise" of its remedies shall constitute a "debt" by GWF to Nalcor. However, whether Nalcor is entitled to the "lawful exercise" of any of its remedies is dependent upon whether GWF breached the terms of the Contract. GWF's debt is not crystalized by the issuance of the notice of default by Nalcor but by a final determination of whether GWF defaulted under the Contract. That is the very issue at the heart of the Litigation. The pleadings reveal a substantial dispute involving a complex commercial contract with hotly contested facts. GWF's obligation to Nalcor will only "crystalize" if GWF fails in the Litigation. If, on the other hand, GWF is successful then it will recover a substantial claim against Nalcor which will be used to fund the Proposal. Put simply, Nalcor's claim is completely contingent upon the outcome of the Litigation. Given the complexity of the legal proceedings, assessing Nalcor's chances of success in the Litigation would be a highly speculative exercise.

[48] In *Port Chevrolet* the court concluded that the speculative nature of a claim of a tax assessor under appeal rendered the claim contingent. There was a similar result in *2713250 Canada* even where the tax assessment was presumed valid and payable immediately. In my view, Nalcor's claim is not sufficiently certain and is too remote and speculative to be considered as anything but contingent. The Chair was correct in rejecting it on the basis that it was contingent.

(ii) Unliquidated

[49] In 2014 *Annotated Bankruptcy and Insolvency Act*, supra, at G-37(4) at page 630 it states:

> A liquidated claim is in the nature of a debt, *i.e.*, a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere arithmetical calculation, then the claim is an unliquidated claim: *Re A Debtor* (No. 64 of 1992), [1994] 1 W.L.R. 264 (H.C.).

[50] The essential elements of a liquidated claim are:

(a) a specific sum ascertained or ascertainable by mere arithmetic;

(b) payable under a contract.

[51] Nalcor relies upon Article 24 of the Contract. That Article sets out a methodology for calculating the damages for completion of the work in the event that Nalcor elects to do so upon breach by GWF. After issuing its notice of default, Nalcor advised GWF that it was proceeding under Article 24.4(b) and completing the work (Record, page 401). Nalcor's Re-stated Proof of Claim incorporates various schedules, one of which summarizes Nalcor's damages resulting from GWF's alleged default (Table 3, Record, page 406). Nalcor says that the aforesaid damages claimed are computed using the agreed formula set out in Article 24.6 and, as such, were ascertained as a mere matter of arithmetic and thus constitute a liquidated claim. I disagree.

[52] While the lion's share of Nalcor's claim is for completion costs, the validity of the claim as well as the assessment of damages is completely dependent on the outcome of the Litigation. For the same reason, I conclude that it cannot be said that Nalcor's claim is for a sum due and payable under a contract. That too will depend upon the outcome of the Litigation. In my view, Nalcor's claim is unliquidated.

[53] While it is not essential to my decision, I believe it is important that this matter be viewed in context. Nalcor's primary concern is that it be entitled to vote at the meeting of creditors. In the circumstances of this case, Nalcor can never share in the distribution. The Proposal depends on GWF succeeding in the Litigation for that is the only source for funding the Proposal. If GWF loses there are no funds for distribution. If GWF succeeds then Nalcor has no claim. In either case, Nalcor will not participate in the distribution.

Further, Nalcor has made it clear that if it is permitted to vote it will defeat the Proposal resulting in the automatic bankruptcy of GWF. The practical effect of this will be the discontinuance of the Litigation against Nalcor. While theoretically any creditor can continue the litigation, I believe it is improbable that any other creditor will assume the significant cost and risk of pursuing the litigation against Nalcor. In these circumstances the comments of Neilson, J. at para. 45 of *Port Chevrolet* resonate (see para. 31 above).

[54] Counsel for GWF argues that Nalcor is using the *BIA* for an improper purpose. Both Grant Thornton and TCE Capital Corporation argue that Nalcor's Proof of Claim does not satisfy the statutory requirements of subsection 124(4) of the *BIA*. Given my conclusion with respect to the Chair's determination that Nalcor's claim is contingent and unliquidated, it is not necessary for me to address these arguments.

VI. CONCLUSION

[55] Nalcor's application is dismissed and the Chair's decision to disallow Nalcor's claim for purposes of voting pursuant to section 108(1) of the *BIA* is affirmed.

[56] The respondent has been successful and is entitled to costs. Lengthy affidavits with extensive supporting documentation were filed in this matter and the parties submitted

comprehensive legal briefs. A full day was required for argument. In all the circumstances Nalcor shall pay costs to the respondent in the sum of $5,000.00.

_____

Terrence J. Morrison,
J.C.Q.B.

TAB 8

Court of Queen's Bench of Alberta

Citation: Lutheran Church Canada (Re), 2016 ABQB 419

Date: 20160802
Docket: 1501 00955
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 Lutheran Church - Canada, the Alberta - British Columbia District, Encharis Community Housing and Services, Encharis Management and Support Services, and Lutheran Church – Canada, The Alberta – British Columbia District Investments Ltd.

Corrected judgment: A corrigendum was issued on August 30, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decisions
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] This *CCAA* proceeding has been complicated by some unusual features. There are approximately 2,592 creditors of the Church extension fund with proven claims of approximately $95.7 million, plus 12 trade creditors with claims of approximately $957,000. There are 896 investors in the Church investment corporation with outstanding claims of $22.4 million. Many of these creditors and investors invested their funds at least in part because of their connection to the Lutheran Church. Many of them are elderly. Some of them are angry that what they thought

were safe vehicles for investment, given the involvement of their Church, have proven not to be immune to insolvency. Some of them invested their life savings at a time of life when such funds are their only security during retirement. Inevitably, there is bitterness, a lack of trust and a variety of different opinions about the outcome of this insolvency restructuring.

[2] A group of creditors have applied to replace the Monitor at a time when the last two plans of arrangement and compromise in these proceedings had been approved by the requisite double majority of creditors. I dismiss the application to replace the Monitor on the basis that there is no reason arising from conflict or breach of duty to do so. I find that the proposed plans are within my jurisdiction to sanction are fair and reasonable in the circumstances and should be sanctioned. These are my reasons.

II. Factual Overview

A. Background

[3] On January 23, 2015, the Lutheran Church – Canada, the Alberta – British Columbia District (the "District"), Encharis Community Housing and Services ("ECHS"), Encharis Management and Support Services ("EMSS") and Lutheran Church – Canada, the Alberta – British Columbia District Investment Ltd. ("DIL", collectively the "District Group") obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. Deloitte Restructuring Inc. was appointed as Monitor and a CRO was appointed for the District and DIL.

[4] The District is a registered charity that includes the Church Extension Fund ("CEF"), which was created to allow District members to lend money to what are characterized as faith-based developments. Through the CEF, the District borrowed approximately $96 million from corporation, churches and individuals. These funds were invested by the District in a variety of ways, including loans and mortgages available to congregations to build or renovate churches and schools, real estate investments, and a mortgage on a real estate development known as the Prince of Peace Development.

[5] CEF was managed by the District's Department of Stewardship and Financial Ministries and was not created as a separate legal entity. As such, District members who loaned funds to CEF are creditors of the District (the "District Depositors").

[6] ECHS owned land and buildings within the Prince of Peace Development, including the Manor and the Harbour, senior care facilities managed by EMSS. EMSS operated the Manor and Harbour for the purpose of providing integrated supportive living services at the Manor and the Harbour to seniors.

[7] The Prince of Peace Development also included a church, a school, condominiums, lands known as the Chestermere lands and other development lands.

[8] DIL is a not-for-profit company that acted as a trust agent and investment manager of registered retirement savings plans, registered retirement income plans and tax-free savings accounts for annuitants. Concentra Trust acted as the trustee with respect to these investments. Depositors to DIL are referred to as the "DIL Investors". The District Depositors and the DIL Investors will collectively be referred to as the "Depositors".

[9] Soon after the initial order, the District and the Monitor received feedback that the District Depositors and the DIL Investors wanted to have a voice in the *CCAA* process. Thus, on February 13, 2015, Jones, J granted an order creating creditors' committees for the District (the "District Creditors' Committee") and DIL (the "DIL Creditors' Committee"), tasked with representing the interests of the District Depositors and DIL Investors. The members of the committees were elected from among the Depositors. By the order that created them, they must act in a fiduciary capacity with respect to their respective groups of creditors. The committees were authorized to engage legal counsel, who have represented them throughout the *CCAA* process, and the committees and their counsel have been active participants in the process.

[10] ECHS and EMSS prepared plans of compromise and arrangement that were approved by creditors and sanctioned by the Court in January 2016. Pursuant to those plans, ECHS' interest in the condominiums was transferred to a new corporation that is to be incorporated under the District Plan ("NewCo"). The Chestermere lands were sold. The remainder of the lands and buildings (the "Prince of Peace properties") are dealt with in the District Plan.

[11] On 22nd and 23rd of February, 2016, a Depositor and an agent of a Depositor commenced proceedings against Lutheran Church – Canada, Lutheran Church – Canada Financial Ministries, Francis Taman, Bishop & McKenzie LLP, John Williams, Roland Chowne, Prowse Chowne LLP, Concentra Trust, and Shepherd's Village Ministries Ltd., all defendants with involvement in the District Group's affairs, pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 (Alberta). Two other Depositors issued a Notice of Civil Claim in the Supreme Court of British Columbia pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c.50 (British Columbia) against the same defendants (together with the Alberta proceeding, the "class action proceedings").

[12] On March 3, 2016, DIL submitted a plan of arrangement that had been approved by creditors for sanction by the Court. I deferred the decision on whether to sanction the DIL plan until the District plan had been finalized, presented to District creditors, and, if approved, submitted for sanctioning. At the same time, I stayed the class action proceedings. The DIL and District plans contain similar provisions that are subject to controversy among some Depositors. There is considerable overlap among the DIL Investors and the District Depositors.

[13] On July 15, 2016, the District applied for an order sanctioning the District plan. On the same day, the Depositors who commenced the class action proceedings applied for an order replacing the Monitor.

B. The District Plan

[14] The District plan has one class of creditors. Pursuant to the claims process, there were 2,638 District Depositors. An emergency fund was implemented prior to the filing date and approved by the Court as part of the initial order, to ensure that District Depositors, many of whom are seniors, would have sufficient funds to cover their basic necessities. Taking into account those payments, District Depositors had proven claims of approximately $96.2 million as at December 31, 2015.

[15] Under the plan, each eligible affected creditor will be paid the lesser of $5,000 or the total amount of their claim (the "Convenience Payment(s)") upon the date that the District plan takes effect. This will result in 1,640 District Depositors (approximately 62%) and 10 trades creditors (approximately 77%) being paid in full. The Convenience Payments are estimated to total $6.3 million.

[16] The District plan contemplates the liquidation of certain non-core assets. Each time the quantum of funds held in trust from the liquidation of these assets, net of the "Restructuring Holdback" and the "Representative Action Holdback" referred to later in this decision, reaches $3 million, funds will be distributed on a pro-rata basis to creditors.

[17] If the District plan is approved, a private Alberta corporation ("NewCo") will be formed following the effective date of the plan. NewCo will purchase the Prince of Peace properties from ECHS in exchange for the NewCo shares. The value of the NewCo shares would be based on the following:

a) the forced sale value of the Harbour and Manor seniors' care facilities based on an independent appraisal dated November 30, 2015;
b) the forced sale value of the remaining Peace of Peace properties, based on an independent appraisal dated October 15, 2015;
c) the estimated value of the assets held by ECHS that would be transferred to NewCo pursuant to the ECHS plan; and
d) the estimated value of the assets held by EMSS that would be transferred to NewCo pursuant to the EMSS plan.

[18] ECHS will then transfer the NewCo shares to the District in partial satisfaction of the District – ECHS mortgage. The NewCo shares will be distributed to eligible affected creditors of the District on a pro-rata basis. The Monitor currently estimates that creditors remaining unpaid after the Convenience Payment will receive NewCo shares valued at between 53% and 60% of their remaining proven claims. The cash payments arising from liquidation of non-core assets and the distribution of shares are anticipated by the Monitor to provide creditors who are not paid in full by the Convenience Payments with distributions valued at between 68% and 80% of their remaining proven claims, after deducting the Convenience Payments. Non-resident creditors (8 in total) will receive only cash.

[19] Distributions to creditors will be subject to two holdbacks:

a) the "Restructuring Holdback", to satisfy reasonable fees and expenses of the Monitor, the Monitor's legal counsel, the CRO, the District Group's legal counsel and legal counsel for the District Creditors' Committee, the amount of which will be determined prior to the date of each distribution based on the estimated professional fees required to complete the administration of the *CCAA* proceedings; and
b) the "Representative Holdback", an amount sufficient to fund the out-of-pocket costs associated with the "Representative Action" process described later in this decision, and to indemnify any District Depositor who may be appointed as a representative plaintiff in the Representative Action for any costs award against him or her. The Representative Action Holdback will be determined prior to any distribution based on guidance from a Subcommittee appointed to pursue the Representative Action and retain representative counsel.

[20] The District will continue to operate but the District's bylaws and handbook will be amended such that the District would no longer be able to raise or administer funds through any type of investment vehicle. NewCo will continue to operate the Harbour and Manor seniors' care facilities.

[21] NewCo's bylaws will include a clause requiring that 50% of the board of directors must be comprised of District Depositors or their nominees. Although NewCo is being created with the object of placing the NewCo assets in the hands of a professional management team with appropriate business and real estate expertise, the District Creditors' Committee wanted to ensure that affected Creditors will have representation equal to that of the professional management team on the NewCo board. The members of the NewCo board may change prior to NewCo being formed, subject to District Creditors' Committee approval. Subsequent changes to the NewCo board would be voted on at future shareholder meetings.

[22] The articles of incorporation for NewCo will be created to include the following provisions, which are intended to provide additional protection for affected creditors:

a) NewCo assets may only be pledged as collateral for up to 10% of their fair market value, subject to an amendment by a special resolution of the shareholders of NewCo;
b) a redemption of a portion of the NewCo shares would be allowed upon the sale of any portion of the NewCo assets that generates net sale proceeds of over $5 million;
c) NewCo would establish a mechanism to join those NewCo shareholders who wished to purchase NewCo shares with those NewCo shareholders who wished to sell them;
d) a general meeting of the NewCo shareholders will be called no later than six months following the effective date of the plan for the purpose of having NewCo shareholders vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation or all or a portion of the NewCo assets or a joint venture to further develop the NewCo assets; and
e) to provide dissent rights to minority NewCo shareholders.

The Representative Action

[23] The District plan establishes a Representative Action process whereby a future legal action or actions, which may be undertaken as a class proceeding, can be undertaken for the benefit of those District Depositors who elect or are deemed to elect to participate. The Representative Action would include only claims by District Depositors who are not fully paid under the District plan and specifically includes the following:

a) claims related to a contractual right of one or more of the District Depositors;
b) claims bases on allegations of misrepresentation or wrongful or oppressive conduct;
c) claims for breach of any legal, equitable , contractual or other duty;
d) claims pursuant to which the District has coverage under directors' and officers' liability insurance; and
e) claims to be pursued in the District's name, including any derivative action or any claims that could be assigned to a creditor pursuant to Section 38 of the *Bankruptcy and Insolvency Act*, if such legislation were applicable.

[24] District Depositors may opt-out of the Representative Action process, in which case they would be barred from further participation. Evidently, some Depositors are precluded by their religious beliefs from participating in this type of litigation.

[25] The District Depositors who elect to participate in the Representative Action process will have a portion of their cash distributions from the sale of assets withheld to fund the Representative Action Holdback. It will only be possible to estimate the value of the

Representative Action Holdback once representative counsel has been retained. At that point, the Monitor will send correspondence to the participating Depositors with additional information, including the name of the legal counsel chosen, the estimated amount of the Representative Action Holdback, the commencement date of the representative action, the deadline for opting out of the Representative Action and instructions on how to opt out of the Representative Action should they choose to do so.

[26] A Subcommittee will be established to choose legal counsel to represent the participating District Depositors. The Subcommittee will include between three and five individuals and all members of the Subcommittee will be appointed by the District Creditors' Committee. The Subcommittee is not anticipated to include a member of the District Committee.

