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| COURT FILE NUMBER | **1601-12571** |
| COURT | Court of Queen's Bench of Alberta |
| JUDICIAL CENTRE | Calgary |
| **Applicant** | IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.X.D. 1985, c. C-36, as amended<br><br>AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 186330 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP |
| **DOCUMENT** | **BOOK OF AUTHORITIES OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD AND 1863360 ALBERTA LTD – THRESHOLD ISSUE** |
| PARTIES FILING THIS DOCUMENT | LIGHTSTREAM RESOURCES LTD. |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | Blake, Cassels & Graydon LLP<br>3500, 855 – 2nd Street S.W.<br>Calgary, AB T2P 4J8<br><br>Attention: Michael Barrack/Richard Bell/ Peter Smiley<br><br>Phone: (416) 863-5280/ (403) 260-9656/ (416) 863-4226<br><br>Email: michael.barrack@blakes.com<br><br>richard.bell@blakes.com<br><br>peter.smiley@blakes.com<br><br>Fax: (416) 863-2653/ (403) 260-9700 |

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**Where:** Calgary Courts Centre, 601 – 5 Street S.W.
Calgary, AB T2P 5P7

**Before Whom:** Mr. Justice McLeod

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# TAB 1

2000 BCSC 879
British Columbia Supreme Court

Agro Pacific Industries Ltd., Re

2000 CarswellBC 1180, 2000 BCSC 879, [2000] B.C.T.C. 332, 18 C.B.R. (4th) 1, 5 B.L.R. (3d) 176, 76 B.C.L.R. (3d) 376, 97 A.C.W.S. (3d) 595

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

In the Matter of the Company Act R.S.B.C. 1996, c. 62

In the Matter of Agro Pacific Industries Ltd., Petitioner

Thackray J.

Heard: May 31, 2000
Judgment: June 6, 2000*
Docket: Vancouver L001146

Proceedings: additional reasons at *Agro Pacific Industries, Re*, 2000 BCSC 945 (B.C. S.C.)

Counsel: *D.I. Knowles*, for Agro Pacific Industries Ltd.
*S.R. McGladery*, for Archer Daniels Midland Company, Interag, Calhoun Agri Services Ltd., Market Laboratory Inc., United Agri Products, United Grain Growers Limited and Van Waters & Rogers Ltd.
*R.J. Kearns*, for Monitor, KPMG Inc.
*M.A. Fitch, Q.C.*, for National Bank of Canada.
*J.I. McLean*, for Bank of Montreal.
*S.C. Fitzpatrick*, for Barenbrug USA Export, Inc., Cargill Limited, International Raw Materials, J.R. Simplot Company, Hydro Agri North America, Inc., IMC Kalium Canada Limited.
*J. Lynch*, for Agrium Inc. and Pioneer Hi-Bred.
*I.J. Weisberg*, for IGI Resources Inc.
*M. Watt*, for James Richardson Int. Ltd., Buckerfield's Limited, Canbra Foods Ltd. and Topnotch Nutri Limited.
*A. Brown*, for 219 Cathedral Ventures Ltd.
*A. Richardson*, for Gramineae Holdings Limited.

Subject: Corporate and Commercial; Insolvency

APPLICATION by petitioning company for extension of stay order.

***Thackray J.*** **:**

1 Agro Pacific Industries Ltd. ("Agro"), the petitioning company, applied for an extension of the stay order until September 6, 2000.

2 There are some changes requested to the initial order. The company wants the classification of creditors to be by Court order. It further asks that if a division of Agro is to be sold, it must be done with Court approval. These are not opposed and are granted.

3 Agro also asks that a Key Employee Retention Program be approved. This plan offers to key employees a bonus of 25%

 

of their monthly salary until such time as the restructuring is completed. There is no opposition to this plan and it is approved.