[27] The duties and responsibilities of the Subcommittee will include the following:

a) reviewing the qualifications of at least three lawyers and selecting one lawyer to act as counsel;
b) with the assistance of counsel, identifying a party(ies) willing to act as the Representative Plaintiff;
c) remaining in place throughout the Representative Action with its mandate to include:
    (i) assisting in maximizing the amount available for distribution;
    (ii) consulting with and instructing counsel including communicating with the participating District Depositors at reasonable intervals and settling all or a portion of the Representative Action;
    (iii) replacing counsel;
    (iv) serving in a fiduciary capacity on behalf of the participating District Depositors;
    (v) establishing the amount of Representative Action Holdback and directing that payments be made to counsel from the Representative Action Holdback; and
    (vi) bringing any matter before the Court by way of an application for advice and direction.

[28] The Representative Action process will be the sole recourse available to District Depositors with respect to the Representative Action claims.

[29] The District plan releases:

a) the Monitor, the Monitor's legal counsel, the District Group's legal counsel, the CRO, the legal counsel for the District Committee and the District Committee members, except to the extent that any liability arises out of any fraud, gross negligence or willful misconduct on the part of the released representatives, to the extent that any actions or omissions of the released representatives are directly or indirectly related to the *CCAA* proceedings or their commencement; and
b) the District, the other *CCAA* applicants, the present and former directors, officers and employees of the District, parties covered under the D&O Insurance and any independent contractors of the District who were employed three days or more on a regular basis, from claims that are largely limited to statutory filing obligations.

[30] The following claims are specifically excluded from being released by the District plan:

a) claims against directors that relate to contractual rights of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors as set out in Section 5.1(2) of the *CCAA*;

b) claims prosecuted by the Alberta Securities Commission or the British Columbia Securities Commission arising from compliance requirements of the *Securities Act* of Alberta and the *Financial Institutions Act* of British Columbia;
c) claims made by the Superintendent of Financial Institutions arising from the compliance requirements of the *Loan and Trust Corporations Acts* of Alberta and British Columbia; and
d) any Representative Action claims, whether or not they are insured under the District's directors and officers liability insurance, that are advanced solely as part of the Representative Action.

C. The District Meeting

[31] On March 21, 2016, I granted an order authorizing the District to file the District plan of compromise and arrangement and present it to the creditors. A draft version of the Monitor's Report to District Creditors was provided to both the Court and counsel for the class action plaintiffs ahead of the District meeting order being granted. Neither class action counsel voiced specific concerns with the disclosure provided therein.

[32] The first meeting of District creditors was held on May 14, 2016. Counsel for the BC and Alberta class action plaintiffs were in attendance and able to make submissions to the meeting and to question the Monitor. A number of attendees made submissions and asked questions. Certain documents that had been referenced in a Monitor's FAQ report on the issue of future potential development of the Prince of Peace properties (described later in this decision) were discussed in detail and questions with respect to these documents were answered by the Monitor. The meeting lasted approximately six hours. It was adjourned at the request of the representative of a Depositor who wanted more time to consider the Prince of Peace development disclosure and obtain further instructions from his congregation.

[33] After making inquiries and being satisfied that congregations who wished further consultation had time to do so, the Monitor posted a notice on its website on May 20, 2016 that the reconvened meeting was to be held on June 10, 2016. The notice was sent by email to those creditors who are congregations on May 20, 2016 and sent by regular mail to all creditors on May 24, 2016. The notice advised creditors that they had additional time to change their vote on the District plan, should they choose to do so. Four congregations asked the Monitor for further information before the reconvened meeting.

[34] The Monitor received a total of 1,294 votes on the District plan from eligible affected creditors with claims totalling approximately $85.1 million. Of these votes, 1,239 were received by way of election letters and 55 were received by way of written ballots submitted in person or by proxy at the District meeting. In total, 50% of eligible affected creditors voted and the claims of those creditors who voted represented 88% of the total proven claims of eligible affected creditors.

[35] Of the creditors who voted, 1,076 or approximately 83% voted in favour of the District plan and 218 or approximately 17% voted against the District plan. Those creditors who voted in favour of the plan held claims totalling approximately $65 million, or approximately 76% in value of the voting claims, and those creditors who voted against the plan held claims totalling approximately $20.1 million or approximately 24% in value of the voting claims. Therefore, the District plan was approved by the required majority, being two-thirds in dollar value and a majority in number of voting eligible affected creditors.

D. The DIL Plan

[36] The DIL plan includes only one class of affected creditors consisting of DIL Investors. The DIL Investors reside in eight provinces and territories in Canada and in three U.S. states. Most of the accounts held by DIL Investors are RRSP and RRIF accounts.

[37] Following the release of the original DIL package of meeting materials, based on discussions with DIL Investors, the Monitor prepared two documents entitled "Answers to frequently asked questions" (the "FAQs"), one of which was dated December 24, 2015 and the other dated January 18, and amended January 20, 2015.

[38] The DIL plan contains provisions for the orderly transition of the registered accounts from Concentra to a replacement trustee and administrator. As part of this transition, the cash and short-term investments held by DIL will be transferred, net of holdbacks outlines in the DIL plan, to the replacement fund manager. The mortgages held by Concentra and administered by DIL will be converted to cash over time and paid to the fund manager.

[39] Pursuant to previous order, DIL was authorized to distribute up to $15 million to the DIL Investors. For those DIL Investors who held registered retirement savings plan, tax free savings accounts or locked-in retirement accounts with DIL, their pro-rate share of the first DIL Distribution was transferred into accounts that had been established with the replacement fund manager. For those DIL Investors who held RRIFs or LIFs, their pro-rate share of the first DIL distribution was transferred upon their request, to an alternate registered account of their choosing. A second distribution of up to $7.5 million was made in April, 2016.

[40] In addition to this these interim distribution, statutory annual minimum payment to RRIF holders were made for 2015. Selected DIL Investors also received payments pursuant to the emergency fund. Taking into account these payments, pre-filing distributions to DIL Investors totalled approximately $15.6 million, 41% of their original investment without taking into account any estimated write-downs on the value of the assets held by DIL.

[41] The DIL plan contains substantially the same provisions with respect to limited releases and a Representative Action process as the District plan.

[42] The Monitor estimates that, prior to any recovery under the Representation Action, DIL Investors will recover between 77% and 83% of their original investment as of the filing date.

E. The DIL Meeting

[43] The DIL meeting of creditors was held on January 23, 2016.

[44] There were 87 attendees at the DIL meeting. The Monitor received a total of 472 votes from DIL Investors with claims totalling approximately $14.5 million. In total, 53% of DIL Investors voted and the claims of those DIL Investors who voted represented 65% of the total proven claims of DIL Investors.

[45] Of the 472 DIL Investors who voted, 434, or approximately 92%, voted in favour of the DIL plan and 38 DIL Investors, or approximately 8%, voted against the DIL plan. Those DIL Investors who voted in favour of the DIL plan had claims totalling approximately $12.7 million, or approximately 87% of the claims, and those DIL Investors who voted against the DIL plan had claims totalling approximately $1.8 million, or approximately 13% of the claims and a majority in number of voting DIL Investors. Therefore, the DIL plan was approved by the required double majority.

III. The Applications

A. Application to Remove the Monitor

[46] The Depositors who commenced the British Columbia class action proceedings, Elvira Kroeger and Randall Kellen, apply:

a) to remove the Monitor and replace it with Ernst & Young LLP; or alternatively
b) to appoint Ernst & Young as a "Limited Purpose Monitor" to review the Representative Action provisions of the District plan and render its opinion to the Court with respect to whether the plan is fair and reasonable to the District Depositors;
c) to authorize Ernst & Young to retain legal counsel to assist it in rendering its opinion to the Court if it considers it reasonable and necessary to do so; and
d) to secure Ernst & Young's fees and those of its counsel to a maximum amount of $150,000.00 plus applicable taxes under the current Administration Charge or under a second Administration Charge to rank *pari passu* with the current Administration Charge.

[47] They are supported in their application by the Alberta class action plaintiffs, collectively the "opposing Depositors". The opposing Depositors submit that the Monitor is unable by reason of conflict of interest to provide the Court with a neutral and objective opinion with respect to the Representative Action provisions of the District plan. They also submit that the Monitor has breached its fiduciary duty to the Court and to the District creditors by failing to disclose certain municipal planning documents relating to the Prince of Peace Development.

1. Overview

[48] It is trite law that the Monitor in *CCAA* proceedings is an officer of the Court and that its duty is to act in the best interests of all stakeholders. Monitors are required to act honestly and fairly and to provide independent observation and oversight of the debtor company.

[49] The Monitor is expected and required to report regularly to the Court, creditors and other stakeholders, and has a statutory obligation to advise the Court on the reasonableness and fairness of any plan of arrangement proposed between the debtor and its creditors: section 23(1) of the *CCAA.* Courts accord a high level of deference to decisions and opinions of the Monitor.

[50] The opposing Depositors submit that the Monitor is acting as an advocate of the debtor, without a sufficient degree of neutrality. They submit, by implication, that I should give the Monitor's recommendations on the plans little or no deference for that reason.

[51] An attack on the Monitor is an attack on the integrity of the *CCAA* process, and must be taken seriously.

2. Conflict of Interest

[52] The opposing Depositors allege that the Monitor has a conflict of interest on the following bases:

a) In its Pre-Filing Report to the Court, the Monitor disclosed that it had provided consulting services to the District between February 6, 2014 and the date of the initial order, including:

(i) on February 6, 2014; to provide an independent evaluation of the potential options relating to the Prince of Peace Development and to create a plan for executing the option that was ultimately chosen;

(ii) on June 30, 2014; to provide an evaluation of the debt structure of the CEF as it related to the District, the members of the District, ECHS, EMSS and the Prince of Peace Development; and

(iii) on July 25, 2014; to act as a consultant regarding the informal or formal restructuring of the District Group.

b) In its Fourth Report dated June 24, 2015, the Monitor advised that it had recently determined that a related professional accounting firm, Deloitte & Touche (now Deloitte LLP) had acted as auditor for the District from 1990 to 1998 or 1999. While the Monitor had performed a conflicts check prior to agreeing to act as Monitor, this check failed to flag the previous audit engagement. The Monitor further stated that, while its former role as auditor to District did not preclude it from acting as Monitor in these proceedings, it might be precluded from conducting a preliminary review of the District's expenditures in relation to the Prince of Peace development for the period during which it had acted as auditor. However, as the District had been unable to produce supporting documentation with respect to funds expended on the Prince of Peace development prior to 2006, and Deloitte did not act as auditor subsequent to 1999, the Monitor took the position that "it was not conflicted from completing the Review to the extent that they can for the period for which documentation is available".

c) On March 8, 2016, the Monitor advised the Court and the parties that Deloitte & Touche had completed the DIL audit for the years ended January 31, 1998 and January 31, 1999, the first two years during which DIL operated the registered fund. Again, the reason for the late disclosure appears to be that the engagements were recorded under different names those now used by the District.

[53] These previous services do not, on their face, disqualify the Monitor from acting as Monitor. With respect to the audit services, it is not a conflict of interest for the auditor of a debtor company to act as Monitor in *CCAA* proceedings. In this case, the sister company of the Monitor has not been the auditor of either the District or DIL for over 16 years, The Monitor does not suffer from any of the restrictions placed on who may be a Monitor by Section 11.7(2) of the *Act*. While the late disclosure of the historical audits was unfortunate, audits performed more than 16 years ago by a sister corporation raise no reasonable apprehension of bias, either real or perceived.

[54] It is also not a conflict of interest, nor is it unusual, for a proposed Monitor to be involved with the debtor companies for a period of time prior to a *CCAA* filing. The Monitor made full disclosure of that involvement prior to being appointed, more than a year before this application was brought.

[55] This is not a case where a Monitor was involved in or required to give advice to the Court on the essential issue before it, such as a pre-filing sales process. The issues with respect to the plans before the Court arise from details of the plans that have been the subject of negotiation and consultation among the District Group, the Creditors' Committees and the Monitor post-filing.

[56] The opposing Depositors, however, point to certain representations that were made by the District in letters to some of Depositors in the months prior to the *CCAA* filing, which they say were untrue and misleading. They submit that the Monitor must have known about these letters, and thus condoned, if not participated in, misrepresentations made to the Depositors.

[57] The Monitor responds that it did not act in a management capacity with respect to the District nor did it prepare or issue communications pre-filing. It did not control the District Group.

[58] There is no realistic indication of conflict arising from these allegations. The attempt to taint the Monitor with knowledge of letters sent by the District to the Depositors is speculation unsupported by any evidence.

[59] The opposing Depositors also submit that the prior audit engagements create a potential conflict for the Monitor in the event that the Subcommittees of the Creditors' Committees decide to bring a claim against Deloitte & Touche as former auditor of the District or DIL. In that respect, Ms. Kroeger and Mr. Kellen have by letter dated March 4, 2016 demanded that the District commence legal proceedings against the District's auditors, including Deloitte & Touche. Given the stay, the District took no action, and the opposing Depositors concede that they did not expect the District to act during the *CCAA* proceedings.

[60] It is not appropriate for this Court to determine or to speculate on whether the Depositors have a realistic cause of action against an auditor sixteen years after the final audit engagement, but assuming that the Representative Action provisions of the plans could result in an action against a sister corporation of the Monitor, the proposed ongoing role of the Monitor in those proceedings should be examined to determine whether such role could give rise to a real or perceived conflict of interest.

[61] As the Monitor points out, its role with respect to the Representative Action is limited to assisting in the formation of the Subcommittees (although it has no role in deciding who will serve on the Subcommittees), facilitating the review of qualifications of legal counsel who wish to act in the Representative Action (although the Monitor will not participate in the selection of the representative counsel), and communicating with Depositors based on instructions given by the Subcommittees with respect to the names of the members of the Subcommittees, the name of the representative counsel, the estimated amount of the Representative Action Holdback, the commencement date of the Representative Action, the deadline for opting out of the Representative Action, and instructions on how to opt-out of the Representative Action should Depositors choose to do so. The Monitor's involvement will be directed by the Subcommittees and is anticipated to be limited to these tasks. The Monitor notes that, should it or the Subcommittees determine that the Monitor has a conflict of interest in respect of completing any of these tasks, the Monitor would recuse itself. It submits however, that it is appropriate that it be involved in order to ensure that the Subcommittees are able to undertake these duties in a manner that complies with the requirements of the plans and does not prejudice the rights of Depositors under the plans.

[62] The Monitor will aid in making distributions under the plans, including with respect to the release of any unused portion of the Representative Action Holdback, which it anticipates will be determined on a global basis and communicated by the Subcommittees to the Monitor on a global basis. The Monitor will have no knowledge of the considerations or calculations that so into establishing the Representative Action Holdback. Further, the Monitor does not need to be,

and will not under any circumstances be, privy to any information regarding the strategy that the representative counsel chooses to communicate to Depositors, including the parties to be named in the Representative Action.

[63] In the circumstances, the Monitor is the most appropriate party to be involved in communication with Depositors in the early stages of the Representative Action process, as it has the information and experience necessary to ensure that such communication is done quickly, effectively, and at the lowest possible expense.

[64] The mere possibility of a decision to proceed against the Monitor's sister corporation does not justify the expense and disruption of bringing in a new Monitor to perform these administrative tasks. If the Subcommittees determine that an action can be commenced against the historical auditors that is not barred by limitations considerations, the issue of a real, rather than a speculative conflict, can be raised before the Court for advice and direction in accordance with the plans. The possibility that the Subcommittees may decide not to proceed against the historical auditors does not imply undue influence from the Monitor. The members of the Subcommittees will be fiduciaries, bound to act in the best interests of the remaining creditors.

[65] There is no persuasive argument nor any evidence that they would act other than in those best interests.

[66] The opposing Depositors' submission that the Monitor cannot with any degree of neutrality or objectivity advise the Court on the reasonableness and fairness of the Representative Action provisions of the plans ignores the fact that the Monitor is not released from liability for any damages arising from its pre-CCAA conduct as auditor to the District by the plans.

[67] The opposing Depositors submit that there are "substantive and procedural benefits" from its continuing position that the Monitor may take advantage of. On closer examination, those alleged advantages are insignificant.

[68] In summary, I find that there is no actual or perceived conflict of interest that would warrant the replacement of the Monitor, particularly at this late state of the *CCAA* proceedings. The Monitor made full disclosure of the historical audit relationship of its sister corporation to the District and DIL and its own pre-filing relationship to the District Group. Neither the Monitor nor Deloitte & Touche benefit from any releases as part of the plans. The Monitors' continuing involvement in the Representative Action process is limited, administrative in nature, and would take place pre-litigation.

3. Breach of Fiduciary Duty

[69] A more serious charge against the Monitor than conflict of interest is the opposing Depositors' allegation that the Monitor breached its fiduciary duty to the Court and to District Depositors by failing to disclose certain municipal planning documents.

[70] The documents at issue are:

a) a master-site development plan (the "MSDP") that was prepared for the District by an architectural firm in December, 2012 and was subsequently approved by the Municipal District of Rocky View County. This plan includes site information, layout and analysis of activities, facilities, maintenance and operations and a context for land use and the associated population density; and

b) an approved area structure plan for the Hamlet of Conrich (the "Conrich ASP"), which was put forward by the MD of Rocky View and which includes reference to the Prince of Peace properties.

[71] The MSDP identifies several prerequisites to development of the Prince of Peace properties, including a connection to the municipal water supply, the upgrading of the sanitary sewer lift station and work on a storm water management infrastructure. The Monitor notes the MSDP was prepared specifically for the development contemplated by EHSS in 2012, being medium density residential and additional assisted living capacity, ground floor retail and a parkade structure. As such, it is likely outdated and may not align with future development. A more recent appraisal of the properties in 2015 assumed low density development. The 2015 appraisal of the properties takes into account the work that would need to be undertaken by any third party who wished to further develop the Prince of Peace properties.

[72] The opposing Depositors submit that the infrastructure projects identified by the MSDP would be costly and would likely pose barriers to development. They presented hearsay evidence of a conversation Mr. Kellen had with a Rocky View official that is of limited relevance apart from its hearsay nature, because future development would likely be different from what was contemplated in 2012.

[73] The Conrich ASP stipulates that no development may occur within the Hamlet of Conrich until the kinds of infrastructure requirements identified in the MSDP are met. The ASP is being appealed by the City of Chestermere.

[74] The Monitor became aware of these documents during its pre-filing services to the District Group. When a Depositor raised a question about these reports on April 28, 2016 at an information meeting, the Monitor prepared a QFA document dated April 29, 2016 regarding the future subdivision and development of the Prince of Peace properties and referencing the documents. This QFA was posted on the Monitor's website on April 29, 2016 and mailed to all affected creditors with claims over $5,000 on May 3, 2016, more than a month before the meeting at which the District plan was approved.

[75] The issue is whether the Monitor breached its duty to the Court and creditors by failing to disclose these reports earlier. The answer to this question must take into account the context of the District plan and the nature of the Monitor's recommendations.

[76] The District plan does not contemplate that any further development of the Prince of Peace properties would occur pursuant to the *CCAA* proceedings. The possibility that NewCo shareholders would pursue further development is one of the options available to NewCo or to a third party purchaser of the Prince of Peace properties if NewCo shareholders decide to sell the properties, as recognized in the plan materials. The plan gives NewCo shareholders the opportunity to consider their options.

[77] As the Monitor notes, a vote on the District plan is not a vote in favour of any particular mandate for NewCo. The District plan contemplates that a NewCo shareholders' meeting will be held within six months of the District plan taking effect, at which time the NewCo shareholders will vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation of all or a portion of the assets held by NewCo, a joint venture to further develop the Prince of Peace properties or

other options. These options will need to be investigated and reported on by NewCo's management team ahead of the NewCo shareholders' meeting.

[78] It was in this context that the Monitor considered the content of its reports to Depositors on the District plan and did not disclose the two plans, which in any event may be dated and of little relevance to a future development. I do not accept the opposing Depositors' allegation that the Monitor "concealed" this information.

[79] In that regard, I note that, although Mr. Kellen in a sworn affidavit deposed that he became aware of the MSDP and Conrich ASP on or about April, 2016, he appears to have posted a link to the Conrich ASP in the CEF Forum website on February 24, 2015. It also appears that the MSDP document was discussed in the CEF Forum in January, 2016, with a link posted for participants in the forum. Mr. Kellen filed a supplementary affidavit after the Monitor noted these facts in its Twenty-First Report. He says that he now recalls reviewing the Conrich ASP, which references the MSDP, in February, 2015, but does not recall reading it in any great detail, that he did not appreciate the significance of the documents and simply forgot about them. This is hard to reconcile with Mr. Kellen's present insistence that the documents are highly relevant.

[80] A further issue is whether the Monitor's recommendation of the District plan gave rise to a duty to disclose these documents. The opposing Depositors submit that the Monitor endorsed the plan on the basis of potential upside opportunities available through development. This submission appears to refer to a sentence in the Monitor's March 28, 2016 report to creditors, as follows:

> The issuance of NewCo Shares pursuant to the District Plan allows District Depositors to benefit from the ability to liquidate the Prince of Peace Properties at a time when market conditions are more favourable or the ability to benefit from potential upside opportunities that may be available such as through the further expansion of the Harbour and Manor seniors' care facilities, through a joint venture to further develop the Prince of Peace Properties or through other options (emphasis added).

[81] Clearly, the Monitor in its report referenced further development as only one of the options available to NewCo shareholders at the time of their first shareholders' meeting. It is incorrect to say that the Monitor's endorsement of the District plan was based solely on the option of development by NewCo acting alone. The Monitor did not recommend any particular mandate for NewCo in its various reports.

[82] The Monitor decided that disclosure of the two documents at issue was not necessary in the context of a plan that put decisions with respect to the various options available to the new corporate owner of the property in the hands of the shareholders at a future date.

[83] The opposing Depositors submit, however, that the District Depositors had the right to this information relating the pros and cons of development before deciding whether to become NewCo shareholders in the first place.

[84] As it happened, they did have such access through the Monitor's April 29, 2016 QFA document, and also, it appears, through information posted on the CEF Forum and from information communicated during the information meetings for Depositors. There is no evidence that any Depositor failed to receive the Monitor's QFA document prior to the June 10, 2016 District meeting date.

[85] The opposing Depositors are critical of the Monitor's QFA disclosure. The problem appears to be that the Monitor does not agree that the issues disclosed in the MSDP and the Conrich ASP are as dire as the opposing Depositors describe.

[86] The opposing Depositors also fault the Monitor for not referencing a website where the documents could be found, but I note that the QFA provides a telephone numbers and email address for any inquiries.

[87] They fault the Monitor for not discussing in the QFA the requirement to upgrade the sanitary sewer lift station and to provide for the disposal of storm water. As noted by the Monitor, those issues are typical of what would be encountered by any developer in considering a new development. The QFA refers to the development risks as follows:

> All development activities have risk associated with them, however, the Monitor is not aware of any known issues related to the PoP Development which would suggest that the future subdivision or development of Prince of Peace Properties would not be feasible other than the risks that are typically associated with real estate development generally.

[88] A difference of opinion between the opposing Depositors and the Monitor with respect to the significance of these development requirements does not constitute concealment, bad faith or breach of duty by the Monitor.

[89] The opposing Depositors also fault the Monitor for failing to provide Depositors with new election letters and forms of proxy in its May 20, 2016 notice of adjournment of the District meeting. The notice clearly sets out the procedure to be followed if a Depositor wishes to change his or her vote or proxy. It invites Depositors to contact the Monitor by telephone or email if they have any additional questions. The Monitor notes that it sent out three election forms with its initial mail-out to Depositors, and received no requests for a new election form. It received at least one change of vote after sending out this notice.

[90] One of the Alberta class action plaintiffs alleges that the Monitor impeded them from distributing material at the information meetings. The Monitor reports that the Alberta plaintiffs were present at the Sherwood Park meeting, handing out material and requesting contact information from other attendees. Some of the attendees expressed confusion as to who had authored the material being handed out by the two Alberta plaintiffs and who was requesting their contact information. The Monitor requested that the Alberta plaintiffs hand-out material at a reasonable distance from the meeting room entrance and communicate clearly to attendees that the material they were handing out was not authored, endorsed or being circulated by the Monitor and that they were not requesting contact information on behalf of the Monitor.

[91] The Monitor wrote to class action counsel as follows:

> The Monitor recognizes that your clients have expressed views thus far which are in opposition to the District's plan. Of course it is up to each depositor, including your clients, to decide how to vote. We also recognize that any party, including your clients, are entitled to voice their support or opposition to the District's plan. However, in the interest of ensuring an efficient meeting that respects the *CCAA* process and the interests of other depositors in attendance, the Monitor is implementing the below referenced rules and procedures. These rules and procedures are intended to provide your clients with the ability to convey their

> opinions in a fashion which does not impede the meeting and respects the rights of other parties in attendance.

[92] The Monitor had a table established for the use of the class action representatives within reasonable proximity to the entrance to the room in which the meetings were held. The class action representatives were entitled to circulate written information to attendees within the reasonable vicinity of that table, but not permitted to disseminate any written material within the room or in the doorway entering the room in which the meetings were held.

[93] The rules provided that any written communication circulated by the class action representatives was to include a prominently displayed disclaimer that such materials were not authored, endorsed or being circulated by the Monitor. A sign identifying the class action representatives was to be prepared by them and displayed at the table established for their use.

[94] These are reasonable rules, designed to avoid confusion, and they did not impede the class action plaintiffs from voicing their views.

[95] The opposing Depositors submit that the Monitor instructed attendees at information meetings to cast their votes immediately, without waiting for the District meeting. The Monitor denies encouraging creditors one way or the other with respect to when to vote. It communicated to attendees the options available to creditors for voting on the District plan and the deadlines associated with each option. It also communicated at meetings that creditors who wished to do so could provide the Monitor with any paperwork they had brought with them. It is a stretch to impute any kind of bad faith to the Monitor in conveying this information.

[96] The class action plaintiffs and their counsel had the ability to attend all of the information meetings. They were in attendance and actively participated in the information meeting in Langley, BC, at the Sherwood Park Meeting, the Red Deer Meeting and the District Meeting. Both counsel were in attendance and participated in the District Meeting. The Monitor notes that it is aware of at least two emails that were widely circulated by a relative of one of the class action plaintiffs outlining the views of the class action plaintiffs on the District Plan. I am satisfied that the opposing Depositors had a more than adequate opportunity to communicate their views to other Depositors and to attempt to garner support for their opposition, and that they were not impeded by the Monitor.

[97] I must address one more disturbing allegation. Two opposing Depositors submit that the Monitor's non-disclosure of the MSDP and the Conrich ASP in the context of what they allege is the Depositor's false and misleading communications with CEF Depositors might lead a reasonable and informed person to believe that "the Monitor is prepared to condone and facilitate the District's dishonest conduct". This is a disingenuous attack on the Monitor's professional reputation, made without evidence or any reasonable foundation. There is no air of reality to this allegation. There is no evidence that the Monitor was aware of misleading statements, if any, made by the District or its employees or agents before or during the *CCAA* proceedings.

[98] The Monitor has prepared 22 regular reports during the approximately 18 months of these proceedings, plus five confidential supplements and three special reports providing creditors with specific information relating to their respective plans of compromise and arrangement. The Monitor also prepared hand-outs tailored to provided information to specific groups of creditors, and five QFAs with information on multiple topics, including NewCo, the potential outcomes of

the *CCAA* proceedings, estates, trust accounts, the assignment of NewCo shares by creditors and the potential future subdivision of the Prince of Peace properties.

[99] The Monitor attended five regional information meetings in Alberta and British Columbia between April 19 and April 28, 2016 to review the contents of the District plan and respond to any inquiries by District Depositors related to the plan. The Information Meetings were each between approximately two and a half and four hours long. It is clear that the information provided to creditors during these CCAA proceedings was far more extensive than that which would normally be provided.

[100] Monitors, being under a duty to the Court as the Court officer and to the parties involved in a *CCAA* proceeding under statute, must sometimes make recommendations that are unpopular with some creditors. The Court expects a Monitor's honest and candid advice, and relies on it. The Monitor in this case went to great lengths to inform the great number of Depositors of ongoing proceedings, and to give its well-reasoned and measured opinion on the myriad of issues in this complex proceeding. In retrospect, it may have been prudent for the Monitor to reference the MSDP and Conrich ASP earlier, in substantially the way it was later referenced in the Monitor's QFA on development, but that is a hindsight observation, and unlikely to resolve other than one of the opposing Depositors' many complaints in support of their application.

4. Cost and Delay

[101] The Monitor and the District Group submit that the timing of this application to remove the Monitor is suspect: that the alleged conflicts complained of have been disclosed for months. The opposing Depositors say that they were awaiting the outcome of the District vote, and that it was not until the May 14, 2016 District meeting that they knew that the Monitor knew about and had failed to disclose the MSDP and the Cornich ASP.

[102] It is clear that the timing of the application is strategic: a clear majority of the DIL and District creditors have voted in favour of the plans despite the efforts of the relatively few opposing Depositors to convince others to join in their opposition. They must now rely on other grounds to frustrate, delay or defeat the Court's sanction of the plans. That is their prerogative as creditors who oppose the plan, and the Court must, and does, consider their objections seriously, whatever the underlying motivation. However, relief on a motion of this kind should only be granted where the evidence indicates "a genuine concern with respect to the merits of the alleged conflict": *Moffatt v Wetstein*, [1996] O.J. No. 1966 at para 131.

[103] While the timing of this application to replace the Monitor does not preclude the opposing Depositors from bringing the application, the Court must balance the potential risk to creditors and the District Group arising from the alleged potential conflict of interest against the prejudice to creditors and the District Group arising from the inevitable delay, duplication of effort and high costs involved with replacing the Monitor at this very late stage of the proceedings.

[104] I have found that the Monitor does not have any legitimate conflict of interest, real or perceived, and that it has not breached any fiduciary duty. Even if I am wrong in this determination, the damage caused by such conflict or breach of duty has been mitigated by full disclosure of potential conflicts and disclosure of the information that the opposing Depositors submit should have been disclosed prior to the vote on the District Plan.

[105] Compared to this, appointing a replacement Monitor would involve costs in excess of $150,000, taking into account that the replacement Monitor would need to retain counsel. The process would cause substantial delay in already lengthy proceedings while the replacement Monitor reviews the events of the last eighteen months.

[106] I also take into account that the key issue that the opposing Depositors want a replacement Monitor to review is whether the Representative Action provisions of the plans are within the jurisdiction of a *CCAA* court to sanction. This is a question of law, on which a replacement Monitor would have to rely on counsel.

[107] At this point in the proceedings, in addition to being reviewed by the Monitor's legal counsel, the provisions of the plans related to the Representative Action have been reviewed by the creditors' committees for the District and DIL, who act in a fiduciary capacity with respect to the creditors of those respective entities and by each committee's independent legal counsel. The jurisdictional issue related to the Representative Action provisions is a legal matter rather than a business issue. As such, this Court is qualified to opine on it independently, without the assistance of a new Monitor.

[108] I note that the creditors' committees who represent the majority of Depositors are strongly opposed to a replacement Monitor. They pointed out that the plans have been approved by the requisite majorities, and delay and additional cost does not serve the interests of the general body of creditors, particularly without what they consider to be any justifiable reason.

[109] The assistance of a further limited purpose Monitor would likely be of little to no further assistance to the Court and would result in increased professional costs to the detriment of creditors as a whole. This is the tail-end of a lengthy process. The introduction of another Monitor without any clear, ascertainable benefit to the body of creditors, leading to uncertainty, costs and delay, is unwarranted.

5. Conclusion

[110] The anger and frustration expressed in these proceedings by a small minority of Depositors, while perhaps understandable given their losses and the trust they placed in their Church, is misplaced when it is directed against the Monitor.