4 The extension of the stay order has been agreed to by the three secured creditors. Mr. Colin Rogers, the Chief Restructuring Officer for Agro, deposed that National Bank of Canada ("NBC") and Bank of Montreal "have each agreed to support the application by Agro to apply for a 90 day extension." The third secured creditor, No. 219 Cathedral Ventures Ltd. ("Cathedral"), has similarly agreed. Their agreement is subject to several conditions.

5 NBC funds a demand operating loan for the company. It has agreed to continue this loan at a reduced maximum of $10 million "to be reduced by the receipt by NBC of proceeds from any sale of assets outside of the ordinary course of business against which NBC has security". As well, "Agro's banker's acceptance option and option to borrow in US dollars is to be eliminated" and "Agro's required margin surplus shall not be less the $5 million calculated on a daily basis."

6 These conditions have been accepted by Agro and no opposition to them was raised at the hearing. They thereby have acceptance by the Court.

7 So far so good. Now the problem. The secured creditors have demanded a "success fee" be agreed to by the company and have asked for Court approval. Agro has agreed but opposition to such a fee by Bank of Montreal and Cathedral is taken by the unsecured creditors represented on this application.

8 Mr. Rogers described the success fee for NBC as being calculated on the basis of 1% of the Loan Authorization which is only payable on the earlier of repayment of the operating loan during the CCAA proceedings or normalization of the banking relationship between itself and Agro upon a successful CCAA plan being approved by the Court. This is to be increased by .5% per month of the Loan Authorization for any extension beyond the proposed 90 day extension.

9 Bank of Montreal and Cathedral proposed that they receive a success fee on the same terms except the .5% increase will apply only to extensions beyond 180 days.

**Submissions**

10 The Monitor concluded that "the terms do not appear unreasonable." Those words reflect exactly the position taken by counsel for Bank of Montreal. He said that his client had been asked for a number of concessions to which it had agreed, consequently "the success fee is not unreasonable".

11 The secured creditors represented by Ms. Fitzpatrick oppose the success fee to Bank of Montreal and to Cathedral. She submitted that the success fee "comes out of the unsecured creditors" and that Agro is "trying to buy peace."

12 Mr. McLean, on behalf of Bank of Montreal, agreed that the success fee is an attempt "to buy peace" but contended that this is a business judgment and as such should be left to the business people. Counsel for Cathedral submitted that in that it is in "third place" its risk is greater and that this accounts for its need for a success fee.

13 In that there was no opposition to a success fee being approved for his client, NBC, Mr. Fitch was content to remain mute. I cannot assume what position he would have taken towards the other secured creditors should there have been opposition to the success fee being granted to his client, but I will assume that he would have argued strongly in favour of a success fee to his client.

14 Ms. Fitzpatrick said that "it falls upon Your Lordship's shoulders to be sure the proposal is fair. It isn't." In support of that submission, she pointed to the Monitor's third report wherein it said that it "recognized that the fees proposed represent a special benefit to [secured creditors] not available to the other creditors." Ms. Lynch on behalf of her clients supported the position taken by Ms. Fitzpatrick.

15 Ms. McGladery said that her clients were prepared "to leave it in Your Lordship's hands."

**Discussion and Conclusions**

  

16 The term "success fee" does not get this application off to a savoury start. Why should anyone be credited with the success of these proceedings? All parties in this matter face risks but the legislative scheme of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 is designed, as said in the reasons arising out of the application by the suppliers to trace and account for "their" goods, to allow a company to continue its business activities "in as normal a manner as possible while reorganizing." The legislation must be taken "as giving hope that reorganization, rather than bankruptcy, will eventually benefit *all* interested parties."

17 In *Re Woodward's Ltd.* (1993), 77 B.C.L.R. (2d) 332 (B.C. S.C.), Tysoe J. traced the purpose of the stay under the CCAA. He noted that it was first summarized by Wachowich J. in *Meridian Development Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.). Tysoe J. continued his review of the legislative intent with reference to *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.) and *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). He then authored what he saw to be the three objectives of maintaining the *status quo*, the first of which is:

> To suspend or freeze the rights of all creditors as they existed as at the date of the stay order (which, in British Columbia, is normally the day on which the CCAA proceedings are commenced). This objective is intended to allow the insolvent company an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor. [my underlining]

18 Ms. Fitzpatrick used the term "level playing field" and said that Bank of Montreal and Cathedral are trying to manoeuvre. That is a way of referencing the *status quo* and of the call of Wachowich J. in *Meridian* "to prevent any manoeuvres" among creditors. He said that s.11 was designed "to prevent any manoeuvres for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive."

19 I would extend that thought to say that the Courts must guard against allowing secured creditors to run the process. This is not in any way suggesting that the secured creditors must not have their position recognized. As I said in my earlier reasons, the secured creditors are the ones "who make the financial means available so that companies such as Agro can operate."

20 However, it must be remembered that the relationships were made by the parties when they entered into commercial contracts, contracts that contemplated insolvency and litigation. Consequently, when that contemplation becomes reality, caution should be exercised in bettering the deal for specific creditors or classes of creditors. To do so alters commercial reality and might frustrate the legislative intent of maintaining the *status quo*.

21 Counsel for the Monitor, Cathedral and Bank of Montreal focused on the size of the success fee rather than on the principle. They categorized the amount as "not unreasonable." That definition arises from a comparison of concessions relative to the size of the success fee. While I hesitate to rule in a manner adverse to that recommended by the Monitor, I came away with the feeling that the Monitor was less than enthusiastic about the whole concept of a success fee. Rather, it simply concluded that it was to become a reality.

22 As for Bank of Montreal and Cathedral, my opinion is that they don't want to be treated substantially differently than NBC. I did not hear anything from any of the secured creditors that bore upon principles. Indeed, I must reflect that the Court was not favoured with *any* material from the secured creditors.

23 I hearken to what is often submitted in criminal sentence hearings. That is, that the major factor must be one of general deterrence. Regardless of the merit in the secured creditors' position, it is more important to let future contenders for favoured positions know that the Court is going to be most reluctant to move the goal posts.

24 The extension is approved to September 6, 2000 but without the success fee requested by the secured creditors, including NBC. I have no way of knowing what will flow from these reasons but if further appearances are necessary I will be in the Courthouse for the ceremony on behalf of the new Chief Justice on Friday June 9, 2000. I am prepared to hear any matters immediately thereafter.

25 Mr. Richardson brought a motion on behalf of his company, Graminac Holdings Limited. His motion is dismissed.

 

much for the same reasons that appear in the earlier reasons in this matter and in these reasons.

*Order accordingly.*

Footnotes

[*] Additional reasons at (2000), 18 C.B.R. (4th) 6, 2000 BCSC 945 (B.C. S.C.).

# TAB 2

1993 CarswellBC 75
British Columbia Supreme Court

Woodward's Ltd., Re

1993 CarswellBC 75, [1993] B.C.W.L.D. 769, 100 D.L.R. (4th) 133, 37 A.C.W.S. (3d) 1041, 77 B.C.L.R. (2d) 332

# Re COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 and Re COMPANY ACT, R.S.B.C. 1979, c. 59;

Re WOODWARD'S LIMITED, WOODWARD STORES LIMITED and ABERCROMBIE & FITCH CO. (CANADA) LTD.

Tysoe J. [in Chambers]

Heard: January 11-12, 1993
Judgment: January 14, 1993
Docket: Doc. Vancouver A924791

Counsel: *M.A. Fitch*, *R.A. Millar* and *J.K. Irving*, for Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd.
*C.M. Trower*, for Transcontinental West, a division of Trans-Continental Printing Inc.
*D.B. Hyndman*, for Accord Business Credit Inc. and others.
*N.E. Kornfeld*, for Dale's Industries and others.
*A.L. Edgson*, for Cosmair Canada Inc. and others.
*A.S. Wilson*, for Matsushita Electric of Canada Limited.
*S.J. Gaerber*, for Restwell Manufacture Ltd.
*G.S. Snarch*, for Palmer Jarvis Advertising.
*D.I. Knowles* and *C.W. Caverly*, for Cambridge Shopping Centres Limited.
*L.H. Koo*, for Gesco Industries Inc.
*W.D. Riley*, for Ernst & Young Inc., the monitor herein.