[111] There is no reason arising from conflict of interest or breach of fiduciary duty to replace the Monitor.

[112] I therefore dismiss the application.

B. Sanctioning of the DIL and District Plans

1. Overview

[113] As provided in section 6(1) of the *CCAA*, the Court has the discretion to sanction a plan of compromise or arrangement where, as here, the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the debtor company and its creditors.

[114] The general requirements for court approval of a *CCAA* plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done that is not authorized by the *CCAA;* and
(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd v Royal Trust Co (1993), 17 CBR (3d) 1(Ont Ct J(Gen Div)) at para 17; *Re Canadian Airlines Corp* , 2000 ABQB 442 at para 60, leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal refused [2001] SCCA No 60; *Re Canwest Global Communications Corp,* 2010 ONSC 4209 at para 14.

[115] It is clear that there has been strict compliance with all statutory requirements with respect to both the DIL and the District plans, assuming jurisdiction as a different issue. The opposing Depositors attack the plans on the basis of the second and third requirements.

[116] They submit:

(a) the plans contain provisions that are not within the scheme and purpose of the *CCAA*;
(b) the plans compromise third party claims;
(c) the plans provide no benefit to Depositors within the purpose of the CCAA;
(d) the plans contravene section 5.1(2) of the *CCAA*;
(e) the plans have not been advanced in good faith, with due diligence and full disclosure; and
(f) the plans are not fair and reasonable.

1. Do the plans contain provisions that are not within the scheme and purpose of the *CCAA*?

[117] The opposing Depositors submit that the Representative Action provisions of the plans do not advance the District Group's restructuring goals.

[118] The District and the Creditors' Committees respond that the Representative Action provisions follow the "one proceeding" model that underpins the *CCAA* and will prevent maneuvering among Depositors for better positions in subsequent litigation, which, they say, has already commenced with the stayed class action proceedings. They submit that the provisions provide certainty to Depositors and allow the District to continue its core function without the distraction of a myriad of claims, consuming its limited resources and having the potential to compromise its insurance coverage.

[119] The opposing Depositors submit that procedural rules can be used to limit proceedings in the absence of the Representative Action provisions, and that if more than one class proceeding is brought within a jurisdiction, carriage motions can be brought to determine which action can proceed to certification. Thus, they argue, there is little likelihood that the District will be overwhelmed by litigation in the event that the plans are not approved. Rather, there will be one class proceeding in each of British Columbia and Alberta, and potentially a number of independent claims advanced by those who choose to opt out of those actions or whose claims are of an individual nature not suited to determination in a class proceeding. It is open to the District to apply to have those individual claims consolidated if is appropriate to do so.

[120] This argument contains its own contradictions. It anticipates multiple actions that may have to resolved through court application and carriage motions, the very multiplicity of actions that the Representative Action provisions are proposed to alleviate.

[121] The opposing Depositors cite *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 240 OAC 245, 2008 ONCA 587 (CanLii); leave dismissed [2008] SCC No. 32765 for the proposition that the Court does not have the jurisdiction to approve a plan that contains terms that fall outside the purpose, objects and scheme of the *CCAA*. The *Metcalfe* decision dealt with a unique situation involving the Court's jurisdiction to approve a plan that involved wide-ranging releases. In the result, the Court approved the plan including the releases. The DIL and District plans do not involve third-party releases except in a limited sense that is not at issue. It is true that Blair, J.A. noted in the *Metcalfe* decision that there must a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of a third party release. However, he also noted at para 51 that, since its enactment:

> Courts have recognized that the [*CCAA*] has a broader dimension than simply the direct relations between the debtor company and creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected.

[122] The opposing creditors in *Metcalfe* raised many of the same arguments that the opposing Depositors raise in this case, and the Court noted that they "reflect a view of the purpose and objects of the *CCAA* that is too narrow": para 55.

[123] The opposing Depositors also argue that any provision of a plan that may benefit the District is improper. They submit that the District's arguments "anticipate that it will be the beneficiary of [the Subcommittee's] goodwill", and that this betrays the District's improper motive. There is nothing improper or contrary to the scheme and purpose of the *CCAA* for a debtor company to attempt to be able to continue its business more efficiently and effectively post-*CCAA.* That is the very core and purpose of the *Act*. This argument assumes that the Subcommittees would betray their fiduciary duty to act in the best interests of the creditors they will represent by favouring DIL or the District. There is no evidence that this would happen; on the contrary, the Creditors' Committees have ably represented the interests of creditors as a whole in this restructuring, and there is no reason that the Subcommittees would do otherwise.

[124] Finally, the opposing Depositors submit, referencing the results of a survey conducted by the Lutheran Church – Canada, that there is little likelihood of the District remaining in operation in the future without being subsumed into a single administrative structure. At this point, this is only a possibility that would not be implemented for more than a year, if it is implemented at all.

[125] There is a nexus between the Representative Action provisions of the plans and the restructuring in that these provisions are designed to allow the District to continue in the operation of its core function without the distraction of multiple litigation, while preserving the rights of Depositors to assert actions against third parties involved in the events that led to this insolvency. This Court does not lack jurisdiction to sanction the plans for this reason.

2. Do the Representative Action provisions of the plans compromise third party claims?

[126] The basis for this submission is that the Subcommittees will have absolute discretion to commence and compromise third party claims (including derivative claims), to instruct counsel, and to determine the litigation budget to be shouldered by the Depositors. Under the terms of the plans, a Depositor whose third-party claim is denied by the Subcommittee has no right to proceed independently.

[127] The plans impose fiduciary duties on the Subcommittee members to act in the best interest of Depositors who do not opt-out. No claims are *prima facie* released, other than the partial releases that are unopposed. Thus, it must be assumed that a claim against a third party will not be advanced by a Subcommittee only if not doing so is consistent with its fiduciary duties for whatever reason (for example, advice from representative counsel that a claim has no basis for success).

[128] The opposing Depositors put forward a hypothetical situation in which an individual may have a meritorious claim that he or she wishes to pursue, but the Subcommittee doesn't wish to proceed due to lack of funding. The District and the Monitor point out, and I accept, that the definition of Representative Action permits more than one action. There is no provision of the plans that prevents this hypothetical individual from funding the Subcommittee to pursue such an action on his or her behalf as a Representative Plaintiff. The individual would become part of the Subcommittee and the action would be advanced by the Subcommittee using representative counsel. The hypothetical action would be treated like any other representative action claim under the plans. The Subcommittee would have carriage and control of such litigation, subject to its fiduciary obligations.

[129] If any issues arose from such a hypothetical situation, the advice and direction of the Court is available.

[130] It is important to note that the Representative Action provisions of the plans do not deprive any Depositors of the right to pursue claims as described against third-parties. They merely funnel the process through independent Subcommittees of creditors chosen from among the Depositors who have claims remaining after the Convenience Payments and who will have the fiduciary duty to act in the best interests of the body of such creditors to maximize recovery of their investments.

[131] While third-party claims could be pursued in another fashion, through uncoordinated action by individual Depositors, that does not mean that the Representative Action provisions constitute a compromise of such claims. There is no jurisdictional impediment to sanction arising from this inaccurate characterization of the plan provisions.

3. Do the Representative Action provisions provide any benefit to Depositors within the purpose of the CCAA?

[132] The Monitor identified the benefits of the Representative Action provisions in its reports to Depositors as follows:

(a) they provide a streamlined process for the establishment of the Representative Action class and the funding of the Representative Action;
(b) they prevent a situation where Depositors are being contacted by multiple groups seeking to represent them in a class action or otherwise;

(c) they may result in increased recoveries through settlement of the Representative Action claims on a group basis; and
(d) as certain Depositors have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs, the Representative Action process allows them to opt-out before litigation is even commenced, should that be their preference.

[133] The opposing Depositors suggest that none of these benefits fall within the "express purposes" of the *CCAA.* As noted by the Supreme Court in *Century Services Inc v Canada (Attorney General),* 2010 SCC 60, the *CCAA* has a broad remedial purpose, and permits a company to continue its business through various methods, with a view to becoming viable once again, including compromises or arrangements between an insolvent company and its creditors, and a going-forward strategy.

[134] The *Act* is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the debtor to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. I accept that this is what the District Group is attempting to do with the plans, including the Representative Action provisions. While these provisions are of benefit to the District in allowing it to deal with claims affecting its officers, directors and employees from a single source, they also have a rationale and reasonable purpose in protecting the community of mostly older Depositors that the District will continue to serve in a religious capacity, and in attempting to maximize recovery through the possibility of focused negotiations with a limited number of parties. This does not mean that these types of provisions will always be an appropriate way to deal with third party claims, but, in the circumstances of this rather unique restructuring, the benefits are reasonable, rationale and connected with the overall restructuring.

[135] The DIL and District plans are part of a four component conceptual plan of arrangement and compromise that is designed to permit the District to continue to carry out its core operations as a church entity without the CEF and DIL functions that it has previously carried out and without the senior's care ministry component it had carried out through ECHS and EMSS. The opposing Depositors take an overly narrow view of the *CCAA's* purpose, and ignore the real benefits identified by the Monitor to the large group of Depositors who are interested in recovering as much of their investment as possible. This Court does not lack jurisdiction to sanction the plans on this ground.

4. Do the plans contravene section 5.1(2) of the *CCAA*?

[136] Claims that may be included in the Representative Action provisions include claims that cannot be compromised pursuant to section 5.1(2) of the *CCAA* as they are claims against directors that relate to a contractual right of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by a director.

[137] As noted previously, the plans do not release or compromise any claims that can be pursued in the Representative Action. Accordingly, the plans permit the directors to be pursued in a Representative Action in accordance with s. 5.1(2) of the *CCAA*.

5. Have the plans been advanced in good faith, with diligence and full disclosure?

[138] As noted with respect to the application to replace the Monitor, it was not necessary for the District to disclose the MSDP and the Conrich ASP in the context of the District plan. However, these documents were disclosed to Depositors before the reconvened District meeting, and Depositors had the ability to change their vote on the District plan with this information in hand. The District was not guilty of bad faith arising from these circumstances.

[139] The opposing Depositors also submit that counsel for the District Group, by acting as counsel and advancing the plans, has "intentionally sought to misuse the *CCAA* proceedings to shield himself and his law firm from liability". First, neither counsel nor his firm is released by the plans from any liability, other than the limited release provisions that are not contentious. The opposing creditors have made a number of allegations against counsel and his firm; none of these allegations have been tested or established and undoubtedly the Subcommittees will have to consider whether to bring proceedings against these parties for advice that may have been provided to the District Group prior to the *CCAA* filing. This situation does not give rise to bad faith by the District Group.

[140] The opposing Depositors also allege that counsel for the District Group has been unjustly enriched as a result of the legal fees they have been paid while acting as counsel in these proceedings. Counsel has not been able to respond to this allegation of dubious merit. Again, this is irrelevant to the issue of the District Group's good faith.

[141] Similar allegations have been made about the Monitor, which have been addressed in the decision relating to the replacement of Monitor.

6. Are the Plans Fair and Reasonable?

a. Overview

[142] Farley, J. in *Re: Sammi Atlas Inc*, [1998] O.J. No. 1089 at para 4 provided a useful description of the Court's duty in determining whether a proposed plan is fair and reasonable:

> … is the Plan fair and reasonable? A Plan under the *CCAA* is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights. It is recognized that the *CCAA* contemplates that a minority of creditors is bound by the Plan which a majority have approved – subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509.

In an earlier case, he commented:

> In the give and take of a *CCAA* plan negotiation, it is clear that equitable treatment need not necessarily involve equal treatment. There is some give and some get in trying to come up with an overall plan which Blair J. in *Olympia & York* likened to a sharing of the pain. Simply put, any *CCAA* arrangement will

> involve pain – if for nothing else than the realization that one has made a bad investment/loan: *Re: Central Guarantee Trust Ltd.*, [1993] O.J. No. 1479.

[143] The objection of the opposing Depositors to these plans focus mainly on whether the different treatment of some creditors results in inequitable treatment, whether the plans are flawed is any respect and how much weight I should accord to the approval of the majority.

b. Deference to the Majority

[144] Dealing with the important factor of the approval of the plans by the requisite double majority of creditors, the Court in *Re Muscletech Research & Development Inc.*, [2007] O.J. No. 695 at para 18 commented:

> It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the Applicants if the plan is not approved. An important factor to be considered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.

[145] The opposing Depositors, however, invite me to do just that. They refer to a remark by McLachlen, J. (as she then was), in *Re Gold Texas Resources* [1989] B.C.J. No. 167 at page 4, to the effect that the court should determine whether "there is not within an apparent majority some undisclosed or unwarranted coercion of the minority…. (i)t must be satisfied that the majority is acting *bona fide* and in good faith".

[146] The opposing Depositors submit that, in considering the voting results, I should keep in mind that the many of the Depositors "are not businessmen" and that 60% of them are senior citizens over 60 years of age. I note that some of the opposing creditors are also "not businessmen" and are over 60, but the Court is not asked to discount their opposing votes for that reason.

[147] I have read the considerable disclosure about the plans prepared and distributed by the Monitor, and note the extraordinary efforts of the Monitor and the District Group to ensure that Depositors had the opportunity to ask questions at the information meetings. The Depositors have had months to inform themselves of the plans. Even if the disputed development disclosure had been necessary, there were roughly 1 ½ months from the Monitor's disclosure of the documents to the vote on the District Plan. It would be patronizing for the Court to assume anything other than the Depositors were capable of reading the materials, asking relevant questions and exercising judgment in their own best interest. Business sophistication is not a necessity in making an informed choice.

[148] The opposing Depositors also submit that there is evidence of efforts by Church officials to influence the outcome of the vote in favour of the plans. This evidence consists of affidavits from the opposing Depositors or their supporters that accuse various Church pastors of efforts to intimidate or silence those who oppose the plans. These allegations have been made against individuals who are not direct parties in these proceedings, at such a time and in such circumstances that it was not possible for them to respond.

[149] As seen from the allegations against the Monitor, to which the Monitor had an opportunity to respond, there may be very different perceptions about what actually occurred during the incidents described in the allegations. I appreciate that it must be uncomfortable to be at odds with your religious community on an important issue. However, these allegations would bear greater weight if the terms of the plans were prejudicial to the Depositors as a whole, or the allegations were supported by the Creditor's Committees but they are not. It is not unreasonable or irrational for Depositors to have voted in favour of the plans.

[150] I am unable to accept on the evidence before me that the Depositors who voted in favour of the plans did so because they were coerced by church officials. This does a disservice to those who exercised their right to vote and to have an opinion on the plans, no matter what their level of sophistication, their age or their religious persuasion.

c. The Convenience Payments

[151] The opposing Depositors also submit that the votes in favour of the District plan were unfairly skewed by the fact that creditors with claims of less than $5,000 are to be paid in full (the "Convenience Creditors"). The Monitor reports that, of the 1,616 Convenience Creditors, 500 or 31% in number holding 54% in value of total claims under $5,000 voted on the District plan.

[152] Of the 500 Convenience Creditors who voted on the District plan, 450 or 90% voted in favour of the District plan and 50 or 10% voted against the District plan. The Convenience Creditors who voted in favour of the District plan had claims of approximately $641,300 (91% of the total claims of voting Convenience Creditors), and the Convenience Creditors who voted against the District plan had claims of approximately $66,500 (9% of the total claims of voting Convenience Creditors).

[153] Approximately 1,294 Eligible Affected Creditors with total claims of approximately $85.1 million voted on the District plan. The Convenience Creditors therefore represented approximately 39% in number and approximately 1% in dollar value of the total eligible affected creditors. In order for the District plan to be approved, both a majority in number and two-thirds in dollar value of voting creditors must have voted in favour of the plan. As such, while the Convenience Payments increased the likelihood that a majority in number of Creditors would vote in favour of the plan, they had little impact on the likelihood that two-thirds in dollar value of voting creditors would vote in favour of the plan.

[154] Excluding the Convenience Creditors, a total of 794 creditors voted on the District plan, of which 626, or approximately 79% voted in favour and 168 voted against. Therefore the plan still would have passed by a majority in number of voting creditors had the Convenience Creditors not voted.