Subject: Corporate and Commercial; Insolvency

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.c Application of Act
XIX.1.c.i Relationship between Act and Bankruptcy and Insolvency Act

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act
XIX.4 Appeals

Headnote

**Corporations — Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings**

**Corporations — Arrangements and compromises — Under Companies' Creditors Arrangements Act**

Corporations — Arrangements and compromises — Stay of proceedings — Effect of stay — Court dismissing application by suppliers of goods to debtor company within 30 days of ex parte interim stay order under Companies' Creditors Arrangement Act for order establishing trust fund in amount of company's purchases during those 30 days — Trust fund not serving intent of legislation to maintain status quo — Suppliers suffering no prejudice by debtor's choice of proceeding under C.C.A.A. rather than Bankruptcy and Insolvency Act.

In December 1992 the debtor corporation obtained an interim stay order pursuant to the *Companies' Creditors Arrangement Act*. Shortly afterward various suppliers applied for the creation of a trust fund in their favour, saying that they had not been treated fairly. Their principal complaints were that the debtor had purchased a substantial amount of inventory in the period preceding the commencement of these proceedings, about $30.4 million worth in the previous 30 days, and that the debtor had proceeded with its reorganization under the C.C.A.A. rather than the *Bankruptcy and Insolvency Act*. The *Bankruptcy and Insolvency Act* was said to give the suppliers an opportunity to seek to protect certain rights and they said that it would be an abuse if those rights could be frustrated by allowing the debtor to choose the C.C.A.A. over the *Bankruptcy and Insolvency Act*.

**Held:**

Application dismissed.

The purpose of a stay under the C.C.A.A. is to effectively maintain the status quo, which is intended to accomplish three objectives: to suspend or freeze the rights of all creditors as they existed as at the date of the stay order, so that the insolvent company may have an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor; to postpone litigation in which the insolvent company is involved so that the human and monetary resources of the company can be devoted to the reorganization process; and to permit the insolvent company to take certain action that is beneficial to its continuation during the period of reorganization or its attempt to reorganize or, conversely, to restrain a non-creditor or a creditor with rights arising after the stay from exercising rights that are detrimental to the continuation of the company during the period of reorganization or its attempt to reorganize. Apart from consideration of s. 81.1 of the *Bankruptcy and Insolvency Act*, there was no justification for the creation of a trust fund. Such a fund would not serve to maintain the status quo. To the contrary, it would give the suppliers an advantage over other creditors. It would not be beneficial to the continuation of the debtor's business during the reorganization period or to the debtor's attempt to reorganize.

As for the *Bankruptcy and Insolvency Act*, there is likely to be no difference in the approach of the court when dealing with a proposal under that Act from the approach of the court when dealing with a reorganization under the C.C.A.A. as they relate to the rights of suppliers. Therefore, there was no special right of suppliers that needed to be preserved by the creation of a trust fund and there was no abuse in the debtor's choosing the C.C.A.A. over the *Bankruptcy and Insolvency Act*. In addition, the suppliers did not have any right to repossess the goods supplied by them at the time they commenced the proceedings.