[155] The District Group and the Monitor note that the Convenience Creditor payments have the effect of limiting the number of NewCo shareholders to about 1,000, rather than 2,600, thus creating a more manageable corporate governance structure for NewCo and ensuring that only Depositors with a significant financial interest in NewCo will be shareholders. This is a reasonable and persuasive rationale for paying out the Convenience Creditors. While each case must be reviewed in its unique circumstances, this type of payout of creditors with smaller claims is not uncommon in *CCAA* restructurings: *Contact Enterprises Inc, Re* 2015 BCSC 129;

Target Canada Co., Re 2016 CarswellOnt 8815; *Nelson Financial Group Ltd., Re* 2011 ONSC 2750.

[156] As noted previously, equitable treatment is not necessary equal treatment, and the elimination of potential shareholders with little financial interest from NewCo is a benefit to remaining Depositors in the context of the District plan. They may not have had any significant financial influence in the corporation, but their interests would have had to be taken into account in deciding on the future of NewCo.

d. The NewCo provisions

[157] The opposing Depositors submit that, as the future of the Prince of Peace properties cannot be known until after the first meeting of NewCo shareholders six months after the effective date of the plan, the plan deprives the Court of the ability to ensure the plan is fair and reasonable and therefore appropriate to impose on the minority.

[158] This is incorrect. What is relevant to the Court in reviewing the plan is the value of the shares of NewCo that are part of the consideration that will be distributed to some of the District Depositors. As noted in *Century Services* at para 77:

> Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation.

[159] The Monitor notes that the value of the NewCo shares is intended to be based principally on the independent appraisals, which reflect a range of forced sale values. The Monitor has consulted with the Deloitte' Valuations Group, which has indicated that in valuing shares such as those of NewCo, it would be more common to value assets such as the Prince of Peace properties based on appraised market values as opposed to forced sale values. The Monitor reports that it has attempted to balance this consideration against other practical considerations, such as that fact that, depending on the mandate that is chosen for NewCo, the Prince of Peace properties may still be liquidated in the near-term, and that therefore, there is the need to accurately reflect the shortfall to some of the Depositors, which will represent the amount they would ultimately be able to pursue in the Representative Action. I accept the Monitor's opinion that it is unlikely that the values attributed to the Prince of Peace properties in calculating the value of the NewCo shares will reflect the lowest forced sale values reflected in the appraisals.

[160] The District Plan contemplates a debt-to equity conversion, which is common in *CCAA* proceedings. The Court does not have to make a determination of the value of the equity offered, as long as it is satisfied, as I am, that the value of the package to be distributed to the Depositors will likely exceed a current forced-sale liquidation recovery in this depressed real estate market, which is the alternative proposed by the opposing Depositors. The plan provides the NewCo shareholders with flexibility to optimize recovery at the time of the first shareholder's meeting, with the advantage of recommendations from an experienced management team. While there is no guarantee that the market will improve, it is a realistic possibility. At any rate, the sale of the Prince of Peace properties will not be the only option available to NewCo shareholders. Again, I must take into account that this appears to be the view of the Depositors who voted in favour of the plan.

[161] The opposing Depositors submit that the NewCo shares are not a suitable investment for District Depositors over the age of 70. It is unrealistic to believe that any *CCAA* plan of

compromise and arrangement would be supported by all of a debtor company's creditors or that the compromise effected would be ideally suited to every creditor's personal situation. The NewCo articles attempt to address the concerns of those who don't want to hold shares by building in provisions that would allow the possibility that shareholders are able to sell to other shareholders or have their shares redeemed.

[162] This is not a perfect solution, but plans do not have to be perfect to be found to be fair and reasonable. I find that the NewCo provisions of the District plan, in the context of the plan, as a whole, are fair and reasonable.

e. The Representative Action provisions

[163] In addition to submissions previously discussed with respect to these provisions, the opposing Depositors submit that "(n)o honest and intelligent District Depositors acting in their own best interests would give up these fundamental rights of [full and unfettered access to the courts] where the law already provides perfectly satisfactory processes for advancing legal claims against third parties on a class basis. These provisions are neither fair nor reasonable, and accordingly must not receive the sanction of this Court".

[164] The short answer to this is that a majority of the honest and intelligent Depositors have voted in favour of the plans, including the Representative Action provisions. It is not the place of this Court to second guess their decision without good and persuasive reasons: *Central Guaranty* at paras 3&4; *Muscletech* at para 18.

[165] The opposing Depositors also submit that the Representative Action provisions of the plans are flawed in that they do not provide for information about causes of action the Subcommittee intends to advance, and against whom prior to the opt-out deadline.

[166] However, Depositors are able to opt-out at any time prior to the last business day preceeding the date of commencement of the Representative Action. It is not unreasonable to anticipate that Depositors will have further information with respect to the proposed Representative Actions prior to their commencement.

[167] It is also true that participating Depositors will not know their own proportionate share of the Representative Action Holdback until after the opt-out deadline has passed and the size of the Representative Action class is known. However, the Monitor has committed to provide a range of what individual shares may be.

[168] The opposing Depositors submit that in the absence of reliable information about the extent of their financial commitment to the Representative Action, it can reasonably be expected that many District Depositors will be content to receive their distribution under the plan and forgo the balance of their claims by electing to opt out the Representative Action. This is not a reasonable assumption. Representative counsel will likely be retained on a contingency fee basis, and therefore Depositors will be unlikely to be at risk for a substantial retainer to advance the Representative Action.

[169] Finally, on this issue, the opposing Depositors submit there is an irreconcilable conflict of interest between the Subcommittee and a Representative Plaintiff that can be expected to mar the Representative Action. Unlike the Subcommittee tasked with instructing counsel, the Representative Plaintiff bears the sole financial responsibility for paying an adverse costs award. The opposing Depositors submit that it is reasonable to expect that there may be a divergence of

views between the Subcommittee and the Representative Plaintiff as to the conduct of the Representative Action.

[170] As would be the case in class action proceedings when the interests of representative plaintiffs come into conflicts with the interests of the class, advice and direction can be sought from the Court in the event that this situation materializes.

[171] The opposing Depositors submit that the Representative Action provisions interfere with a citizen's constitutional right of access to the courts. These provisions do not deprive the Depositors from their right to take action against third parties; they are able to do so through a Subcommittee chosen from their members with fiduciary duties to the whole. This issue was considered in the context of third-party releases, which do eliminate the right to pursue an action against third parties, in *Metcalfe*, and Blair, J.A. commented at para 104 as follows:

> The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the *CCAA*. The fact that this may interfere with a claimant's right to pursue a civil action – normally a matter of provincial concern – or trump Quebec rules of public order is constitutionally immaterial. The *CCAA* is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the *CCAA* governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount.

7. Conclusion

[172] As noted at para 18 of *Metcalfe*:

> Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the *CCAA* supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

[173] In this case, the requisite double majority, after significant disclosure and opportunities to review and question the plans, have voted in favour of the plans. The Creditors' Committees of DIL and the District, who have the duty to act in the best interests of the body of creditors, support the plans.

[174] The Monitor supports the plans, and there is no reason in this case to give the Monitor's opinion less than the usual deference and weight.

[175] Measuring the plans against available commercial alternatives leads me to the conclusion that they provide greater benefits to Depositors and other creditors than a forced liquidation in a depressed real estate market.

[176] The plans preserve the District's core operations. I accept that the Representative Action provisions are appropriate and reasonable in the circumstances of this restructuring, that, in addition to the benefits identified by the Monitor of stream-lined proceedings, the avoidance of multiple communications and the potential of increased recovery, Depositors will benefit from the oversight of the Subcommittees and the Representative Action process will be able to incorporate cause of action, such as derivative actions, that are normally outside the scope of class actions.

[177] The insolvency of the District Group has caused heartbreak and hardship for many people, as is the case in any insolvency. In the end, the majority of affected creditors have accepted plans that resolve their collective problems to the extent possible in difficult circumstances. As noted in *Metcalfe* " in insolvency restructuring proceedings almost everyone loses something": para 117. That is certainly the case here, and the best that can be done is to try to ensure that the plans are a reasonable "balancing of prejudices". It is not possible to please all stakeholders.

[178] The balance of interests clearly favours approval. I am satisfied that the DIL and District plans are fair and reasonable and should be sanctioned.

Heard on the 15th day of July, 2016.
Dated at the City of Calgary, Alberta this 2nd day of August, 2016.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Francis N.J. Taman and Ksena J. Court
for the District Group

Jeffrey L. Oliver and Frank Lamie
for the Monitor

Chris D. Simard and Alexis E. Teasdale
for the District Creditors' Committee

Douglas S. Nishimura
for the DIL Creditors' Committee

Errin A. Poyner
for Elvira Kroeger and Randall Kellen

Allan a. Garber
for Marilyn Huber and Sharon Sherman

Dean Hutchison
for Concentra Trust

Christa Nicholson
for Francis Taman and Bishop and McKenzie LLP

Corrigendum of the Reasons for Decisions
of
The Honourable Madam Justice B.E. Romaine

On page 30 - Ms. Nicholson is counsel only for Francis Taman and Bishop and McKenzie LLP.

TAB 9

Court File No.: CV-20-00637297-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	THURSDAY, THE 11TH
	)	
JUSTICE MCEWEN	)	DAY OF MARCH, 2021

BCIMC CONSTRUCTION FUND CORPORATION and OTÉRA CAPITAL INC.

Applicants

-and-

33 YORKVILLE RESIDENCES INC. and 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. 1990, c. C-43, AS AMENDED

APPROVAL AND VESTING ORDER

THIS MOTION, made by PricewaterhouseCoopers Inc. in its capacity as the Court-appointed receiver (the "**Receiver**") of the undertakings, properties and assets of 33 Yorkville Residence Inc. and 33 Yorkville Residences Limited Partnership (the "**Debtor**"), for an order approving the sale transaction (the "**Transaction**") contemplated by an agreement of purchase and sale between the Receiver and PEM (YORKVILLE) HOLDINGS INC. (the "**Purchaser**") dated August 29, 2020, as amended, and appended to the Fifth Report of the Receiver dated March 4, 2021 (the "**Report**") as Appendix "A" (the "**Sale Agreement**"), and vesting in the

Purchaser the Debtor's right, title and interest in and to the Property as defined and described in the Sale Agreement (the "**Purchased Assets**"), was heard this day by videoconference by reason of the COVID 19 pandemic.

ON READING the Report and on hearing the submissions of counsel for the Receiver, the Applicants, the Purchaser, and those other parties that were present as listed on the counsel slip, and no one appearing for any other person on the service list, although properly served as appears from the affidavit of service, filed:

1. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved, and the execution of the amendments to the Sale Agreement executed by the Receiver following its authorization to enter into the Sale Agreement on December 16, 2020 are hereby authorized and approved, with such minor amendments to the Sale Agreement as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.

2. THIS COURT ORDERS AND DECLARES that unless otherwise indicated herein, capitalized words and terms have the meanings given to them in the Sale Agreement.

3. THIS COURT ORDERS AND DECLARES that the Sale Agreement is the Successful Bid as defined in the SISP and the Receiver is authorized and empowered, *nunc pro tunc*, to enter into any and all necessary agreements with respect to the Successful Bid and to undertake such other actions as may be necessary or appropriate to give effect to the Successful Bid.

4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "**Receiver's Certificate**"), all of the Debtor's right, title and interest in and to the Purchased Assets shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other

financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Koehnen dated March 27, 2020; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; (iii) all mortgages, pledges, charges, liens, debentures, trust deeds, assignments by way of security, security interests, conditional sales contracts or other title retention agreements or similar interests or instruments charging, or creating a security interest in, the Property or any part thereof or interest therein, and any agreements, Leases, options, easements, rights of way, restrictions, executions, or other encumbrances (including notices or other registrations in respect of any of the foregoing) affecting title to the Property or any part thereof or interest therein, including but not limited to any of the foregoing which are registered on title to the Property following the date referred to in Schedule C hereto but prior to the registration in the Land Registry Office for the Land Titles Division of Toronto (No. 66) of an Application for Vesting Order to which this order is attached; (iv) all rights and claims of the condominium purchasers pursuant to the Existing Agreements of Purchase and Sale (as defined in the Sale Agreement) in respect of the Property; and (v) those Claims listed on Schedule C hereto (all of which are, collectively with those items set out in Section 3(i), (ii), (iii), and (iv) above, referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

5. THIS COURT ORDERS that upon the registration in the Land Registry Office for the Land Titles Division of Toronto (No. 66) of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario), which the Purchaser is hereby authorized to submit for registration, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule B hereto (the "**Real Property**") in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims, including those listed in Schedule C hereto.

6. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

7. THIS COURT ORDERS that upon the delivery of the Receiver's Certificate:

(a) all of the rights and obligations of the Debtor under, to, and in connection with, any Assumed Contract (as defined in the Sale Agreement) with respect to the Property which the Debtor is a party to or other Included Asset (other than Unassumed Contracts and Permits, (as such terms are defined in the Sale Agreement) with respect to the Property which requires the consent of any counterparty to such Assumed Contract or Included Asset to the assignment or transfer of such Assumed Contract or Included Asset to the Purchaser ("**Included Asset**" having the meaning set out in the Sale Agreement), and where such consent is not obtained on or prior to the issuance of this Order, shall be assigned, conveyed, transferred to, and assumed by, the Purchaser and such assignment is valid and binding upon all such counterparties to such Assumed Contract or Included Asset, notwithstanding any restriction, condition or prohibition contained in any such Assumed Contract or Included Asset relating to the assignment thereof, including any provision requiring the consent of any party to the assignment; and (2) the counterparties to such Assumed Contract or Included

Asset are prohibited from exercising any rights or remedies under such Assumed Contract or Included Asset, and shall be forever barred and estopped from taking such action, by reason of: (i) any defaults thereunder related to these receivership proceedings or the insolvency of the Debtor; (ii) any restriction, condition or prohibition contained therein relating to the assignment thereof or any change of control; or (iii) the Transaction or any parts thereof (including, for certainty, the assignment of such Assumed Contract or Included Asset), and are hereby deemed to waive any defaults relating thereto, *subject to* all monetary defaults accrued under or in respect of such Assumed Contract or Included Asset being paid by the Purchaser in accordance with the Sale Agreement. For greater certainty and without limiting the foregoing, no counterparty to any Assumed Contract or Included Asset shall rely on a notice of default sent prior to the filing of the Receiver's Certificate to terminate such Assumed Contract or Included Asset; and

(b) the Purchaser shall not have any liability or obligation in respect of any Unassumed Contract, including, without limitation, any Contract that is deemed to be an Unassumed Contract pursuant to the Sale Agreement, in respect of the Property.

8. THIS COURT ORDERS that all of the Existing Agreements of Purchase and Sale shall be and are hereby deemed to be terminated, repudiated, and /or not assumed, in each case effective on the Closing, and such Existing Agreements of Purchase and Sale and any rights or claims thereunder or relating thereto are not continuing obligations effective against the Purchased Assets or binding on the Purchaser.

9. THIS COURT ORDERS that the Purchaser is hereby assigned all rights, interests, benefits, obligations, and outstanding liabilities of the Debtor and the Vendor in and in respect of all Levies (as defined in the Sale Agreement) paid to any Governmental Authority (as defined in

the Sale Agreement) prior to Closing and all Governmental Authorities (as defined in the Sale Agreement) shall apply the Levies to the benefit of the Purchaser.

10. THIS COURT ORDERS AND DIRECTS the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof by the Receiver to the Purchaser.

11. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Company's records pertaining to the Debtor's past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.

12. THIS COURT ORDERS that the Purchaser shall not have any liability, obligation or responsibility to hire or retain any employees of the Debtor and is not retaining any employees and, therefore, the Purchaser and its directors and officers shall not have any liability, obligation or responsibility to pay any wages, termination, severance or other common law or statutory amount payable in connection any employees of the Debtor.

13. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Debtor;

the vesting of the Purchased Assets in the Purchaser and the assignments pursuant to this Order and other terms and provisions of this Order shall be binding on any trustee in bankruptcy that

may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

14. THIS COURT ORDERS that Confidential Appendix B to the Report shall be kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the court file for these proceedings, in a sealed envelope attached to a notice that sets out the title of these proceedings and the statement that the contents are subject to this motion and sealing order, and remain under seal until the completion of the Transaction, or until further Order of this Court.

15. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

McEwen T.

Schedule A - Form of Receiver's Certificate

Court File No. CV-20-00637297-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

B E T W E E N:

BCIMC CONSTRUCTION FUND CORPORATION and OTÉRA CAPITAL INC.

Applicants

-and-

33 YORKVILLE RESIDENCES INC. and 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

RECEIVER'S CERTIFICATE
(33 Yorkville Closing of Transaction)

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice Koehnen of the Ontario Superior Court of Justice (the "**Court**") dated March 27, 2020, PricewaterhouseCoopers Inc. was appointed as the receiver (the "**Receiver**") of the undertaking, property and assets of 33

Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership (collectively, the "**Debtor**").

B. Pursuant to an Order of the Court dated March 11, 2021, the Court approved the agreement of purchase and sale made as of August 29, 2020, as amended (the "**Sale Agreement**"), between the Receiver and PEM (YORKVILLE) HOLDINGS INC. (the "**Purchaser**") and provided for the vesting in the Purchaser of the Debtor's right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming: (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in Section 4 of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, capitalized words and terms have the meanings given to them in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid, and the Receiver has received, the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to Closing as set out in Section 4 of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver at _____ [TIME] on _____ [DATE].

PRICE WATERHOUSECOOPERS INC., solely in its capacity as Court-Appointed Receiver and Manager of 33 YORKVILLE RESIDENCES INC. and 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP, and not in its personal capacity

Per: _____

Name:

Title:

Schedule B – Real Property

33 Yorkville Avenue, 27-37 Yorkville Avenue and 26-50 Cumberland Street, Toronto

Firstly Lands:

PIN 21197-0012(LT)

PCL 13-1 SEC A355; PT LT 13 PL 355 TORONTO; LT 14 PL 355 TORONTO; LT 15 PL 355 TORONTO PT 1 66R7336; T/W THE USE OF THE WLY WALL OF THE BUILDING NOW KNOWN AS NO. 25 YORKVILLE AV, ERECTED TO THE EAST OF THE SAID PT 1, ON PLAN 66R7336 FOR THE PURPOSE ONLY OF INSERTING THEREIN JOISTS AND GIRDERS S/T THE APPROVAL OF THE ARCHITECT FOR ONE JOHN TOWNSEND, THE OWNER OF THE SAID BUILDING, AND IN COMPLIANCE WITH ANY BY-LAW OR BYLAWS OF THE CITY OF TORONTO AND S/T THE APPROVAL OF THE ARCHITECT FOR THE SAID CITY, AS IN EM62263; SEE A424504; TORONTO; SUBJECT TO AN EASEMENT AS IN AT5316512; CITY OF TORONTO

Secondly Lands:

PIN 21197-0353(LT)

LTS 16, 17, 18, 19 PL 355; PT PRIVATE LANE PL 355 (CLOSED BY BYLAW EM57946 & EM68522), PT LT 1 PL 46, PT LT 21 CON 2 FTB, PARTS 1, 2 66R30438; TOGETHER WITH AN EASEMENT OVER PART 3 66R30438 AS IN AT5276321; SUBJECT TO AN EASEMENT AS IN AT5316512; CITY OF TORONTO

Thirdly Lands:

PIN 21197-0356(LT)

PART LOT 21 CONCESSION 2 FTB YORK, PARTS 10, 20 66R30438; TOGETHER WITH AN EASEMENT OVER PARTS 9, 11 66R30438 AS IN AT5276321; SUBJECT TO AN EASEMENT AS'IN AT5316512; CITY OF TORONTO

Fourthly Lands:

PIN 21197-0357(LT)

PART LOT 21 CONCESSION 2 FTB YORK; PART LANE PLAN 355 YORKVILLE, CLOSED BY BY-LAW 1391-2019 REGISTERED AS INSTRUMENT AT5275142, PARTS 5, 6, 18 66R30438; SUBJECT TO AN EASEMENT AS IN AT5316512; CITY OF TORONTO

Schedule C - Claims to be deleted and expunged from title to Real Property

Instruments on Title

Current as of: March 2, 2021

PIN 21197-0012(LT)

1. Instrument No. AT4765786, registered December 20, 2017, being a Charge in the amount $150,000,000 between Kingsett Mortgage Corporation, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

2. Instrument No. AT4765787, registered December 20, 2017, being a Notice of Assignment of Rents – General related to Charge No. AT4765786 between Kingsett Mortgage Corporation and 33 Yorkville Residences Inc.

3. Instrument No. AT4765788, registered December 20, 2017, being a Charge in the amount $335,625,000 between Kingsett Real Estate Growth GP No. 4 Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

4. Instrument No. AT5000919, registered November 6, 2018, being a Charge in the amount $817,875,000 between bcIMC Construction Fund Corporation and Otéra Capital Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

5. Instrument No. AT5000920, registered November 6, 2018, being a Notice of Assignment of Rents - General related to Charge No. AT5000919 between bcIMC Construction Fund Corporation and Otéra Capital Inc. and 33 Yorkville Residences Inc.

6. Instrument No. AT5000946, registered November 6, 2018, being a Postponement of Instrument No. AT4765786 to AT5000919.

7. Instrument No. AT5000947, registered November 6, 2018, being a Postponement of Instrument No. AT4765787 to AT5000920.

8. Instrument No. AT5000948, registered November 6, 2018, being a Postponement of Instrument No. AT4765788 to AT5000919.

9. Instrument No. AT5000949, registered November 6, 2018, being a Charge in the amount $21,000,000 between Westmount Guarantee Services Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

10. Instrument No. AT5000975, registered November 6, 2018, being a Postponement of Instrument No. AT4765786 to AT5000949.

11. Instrument No. AT5000976, registered November 6, 2018, being a Postponement of Instrument No. AT4765788 to AT5000949.

12. Instrument No. AT5001034, registered November 6, 2018, being a Postponement of Instrument No. AT4765786 to AT5000977.

13. Instrument No. AT5001035, registered November 6, 2018, being a Postponement of Instrument No. AT4765788 to AT5000977.

14. Instrument No. AT5001036, registered November 6, 2018, being a Charge in the amount $277,000,000 between Westmount Guarantee Services Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

15. Instrument No. AT5001051, registered November 7, 2018, being a Postponement of Instrument No. AT4765788 to AT5001036.

16. Instrument No. AT5130064, registered May 7, 2019, being a Transfer of Charge AT4765788 from Kingsett Real Estate Growth GP No. 4 Inc. to Kingsett Real Estate Growth GP No. 6 Inc.

17. Instrument No. AT5130467, registered May 7, 2019, being a Notice of Change of Address – Instrument from bcIMC Construction Fund Corporation.

18. Instrument No. AT5242802, registered September 20, 2019, being a Postponement of Instrument No. AT4765786 to AT5242801.

19. Instrument No. AT5242803, registered September 20, 2019, being a Postponement of Instrument No. AT4765788 and AT5130064 to AT5242801.

20. Instrument No. AT5242805, registered September 20, 2019, being a Postponement of Instrument No. AT5000919 to AT5242801.

21. Instrument No. AT5242806, registered September 20, 2019, being a Postponement of Instrument No. AT5000949 to AT5242801.

22. Instrument No. AT5242808, registered September 20, 2019, being a Postponement of Instrument No. AT5001036 to AT5242801.

23. Instrument No. AT5276986, registered October 31, 2019, being a Charge in the amount $817,875,000 between bcIMC Construction Fund Corporation and Otéra Capital Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

24. Instrument No. AT5276987, registered October 31, 2019, being a Notice of Assignment of Rents – General related to Charge No. AT5276986 between bcIMC Construction Fund Corporation and Otéra Capital Inc. and 33 Yorkville Residences Inc.

25. Instrument No. AT5276988, registered October 31, 2019, being a Charge in the amount $21,000,000 between Westmount Guarantee Services Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

26. Instrument No. AT5276990, registered October 31, 2019, being a Charge in the amount $150,000,000 between Kingsett Mortgage Corporation, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

27. Instrument No. AT5276991, registered October 31, 2019, being a Notice of Assignment of Rents – General related to Charge No. AT5276990 between Kingsett Mortgage Corporation and 33 Yorkville Residences Inc.

28. Instrument No. AT5276992, registered October 31, 2019, being a Charge in the amount $277,000,000 between Westmount Guarantee Services Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

29. Instrument No. AT5276993, registered October 31, 2019, being a Charge in the amount $335,625,000 between Kingsett Real Estate Growth GP No. 6 Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

30. Instrument No. AT5390890, registered March 18, 2020, being a Construction Lien in the amount of $93,089 from Petra Consultants Ltd.

31. Instrument No. AT5391654, registered March 19, 2020, being a Construction Lien in the amount of $1,281,889 from Royal Excavating & Grading Limited c.o.b. Michael Bros. Excavation.

32. Instrument No. AT5393680, registered March 24, 2020, being a Construction Lien in the amount of $2,963,442 from GFL Infrastructure Group Inc.

33. Instrument No. AT5394278, registered March 24, 2020, being a Construction Lien in the amount of $734,500 from Verdi Structures Inc.

34. Instrument No. AT5394376, registered March 25, 2020, being a Construction Lien in the amount of $302,302 from Architectsalliance and Stephen Wells Architect Ltd.

35. Instrument No. AT5395553, registered March 26, 2020, being a Certificate from Architectsalliance and Stephen Wells Architect Ltd.

36. Instrument No. AT5396001, registered March 27, 2020, being a Certificate from GFL Infrastructure Group Inc.

37. Instrument No. AT5399671, registered April 1, 2020, being a Construction Lien in the amount of $217,924 from Aqua-Tech Dewatering Company Inc.

38. Instrument No. AT5404088, registered April 8, 2020, being a Construction Lien in the amount of $22,858 from Kramer Design Associates Limited.

39. Instrument No. AT5404535, registered April 8, 2020, being a Construction Lien in the amount of $785,350 from Toro Glasswall Inc.

40. Instrument No. AT5406095, registered April 14, 2020, being a Construction Lien in the amount of $48,950 from Read Jones Christoffersen Ltd.

41. Instrument No. AT5408369, registered April 15, 2020, being a Construction Lien in the amount of $5,283 from 1389256 Ontario Ltd.

42. Instrument No. AT5413487, registered April 22, 2020, being a Construction Lien in the amount of $278,942 from Royal Excavating & Grading Limited.

43. Instrument No. AT5416970, registered April 28, 2020, being a Construction Lien in the amount of $6,276 from The Fence People Limited.

44. Instrument No. AT5422088, registered May 4, 2020, being a Certificate from Royal Excavating & Grading Limited.

45. Instrument No. AT5430223, registered May 15, 2020, being a Certificate from Toro Glasswall Inc.

46. Instrument No. AT5433481, registered May 21, 2020, being a Certificate from Aqua-Tech Dewatering Company Inc.

47. Instrument No. AT5445217, registered June 5, 2020, being a Construction Lien in the amount of $4,857 from Petra Consultants Ltd.

48. Instrument No. AT5447771, registered June 9, 2020, being a Certificate from Petra Consultants Ltd.

49. Instrument No. AT5454004, registered June 17, 2020, being a Certificate from Verdi Structures Inc.

50. Instrument No. AT5456074, registered June 19, 2020, being a Certificate from The Fence People Limited.

51. Instrument No. AT5462918, registered June 30, 2020, being a Certificate from Kramer Design Associates Limited.

52. Instrument No. AT5571403, registered November 13, 2020, being a Construction Lien in the amount of $5,880,311 from Verdi Structures Inc.

53. Instrument No. AT5606669, registered December 22, 2020, being a Certificate from Verdi Structures Inc.

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54. Instrument No. AT4765786, registered December 20, 2017, being a Charge in the amount $150,000,000 between Kingsett Mortgage Corporation, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

55. Instrument No. AT4765787, registered December 20, 2017, being a Notice of Assignment of Rents – General related to Charge No. AT4765786 between Kingsett Mortgage Corporation and 33 Yorkville Residences Inc.

56. Instrument No. AT4765788, registered December 20, 2017, being a Charge in the amount $335,625,000 between Kingsett Real Estate Growth GP No. 4 Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

57. Instrument No. AT5000919, registered November 6, 2018, being a Charge in the amount $817,875,000 between bcIMC Construction Fund Corporation and Otéra Capital Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

58. Instrument No. AT5000920, registered November 6, 2018, being a Notice of Assignment of Rents- General related to Charge No. AT5000919 between bcIMC Construction Fund Corporation and Otéra Capital Inc. and 33 Yorkville Residences Inc.

59. Instrument No. AT5000946, registered November 6, 2018, being a Postponement of Instrument No. AT4765786 to AT5000919.

60. Instrument No. AT5000947, registered November 6, 2018, being a Postponement of Instrument No. AT4765787 to AT5000920.

61. Instrument No. AT5000948, registered November 6, 2018, being a Postponement of Instrument No. AT4765788 to AT5000919.

62. Instrument No. AT5000949, registered November 6, 2018, being a Charge in the amount $21,000,000 between Westmount Guarantee Services Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

63. Instrument No. AT5000975, registered November 6, 2018, being a Postponement of Instrument No. AT4765786 to AT5000949.

64. Instrument No. AT5000976, registered November 6, 2018, being a Postponement of Instrument No. AT4765788 to AT5000949.

65. Instrument No. AT5001034, registered November 6, 2018, being a Postponement of Instrument No. AT4765786 to AT5000977.

66. Instrument No. AT5001035, registered November 6, 2018, being a Postponement of Instrument No. AT4765788 to AT5000977.

67. Instrument No. AT5001036, registered November 6, 2018, being a Charge in the amount $277,000,000 between Westmount Guarantee Services Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

68. Instrument No. AT5001051, registered November 7, 2018, being a Postponement of Instrument No. AT4765788 to AT5001036.

69. Instrument No. AT5130064, registered May 7, 2019, being a Transfer of Charge AT4765788 from Kingsett Real Estate Growth GP No. 4 Inc. to Kingsett Real Estate Growth GP No. 6 Inc.

70. Instrument No. AT5130467, registered May 7, 2019, being a Notice of Change of Address – Instrument from bcIMC Construction Fund Corporation.

71. Instrument No. AT5242802, registered September 20, 2019, being a Postponement of Instrument No. AT4765786 to AT5242801.

72. Instrument No. AT5242803, registered September 20, 2019, being a Postponement of Instrument No. AT4765788 and AT5130064 to AT5242801.

73. Instrument No. AT5242805, registered September 20, 2019, being a Postponement of Instrument No. AT5000919 to AT5242801.

74. Instrument No. AT5242806, registered September 20, 2019, being a Postponement of Instrument No. AT5000949 to AT5242801.

75. Instrument No. AT5242808, registered September 20, 2019, being a Postponement of Instrument No. AT5001036 to AT5242801.

76. Instrument No. AT5276986, registered October 31, 2019, being a Charge in the amount $817,875,000 between bcIMC Construction Fund Corporation and Otéra Capital Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

77. Instrument No. AT5276987, registered October 31, 2019, being a Notice of Assignment of Rents – General related to Charge No. AT5276986 between bcIMC Construction Fund Corporation and Otéra Capital Inc. and 33 Yorkville Residences Inc.

78. Instrument No. AT5276988, registered October 31, 2019, being a Charge in the amount $21,000,000 between Westmount Guarantee Services Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

79. Instrument No. AT5276990, registered October 31, 2019, being a Charge in the amount $150,000,000 between Kingsett Mortgage Corporation, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

80. Instrument No. AT5276991, registered October 31, 2019, being a Notice of Assignment of Rents – General related to Charge No. AT5276990 between Kingsett Mortgage Corporation and 33 Yorkville Residences Inc.