**Table of Authorities**

**Cases considered:**

*Alberta-Pacific Terminals, Re* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.) — *applied*

*Century Industries Inc. v. Enterprises Union Électrique Ltée* (April 29, 1992), Doc. 500-05-005804-925, Archambault J. (Que. S.C.) — *considered*

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.) — *applied*

*Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Q.B.) — *considered*

*Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 139, 72 C.B.R. (N.S.) 20 (Q.B.) — *applied*

*Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.) — *applied*

*Steinberg Inc. c. Colgate-Palmolive Canada Inc.* (1992), 13 C.B.R. (3d) 139 (Qué.) — *considered*

*Westar Mining Ltd., Re*, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331, 14 C.B.R. (3d) 88 (S.C.) — *applied*

**Statutes considered:**

Bank Act, R.S.C. 1985, c. B-1

s. 178*referred to*

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [title am. 1992, c. 27, s. 1]

s. 47.1*referred to*

s. 81.1*considered*

s. 243(2)*referred to*

Civil Code of Lower Canada — *referred to*

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 11*considered*

Application by suppliers of goods and services to debtor company for relief under Companies' Creditors Arrangement Act.

***Tysoe J.*:**

1 On December 11, 1992 I granted an interim stay Order pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") in favour of Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd. (collectively, "Woodward's"). Shortly thereafter a number of Woodward's suppliers of goods and services made applications for various forms of relief. The item of relief that was pursued at the hearing of the applications was the creation of a trust fund for the benefit of the suppliers.

2 The interim stay Order was granted on an ex parte basis and it was expressed to expire at 6 p.m. on January 8, 1993, the day on which the hearing of the Petition in this matter was intended to take place. The applications of the suppliers

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first came on for hearing at 4 p.m. on December 17, 1992. The relief requested at that time included (i) the setting aside or varying of the interim stay Order, (ii) the payment of the amounts owing to the suppliers, (iii) the return of the goods provided by the suppliers and (iv) the creation of the trust fund. Time did not permit the hearing of the applications on that day and the earliest they could be heard was one week later. I adjourned the applications for one week but, as I did not want the adjournment to prejudice any rights that the suppliers may have, I made an interim Order that the proceeds from the sale of any goods after December 17 would stand in the place and stead of such goods. When the matter came back on for hearing on December 24, the parties agreed that the applications could be adjourned until January 8 and heard concurrently with the hearing of the Petition.

3 The hearings began on January 8 and when it became clear that these and other applications would take several days to be heard, I extended the interim Orders until further Order of the Court with the intent that they would continue until I made my determinations on the various issues to be decided. There appears to be little doubt that there will be an extension of the stay Order and it is the terms of the continuing stay Order and the related applications that are in dispute. I will approach the present applications on the basis that the CCAA stay is going to be extended and the issue to be determined is how the suppliers should be treated within this context.

4 Woodward Stores Limited operates a chain of 59 full line and junior department stores in British Columbia and Alberta. Abercrombie & Fitch Co. (Canada) Ltd. operates two stores in Ontario. Each of these companies is a subsidiary of Woodward's Limited.

5 Woodward's has been carrying on business for 100 years. Until January 8, 1993, when it terminated 1,200 employees as part of its downsizing strategy, Woodward's had approximately 6,000 employees. Woodward's has been an important part of the economy of Western Canada for a long period of time and every effort should be made to facilitate its financial reorganization, which is the stated purpose of the CCAA.

6 Woodward's suppliers generally support its reorganization but they do not feel that they have been treated fairly in all of the circumstances. The principal complaints of the suppliers are that Woodward's purchased a substantial amount of inventory in the period preceding the commencement of these CCAA proceedings and that Woodward's is proceeding with its reorganization under the CCAA rather than the *Bankruptcy and Insolvency Act* (the "B & I Act").

7 On December 17 I directed that the Monitor appointed by the interim stay Order report to the Court regarding the inventory purchased by Woodward's during the period prior to the commencement of these proceedings. The Monitor has reported that in the 30-day period prior to December 11 Woodward's received goods having an aggregate cost of approximately $30.4 million, of which $27.3 remains unpaid. The Monitor estimates that approximately $4.3 million worth of the goods for which payment has not been made can be identified and were unsold by Woodward's at the time these proceedings were commenced. Identification of goods appears to be a major difficulty because the Monitor believes that less than $8 million of the $30.4 worth of goods received within the 30-day period preceding December 11 can be identified by way of Woodward's inventory control system. The suppliers say that they will be able to assist in identifying the goods that were supplied by them.