81. Instrument No. AT5276992, registered October 31, 2019, being a Charge in the amount $277,000,000 between Westmount Guarantee Services Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

82. Instrument No. AT5276993, registered October 31, 2019, being a Charge in the amount $335,625,000 between Kingsett Real Estate Growth GP No. 6 Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

83. Instrument No. AT5353995, registered January 30, 2020, being a Construction Lien in the amount of $2,203,385 from GFL Infrastructure Group Inc.

84. Instrument No. AT5389862, registered March 17, 2020, being a Construction Lien in the amount of $ 760,057 from GFL Infrastructure Group Inc.

85. Instrument No. AT5390890, registered March 18, 2020, being a Construction Lien in the amount of $93,089 from Petra Consultants Ltd.

86. Instrument No. AT5391654, registered March 19, 2020, being a Construction Lien in the amount of $1,281,889 from Royal Excavating & Grading Limited c.o.b. Michael Bros. Excavation.

87. Instrument No. AT5394278, registered March 24, 2020, being a Construction Lien in the amount of $734,500 from Verdi Structures Inc.

88. Instrument No. AT5394376, registered March 25, 2020, being a Construction Lien in the amount of $302,302 from Architectsalliance and Stephen Wells Architect Ltd.

89. Instrument No. AT5395553, registered March 26, 2020, being a Certificate from Architectsalliance and Stephen Wells Architect Ltd.

90. Instrument No. AT5396001, registered March 27, 2020, being a Certificate from GFL Infrastructure Group Inc.

91. Instrument No. AT5396795, registered March 27, 2020, being a Construction Lien in the amount of $78,356 from Brian Isherwood & Associates Ltd.

92. Instrument No. AT5399671, registered April 1, 2020, being a Construction Lien in the amount of $217,924 from Aqua-Tech Dewatering Company Inc.

93. Instrument No. AT5404088, registered April 8, 2020, being a Construction Lien in the amount of $22,858 from Kramer Design Associates Limited.

94. Instrument No. AT5404535, registered April 8, 2020, being a Construction Lien in the amount of $785,350 from Toro Glasswall Inc.

95. Instrument No. AT5406095, registered April 14, 2020, being a Construction Lien in the amount of $48,950 from Read Jones Christoffersen Ltd.

96. Instrument No. AT5408369, registered April 15, 2020, being a Construction Lien in the amount of $5,283 from 1389256 Ontario Ltd.

97. Instrument No. AT5413487, registered April 22, 2020, being a Construction Lien in the amount of $278,942 from Royal Excavating & Grading Limited.

98. Instrument No. AT5416970, registered April 28, 2020, being a Construction Lien in the amount of $6,276 from The Fence People Limited.

99. Instrument No. AT5422088, registered May 4, 2020, being a Certificate from Royal Excavating & Grading Limited.

100. Instrument No. AT5430223, registered May 15, 2020, being a Certificate from Toro Glasswall Inc.

101. Instrument No. AT5433481, registered May 21, 2020, being a Certificate from Aqua-Tech Dewatering Company Inc.

102. Instrument No. AT5445217, registered June 5, 2020, being a Construction Lien in the amount of $4,857 from Petra Consultants Ltd.

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130. Instrument No. AT5242806, registered September 20, 2019, being a Postponement of Instrument No. AT5000949 to AT5242801.

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144. Instrument No. AT5395553, registered March 26, 2020, being a Certificate from Architectsalliance and Stephen Wells Architect Ltd.

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146. Instrument No. AT5399671, registered April 1, 2020, being a Construction Lien in the amount of $217,924 from Aqua-Tech Dewatering Company Inc.

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149. Instrument No. AT5406095, registered April 14, 2020, being a Construction Lien in the amount of $48,950 from Read Jones Christoffersen Ltd.

150. Instrument No. AT5408369, registered April 15, 2020, being a Construction Lien in the amount of $5,283 from 1389256 Ontario Ltd.

151. Instrument No. AT5413487, registered April 22, 2020, being a Construction Lien in the amount of $278,942 from Royal Excavating & Grading Limited.

152. Instrument No. AT5416970, registered April 28, 2020, being a Construction Lien in the amount of $6,276 from The Fence People Limited.

153. Instrument No. AT5422088, registered May 4, 2020, being a Certificate from Royal Excavating & Grading Limited.

154. Instrument No. AT5430223, registered May 15, 2020, being a Certificate from Toro Glasswall Inc.

155. Instrument No. AT5433481, registered May 21, 2020, being a Certificate from Aqua-Tech Dewatering Company Inc.

156. Instrument No. AT5445217, registered June 5, 2020, being a Construction Lien in the amount of $4,857 from Petra Consultants Ltd.

157. Instrument No. AT5447771, registered June 9, 2020, being a Certificate from Petra Consultants Ltd.

158. Instrument No. AT5454004, registered June 17, 2020, being a Certificate from Verdi Structures Inc.

159. Instrument No. AT5456074, registered June 19, 2020, being a Certificate from The Fence People Limited.

160. Instrument No. AT5462918, registered June 30, 2020, being a Certificate from Kramer Design Associates Limited.

161. Instrument No. AT5571403, registered November 13, 2020, being a Construction Lien in the amount of $5,880,311 from Verdi Structures Inc.

162. Instrument No. AT5606669, registered December 22, 2020, being a Certificate from Verdi Structures Inc.

PIN 21197-0357(LT)

163. Instrument No. AT5276986, registered October 31, 2019, being a Charge in the amount $817,875,000 between bcIMC Construction Fund Corporation and Otéra Capital Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

164. Instrument No. AT5276987, registered October 31, 2019, being a Notice of Assignment of Rents – General related to Charge No. AT5276986 between bcIMC Construction Fund Corporation and Otéra Capital Inc. and 33 Yorkville Residences Inc.

165. Instrument No. AT5276988, registered October 31, 2019, being a Charge in the amount $21,000,000 between Westmount Guarantee Services Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

166. Instrument No. AT5276990, registered October 31, 2019, being a Charge in the amount $150,000,000 between Kingsett Mortgage Corporation, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

167. Instrument No. AT5276991, registered October 31, 2019, being a Notice of Assignment of Rents – General related to Charge No. AT5276990 between Kingsett Mortgage Corporation and 33 Yorkville Residences Inc.

168. Instrument No. AT5276992, registered October 31, 2019, being a Charge in the amount $277,000,000 between Westmount Guarantee Services Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

169. Instrument No. AT5276993, registered October 31, 2019, being a Charge in the amount $335,625,000 between Kingsett Real Estate Growth GP No. 6 Inc., as Chargee, and 33 Yorkville Residences Inc., as Chargor.

170. Instrument No. AT5390890, registered March 18, 2020, being a Construction Lien in the amount of $93,089 from Petra Consultants Ltd.

171. Instrument No. AT5391654, registered March 19, 2020, being a Construction Lien in the amount of $1,281,889 from Royal Excavating & Grading Limited c.o.b. Michael Bros. Excavation.

172. Instrument No. AT5393680, registered March 24, 2020, being a Construction Lien in the amount of $2,963,442 from GFL Infrastructure Group Inc.

173. Instrument No. AT5394278, registered March 24, 2020, being a Construction Lien in the amount of $734,500 from Verdi Structures Inc.

174. Instrument No. AT5394376, registered March 25, 2020, being a Construction Lien in the amount of $302,302 from Architectsalliance and Stephen Wells Architect Ltd.

175. Instrument No. AT5395553, registered March 26, 2020, being a Certificate from Architectsalliance and Stephen Wells Architect Ltd.

176. Instrument No. AT5396001, registered March 27, 2020, being a Certificate from GFL Infrastructure Group Inc.

177. Instrument No. AT5399671, registered April 1, 2020, being a Construction Lien in the amount of $217,924 from Aqua-Tech Dewatering Company Inc.

178. Instrument No. AT5404088, registered April 8, 2020, being a Construction Lien in the amount of $22,858 from Kramer Design Associates Limited.

179. Instrument No. AT5404535, registered April 8, 2020, being a Construction Lien in the amount of $785,350 from Toro Glasswall Inc.

180. Instrument No. AT5406095, registered April 14, 2020, being a Construction Lien in the amount of $48,950 from Read Jones Christoffersen Ltd.

181. Instrument No. AT5408369, registered April 15, 2020, being a Construction Lien in the amount of $5,283 from 1389256 Ontario Ltd.

182. Instrument No. AT5413487, registered April 22, 2020, being a Construction Lien in the amount of $278,942 from Royal Excavating & Grading Limited.

183. Instrument No. AT5416970, registered April 28, 2020, being a Construction Lien in the amount of $6,276 from The Fence People Limited.

184. Instrument No. AT5422088, registered May 4, 2020, being a Certificate from Royal Excavating & Grading Limited.

185. Instrument No. AT5430223, registered May 15, 2020, being a Certificate from Toro Glasswall Inc.

186. Instrument No. AT5433481, registered May 21, 2020, being a Certificate from Aqua-Tech Dewatering Company Inc.

187. Instrument No. AT5445217, registered June 5, 2020, being a Construction Lien in the amount of $4,857 from Petra Consultants Ltd.

188. Instrument No. AT5447771, registered June 9, 2020, being a Certificate from Petra Consultants Ltd.

189. Instrument No. AT5454004, registered June 17, 2020, being a Certificate from Verdi Structures Inc.

190. Instrument No. AT5456074, registered June 19, 2020, being a Certificate from The Fence People Limited.

191. Instrument No. AT5462918, registered June 30, 2020, being a Certificate from Kramer Design Associates Limited.

192. Instrument No. AT5571403, registered November 13, 2020, being a Construction Lien in the amount of $5,880,311 from Verdi Structures Inc.

193. Instrument No. AT5606669, registered December 22, 2020, being a Certificate from Verdi Structures Inc.

Registrations under the Personal Property Security Act (Ontario)

194. 745009461 – Secured Party: Westmount Guarantee Services Inc.;

195. 744577758 – Secured Party: BCIMC Construction Fund Corporation and Otera Capital Inc.;

196. 735068052 – Secured Party: KingSett Mortgage Corporation; and

197. 735086403 – Secured Party: KingSett Mortgage Corporation.

Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(unaffected by the Vesting Order)

A. GENERAL

1. All existing Work Orders relating to the Property.

2. Any municipal agreements and agreements with publicly regulated utilities.

3. Subdivision agreements, site plan control agreements, servicing or industrial agreements, utility agreements, airport zoning regulations and other similar agreements with Government Authorities or private or public utilities affecting the development or use of the Lands.

4. Any easements for the supply of domestic utility or telephone services to the Property or adjacent properties.

5. Encumbrances respecting minor encroachments by the Lands over neighbouring lands and/or permitted under agreements with the owners of such other lands and minor encroachments over the Lands by improvements of abutting land owners.

6. Title defects or irregularities which are of a minor nature and in the aggregate will not materially impair the use or marketability of the Lands for the purposes for which it is presently used or proposed to be used by the Debtor.

7. Any easements or rights of way in favour of any Governmental Authority, any private or public utility, any railway company or any adjoining owner, including easements for drainage, storm or sanitary sewers, public utility lines, telephone lines, cable television lines or other services which do not materially affect the present use of the Property.

8. All reservations, limitations, provisos, and conditions expressed in the original grant of title of the lands and premises comprising the Property from the Crown.

B. SPECIFIC

PIN 21197-0012(LT)

(1) Instrument No. 66R7336, registered March 28, 1974, being the Reference Plan.

(2) Instrument No. AT4603808, registered June 21, 2017, between MK 37 Yorkville Inc. and KS Yorkville/Cumberland Inc., and City of Toronto with respect to Section 37 of the Planning Act.

(3) Instrument No. AT4765783, registered December 20, 2017, being a Transfer between 33 Yorkville Residences Inc., as Transferee, and MK 37 Yorkville Inc. and KS Yorkville/Cumberland Inc., collectively, as Transferor.

(4) Instrument No. AT4765789, registered December 20, 2017, being Notice of a Good Neighbour Agreement dated December 20, 2017, between 33 Yorkville Residences Inc. and KS 1255 Bay Street Inc., KS 1255 Bay Street (Freehold) Inc., KS 1235 Bay Street Inc., KS 21 Yorkville Inc., Cumberland Terrace Acquisition Inc., and Bloor CT Acquisition Inc.

(5) Instrument No. 66R30358, registered October 5, 2018, being Strata Reference Plan.

(6) Instrument No. AT5000977, registered November 6, 2018, being a Charge in the amount of $50,000 between City of Toronto, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

(7) Instrument No. 66R30438, registered November 21, 2018, being the Reference Plan.

(8) Instrument No. AT5242801, registered September 20, 2019, being a Notice of an Amending Agreement dated August 21, 2019 between 33 Yorkville Residences Inc. and City of Toronto with respect to Section 37 of the Planning Act.

(9) Instrument No. AT5242804, registered September 20, 2019, being a Postponement of Instrument. No. AT4765789 to AT5242801.

(10) Instrument No. AT524807, registered September 20, 2019, being a Postponement of Instrument No. AT5000977 to AT51242801.

(11) Instrument No. AT5276320, registered October 30, 2019, being a Notice of Site Plan Agreement dated October 30, 2019, between 33 Yorkville Residences Inc. and City of Toronto.

(12) Instrument No. AT5276985, registered October 31, 2019, being Notice of a Good Neighbour Agreement dated October 30, 2019, between 33 Yorkville Residences Inc. and KS 1255 Bay Street Inc., KS 1255 Bay Street (Freehold) Inc., KS 1235 Bay Street Inc., Bloor CT Acquisition Inc. and 2 Bloor Inc..

(13) Instrument No. AT5276989, registered October 31, 2019, being a Charge in the amount of $50,000 between City of Toronto, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

(14) Instrument No. AT5316512, registered December 11, 2019, being Transfer of Easement between Enbridge Gas Inc., as Transferee, and 33 Yorkville Residences Inc., as Transferor.

PIN 21197-0353(LT)

(15) Instrument No. AT4100213, registered December 18, 2015, being Restrictive Covenant Agreement dated December 18, 2015, between MK 37 Yorkville Inc., Toronto Parking Authority, and City of Toronto.

(16) Instrument No. AT4603808, registered June 21, 2017, being a Notice of Site Plan Agreement dated June 16, 2017, between MK 37 Yorkville Inc., KS Yorkville/Cumberland Inc., and City of Toronto.

(17) Instrument No. AT4765783, registered December 20, 2017, being a Transfer between 33 Yorkville Residences Inc., as Transferee, and MK 37 Yorkville Inc. and KS Yorkville/Cumberland Inc., collectively, as Transferor.

(18) Instrument No. AT4765789, registered December 20, 2017, being Notice of a Good Neighbour Agreement dated December 20, 2017, between 33 Yorkville Residences Inc. and KS 1255 Bay Street Inc., KS 1255 Bay Street (Freehold) Inc., KS 1235 Bay Street Inc., KS 21 Yorkville Inc., Cumberland Terrace Acquisition Inc., and Bloor CT Acquisition Inc..

(19) Instrument No. 66R30438, registered November 21, 2018, being the Reference Plan.

(20) Instrument No. AT5000977, registered November 6, 2018, being a Charge in the amount of $50,000 between City of Toronto, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

(21) Instrument No. AT5242801, registered September 20, 2019, being a Notice of an Amending Agreement dated August 21, 2019 between 33 Yorkville Residences Inc. and City of Toronto with respect to Section 37 of the Planning Act.

(22) Instrument No. AT5242804, registered September 20, 2019, being a Postponement of Instrument. No. AT4765789 to AT5242801.

(23) Instrument No. AT524807, registered September 20, 2019, being a Postponement of Instrument No. AT5000977 to AT51242801.

(24) Instrument No. AT5276320, registered October 30, 2019, being a Notice of Site Plan Agreement dated October 30, 2019, between 33 Yorkville Residences Inc. and City of Toronto.

(25) Instrument No. AT5276985, registered October 31, 2019, being Notice of a Good Neighbour Agreement dated October 30, 2019, between 33 Yorkville Residences Inc. and KS 1255 Bay Street Inc., KS 1255 Bay Street (Freehold) Inc., KS 1235 Bay Street Inc., Bloor CT Acquisition Inc. and 2 Bloor Inc..

(26) Instrument No. AT5276989, registered October 31, 2019, being a Charge in the amount of $50,000 between City of Toronto, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

(27) Instrument No. AT5316512, registered December 11, 2019, being Transfer of Easement between Enbridge Gas Inc., as Transferee, and 33 Yorkville Residences Inc., as Transferor.

<u>PIN 21197-0356(LT)</u>

(28) Instrument No. AT4603808, registered June 21, 2017, being a Notice of Site Plan Agreement dated June 16, 2017, between MK 37 Yorkville Inc., KS Yorkville/Cumberland Inc., and City of Toronto.

(29) Instrument No. AT4765783, registered December 20, 2017, being a Transfer between 33 Yorkville Residences Inc., as Transferee, and MK 37 Yorkville Inc. and KS Yorkville/Cumberland Inc., collectively, as Transferor.

(30) Instrument No. AT4765789, registered December 20, 2017, being Notice of a Good Neighbour Agreement dated December 20, 2017, between 33 Yorkville Residences Inc. and KS 1255 Bay Street Inc., KS 1255 Bay Street (Freehold) Inc., KS 1235 Bay Street Inc., KS 21 Yorkville Inc., Cumberland Terrace Acquisition Inc., and Bloor CT Acquisition Inc..

(31) Instrument No. 66R30438, registered November 21, 2018, being the Reference Plan.

(32) Instrument No. AT5000977, registered November 6, 2018, being a Charge in the amount of $50,000 between City of Toronto, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

(33) Instrument No. AT5242801, registered September 20, 2019, being a Notice of an Amending Agreement dated August 21, 2019 between 33 Yorkville Residences Inc. and City of Toronto with respect to Section 37 of the Planning Act.

(34) Instrument No. AT5242804, registered September 20, 2019, being a Postponement of Instrument. No. AT4765789 to AT5242801.

(35) Instrument No. AT524807, registered September 20, 2019, being a Postponement of Instrument No. AT5000977 to AT51242801.

(36) Instrument No. AT5276320, registered October 30, 2019, being a Notice of Site Plan Agreement dated October 30, 2019, between 33 Yorkville Residences Inc. and City of Toronto.

(37) Instrument No. AT5276985, registered October 31, 2019, being Notice of a Good Neighbour Agreement dated October 30, 2019, between 33 Yorkville Residences Inc. and KS 1255 Bay Street Inc., KS 1255 Bay Street (Freehold) Inc., KS 1235 Bay Street Inc., Bloor CT Acquisition Inc. and 2 Bloor Inc..

(38) Instrument No. AT5276989, registered October 31, 2019, being a Charge in the amount of $50,000 between City of Toronto, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

(39) Instrument No. AT5316512, registered December 11, 2019, being Transfer of Easement between Enbridge Gas Inc., as Transferee, and 33 Yorkville Residences Inc., as Transferor.

PIN 21197-0357(LT)

(40) Instrument No. PLY355, registered June 18, 1874, being a Subdivision Plan.

(41) Instrument No. EW1871, registered December 31, 1954, being Bylaw No. 19307 in favour of City of Toronto to expropriate lands for municipal purposes.

(42) Instrument No. CT423102, registered July 24, 1980, being a Development Agreement dated July 23, 1980 between Corazza Cusine Limited and the Corporation of the City of Toronto.

(43) Instrument No. CT482060, registered June 16, 1981, being Bylaw No. 337-81in favour of City of Toronto to dedicate certain land for public lane purposes.

(44) Instrument No. CT783189, registered April 28, 1986, being a Development Agreement dated April 23, 1986 between Asen Vitko and Bojan Vitko, and the Corporation of the City of Toronto.

(45) Instrument No. CT820302, registered October 2, 1986, being Bylaw No. 624-86 in favour of City of Toronto to dedicate and widen certain land for public lane purposes.

(46) Instrument No. CT980475, registered September 27, 1988, being a Development Agreement dated September 14, 1988 between Gerenby Investments Limited and the Corporation of the City of Toronto.

(47) Instrument No. CA53398, registered October 5, 1989, being Bylaw No. 626-89 in favour of City of Toronto to lay out, widen, and dedicate certain land for public lane purposes.

(48) Instrument No. CA489864, registered August 11, 1997, being Bylaw No. 1997-0348 in favour of City of Toronto to lay out and dedicate certain land for public lane purposes.

(49) Instrument No. 66R30438, registered November 21, 2018, being the Reference Plan.

(50) Instrument No. AT5275142, registered October 30, 2019, being Bylaw No. 1391-2019 in favour of City of Toronto to permanently close part of the public lane at the rear of 27-37 Yorkville Avenue and abutting 26 Cumberland Street.

(51) Instrument No. AT5275258, registered October 30, 2019, being a Transfer between City of Toronto, as Transferee, and 33 Yorkville Residences Inc., as Transferor.

(52) Instrument No. AT5276320, registered October 30, 2019, being a Notice of Site Plan Agreement dated October 30, 2019, between 33 Yorkville Residences Inc. and City of Toronto.

(53) Instrument No. AT5276985, registered October 31, 2019, being Notice of a Good Neighbour Agreement dated October 30, 2019, between 33 Yorkville Residences Inc. and KS 1255 Bay Street Inc., KS 1255 Bay Street (Freehold) Inc., KS 1235 Bay Street Inc., Bloor CT Acquisition Inc. and 2 Bloor Inc..

(54) Instrument No. AT5276989, registered October 31, 2019, being a Charge in the amount of $50,000 between City of Toronto, as Chargee, and 33 Yorkville Residences Inc., as Chargor.

(55) Instrument No. AT5316512, registered December 11, 2019, being Transfer of Easement between Enbridge Gas Inc., as Transferee, and 33 Yorkville Residences Inc., as Transferor.

C. ASSUMED CONTRACTS

(1) Offer to connect made on August 16, 2019 by Toronto Hydro-Electric System Limited to 33 Yorkville Residences Inc. bearing Offer to Connect Reference #: THO2019-00021C;

(2) Agreement of Purchase and Sale dated February 16, 2011 between Toronto Parking Authority, as vendor, and MUC Properties Inc., as purchaser, and the following related amendments, assignments, assumptions, and related agreement:

(i) Amending Agreement dated June, 2011 between Toronto Parking Authority, as vendor, and MUC Properties Inc., as purchaser;

(ii) Assignment of Purchase Agreement dated June 26, 2011 between MUC Properties Inc., as assignor, and MK 37 Yorkville Inc., as assignee;

(iii) Assumption Agreement dated June 26, 2011 between MUC Properties Inc., as assignor, and MK 37 Yorkville Inc., as assignee;

(iv) Amending Agreement dated August 11, 2011 between Toronto Parking Authority, as vendor, and MUC Properties Inc., as purchaser;

(v) Amending Agreement dated January 18, 2012 between Toronto Parking Authority, as vendor, and MUC Properties Inc., as purchaser;

(vi) Amending Agreement dated March 14, 2012 between Toronto Parking Authority, as vendor, and MUC Properties Inc., as purchaser;

(vii) Consent and Assumption Agreement dated September 17, 2015 between Toronto Parking Authority, as vendor, MK 37 Yorkville Inc., as nominee, MUC Properties Inc. and KingSett Real Estate Growth LP No. 4;

(viii) Amending Agreement dated September 17, 2015 between Toronto Parking Authority, as vendor, MK 37 Yorkville Inc., as nominee, and KingSett Real Estate Growth LP No. 4, as beneficial owner;

(ix) Consent and Assumption Agreement dated December 15, 2017 between Toronto Parking Authority, MK 37 Yorkville Inc. and KingSett Real Estate Growth LP No. 4, collectively as assignor, and Cresford Capital Corporation and 33 Yorkville Residences Inc., collectively as assignee;

(x) Amending Agreement dated August 17, 2018 between Toronto Parking Authority, Cresford Capital Corporation and 33 Yorkville Residences Inc;

(3) Non-merger Agreement dated December 18, 2015 between Toronto Parking Authority and MK 37 Yorkville Inc.;

(4) Construction Procedures Agreement dated December 18, 2015 between MK 37 Yorkville Inc. and Toronto Parking Authority;

(5) Restrictive Covenants Agreement dated December 18, 2015 between MK 37 Yorkville Inc., Toronto Parking Authority and City of Toronto;

(6) Mutual Undertaking re: Reciprocal Agreement dated December 18, 2015 between Toronto Parking Authority and MK 37 Yorkville Inc.;

(7) Side Letter Agreement dated December 15, 2017 between Cresford Capital Corporation, 33 Yorkville Residences Inc. and Toronto Parking Authority reviving Mutual Undertaking re: Reciprocal Agreement;

(8) Offer to purchase accepted October 31, 2017 between the City of Toronto, as vendor, and MY 37 Yorkville Inc. and KS Yorkville/Cumberland Inc., as purchaser, and the following related amendments, assignments, assumptions, and related agreements:

(i) Consent and assumption agreement dated December 15, 2017 between, *inter altos*, the City of Toronto, as vendor, and MY 37 Yorkville Inc. and KS Yorkville/Cumberland Inc., as assignor, and Cresford Capital Corporation and 33 Yorkville Residences Inc., as assignee; and

(ii) Letter dated April 2, 2019 issued by the City of Toronto to Cresford Capital Corporation and 33 Yorkville Residences Inc.;

(9) Non-merger agreement dated October 8, 2019 between City of Toronto, Cresford Capital Corporation and 33;

(10) Crane swing and tieback agreement dated April 8, 2019 between 33 Yorkville Residences Inc. and Minic Investments Limited;

(11) TTC access agreement (re: tunnel connections) dated December 20, 2017 between 33 Yorkville Residences Inc. and Bloor CT Acquisition Inc.;

(12) Any and all realty tax appeals relating to the Property (to the extent any such appeal constitutes a "Contract" as defined in the Purchase Agreement), including but not limited to:

(a) Appeal No. 3416572 (ARN 190405202000300);

(b) Appeal No. 3415973 (ARN 190405202002700); and

(c) Appeal No. 3416687 (ARN 190405202002802);

provided that, notwithstanding the foregoing, no contracts for representation/service in respect of such ongoing realty tax appeals shall be assumed;

(13) Sanitary discharge agreement (temporary) dated September 10, 2018 between the City of Toronto and 33 Yorkville Residences Inc.;

(14) Sanitary discharge agreement (permanent) dated September 10, 2018 between the City of Toronto and 33 Yorkville Residences Inc.;

(15) Construction agreement dated January 21, 2019 between the Toronto Transit Commission and 33 Yorkville Residences Inc.;

(16) Good neighbour agreement between KS 1255 Bay Street Inc., KS 1255 Bay Street (Freehold) Inc., KS 1235 Bay Street Inc., KS 21 Yorkville Inc., Cumberland Terrace Acquisition Inc. & Bloor CT Acquisition Inc., and 33 Yorkville Residences Inc. registered on December 20, 2017 as AT4765789, as partially assumed pursuant to the assumption and acknowledgment agreements dated January 23, 2018 issued by 11 Yorkville Partners Inc.; and

(17) Good neighbour agreement between KS 1255 Bay Street Inc., KS 1255 Bay Street (Freehold) Inc., KS 1235 Bay Street Inc., KS 21 Yorkville Inc., Cumberland Terrace Acquisition Inc. & Bloor CT Acquisition Inc., and 33 Yorkville Residences Inc. registered on October 31, 2019 as AT5276985.

BCIMC CONSTRUCTION FUND CORPORATION and OTÉRA CAPITAL INC. Applicants	and	**33 YORKVILLE RESIDENCES INC. and 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP** Respondents

Court File No: CV-20-00637297-00CL

11 March 21

The Order shall go as per the draft filed and signed. I have reviewed the materials and heard submissions.
The motion is unopposed.
The sales process has been robust. Soundair criteria have been met.
The ancillary relief sought is fair and reasonable.
A sealing order shall also go as the Sierra Club criteria have been met.

McE T.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

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Lawyers for the Receiver

TAB 10

CV-20-00642928

Re Clover on Yonge Inc

(1) This is a motion for an Order sanctioning the Plan of Compromise and Arrangement dated November 6, 2020. ("Plan")

(2) The Plan was approved on December 15, 2020 by the requisite Statutory Majorities of affected creditors with voting claims in each of the Plan's two classes of creditors. 96.6% of the Deposit Creditor class voted in favour of the

Plan and 98.8% of the General Unsecured Creditor claims voted in favor of the plan.

(3) There is one unresolved Voting claim advanced by Maria Athanasoulis, which she values at $49 Million ("Maria's claim"). If this claim is accepted in the value asserted, the Plan would be defeated in the General Unsecured Creditor class. All but $1 million of Maria's claim is a claim for a share of

profits in a number of projects, including the Clover on Yonge project.

(4) I accept the Monitor's position that with respect to the component of Maria's claim related to an alleged profit sharing agreement with respect to the Clover on Yonge project there was no prospect of any profit from that project because as of March 31, 2020, shortly after the receivership commenced, the Clover on Yonge project was forecast to generate a loss of $61 Million. As a

result because I accept that the proper date to value Maria's claim is when the Receiver was appointed on March 27, 2020 There was no profit from the closed on Gorgl Project that could be shared with Maria.

(5) Mr Dunn, on behalf of Maria, concedes there can be no profit from this project unless the pre-sale unit purchase contracts are disclaimed. I have already ordered that those contracts can only

be disclaimed if the Plan is approved.

(6) As the Monitor points out in the Supplementary Report & its 1972 Report any forecast profit is entirely dependent on the restructuring of the leverage of the Clover Gorge Project. I accept and adopt the Monitor's following statement:

"It does not assist Ms. Athanasoulis to argue she is entitled to share in profit denied from a successful Plan That she would vote against and cause to fail

if she had a claim."

(7) In my view I agree that the relevant date to calculate her profit-sharing claim is later than the secondment appointment date and that profit could be deemed from the closed on Yonge Road is just too remote and speculative and lacks an air of reality. I agree with the applicant's submission that "there is no profit absent disclaimer, and no disclaimer absent the approval, sanction and

implementation of the Plan. Accordingly, if the profit component of the alleged Athanasoulis claim is allowed for negative voting purposes, it must follow that the value attributed to it is a profit expectation of $ nil, and not a profit expectation of $48 Million."

(8) The criterion I must use to determine if Nadia's claim, which is a contingent claim, is to be included in the insolvency proceeding is whether the event that has

not yet accrued is too remote or speculative. For my view Maria's claim cannot be shown to be neither too remote nor speculative unless the plan is approved, sanctioned and implemented. This is the very event that Maria would defeat if her contingent profit-sharing claim of $48 Million is allowed for voting purposes.

(9) I rely on Justice Morrison's decision in Nelson Energy v. Grant Thornton, 2015 NBQB 20 at para 35 where he

opposed the proposal trustee's decision to disallow a contingent creditor's claim for purpose of voting on a summary basis on facts that are strikingly similar to the facts in this case.

(10) accordingly, I have concluded, for the reasons outlined above, that Maria's claim is so speculative and remote in the amount of $48 million to be allowed for voting purposes. I will therefore not have to consider whether Maria's claim is an equity claim that should not be counted for voting purposes.

(11) With respect to the issue of whether the Plan should be sanctioned, I am satisfied that,

(a) It has been approved by the requisite statutory majority of the Applicants' non-equity creditors;

(b) There has been strict compliance with all statutory requirements and adherence to previous orders of the Court;

(c) Nothing has been done, or purported to be done

(11) that is not authorized by the CCAA; and

(d) The Plan is fair and reasonable.

(12) In conclusion, for the reasons set out above, the Plan is sanctioned by the Court in its entirety and I declare that Nova's claim cannot be valued at more than $1 Million (the wrongful dismissal portion of the claim) for voting purposes with respect to the Plan.

(12)

(13) An order shall go to this effect.

(14) I thank all counsel for their helpful submissions.

Harvey J.

January 8, 2021

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Consolidated Court File No. 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY

BRIEF OF AUTHORITIES OF THE APPLICANTS

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Lawyers for YG Limited Partnership and *YSL Residences Inc.*