8 The reason for the importance of the 30-day period preceding the commencement of these proceedings is s. 81.1 of the B & I Act which came into effect on November 30, 1992. Section 81.1 gives rights of repossession to suppliers of goods similar to the revendication rights that suppliers have previously enjoyed by virtue of the *Civil Code of Lower Canada* in effect in Quebec. In brief terms, s. 81.1(1) provides that suppliers are entitled to the return of goods supplied by them within 30 days of a written demand for repossession that can be given if the purchaser of the goods has gone into bankruptcy or receivership. Two important qualifications are that the goods have not been resold and that the goods are identifiable.

9 Section 81.1(4) is also relevant because it deals with a situation analogous to these CCAA proceedings, namely, a situation where the purchaser of the goods has filed a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*. The section provides that the time between the filing of the notice of intention and the date on which

the purchaser goes into bankruptcy or receivership is not counted as part of the 30-day period following delivery of the goods within which the supplier must make its demand of repossession. Hence, if the purchaser of the goods files a notice of intention to file a proposal 20 days after the goods are delivered, the supplier can make the written demand for repos session within the first 10 days of a subsequent bankruptcy or receivership even though the reorganization attempt by means of the proposal may have taken several months. The statute is silent with respect to the resale of goods by the purchaser during the period of reorganization and, all other things being equal, the supplier will lose its right of repossession if the goods are sold during this period.

10 The suppliers submitted that if Woodward's had proceeded under the B & I Act rather than the CCAA, they could have taken one of two steps to protect their rights. First, they say that an application could have been made for the appointment of an interim receiver under s. 47.1 of the B & I Act and that upon the appointment of the interim receiver the suppliers could exercise their rights under s. 81.1. Second, they say that an application could be made under s. 81.1(8) which allows the Court to make any order it considers appropriate if a supplier is aggrieved by an act of the purchaser of the goods and that such an order could direct the creation of a trust fund. The suppliers conclude this aspect of their argument by saying that it would be an abuse if the rights under s. 81.1 could be frustrated by allowing the insolvent company to choose the CCAA over the B & I Act and that the suppliers should therefore be given the protection of the trust fund.

11 In addition to the potential rights under the B & I Act, the suppliers argued that the trust fund should be created to redress an inequity. They say that other creditors such as Woodward's banker had advance warning that Woodward's would be commencing these proceedings and that they took steps to ensure payment of the indebtedness owing to them. Although the evidence does not support an allegation that Woodward's purchased additional inventory with the knowledge that it would be commencing these proceedings, the suppliers say that Woodward's purposely choose the December 11 date to obtain the stay Order because the aggregate of all unpaid amounts for the purchase of inventory would be at its highest on or about that date. An Affidavit was filed to the effect that some of Woodward's directors first consulted the Monitor about the possibility of commencing CCAA proceedings in October, 1992.

12 There was not a consensus among the suppliers as to the exact nature of the trust fund that they were requesting be established. All of the suppliers did want the Court to make the determination that they were entitled to the monies in the trust fund if Woodward's is not successful in its reorganization effort. Most of the suppliers suggested that the fund be equal to the total cost of the purchases during the 30-day period preceding December 11. One supplier wrote a letter requesting that the fund be equal to 90 days' worth of purchases. One supplier of services was represented during the hearing and had filed its own Notice of Motion. It wanted the fund to provide for services that were purchased by Woodward's, as well as the inventory.

13 The purpose of the stay under s. 11 of the CCAA was first summarized by Wachowich J. in *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.). At p. 219 Wachowich J. said:

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

And at p. 220 he stated:

> This order is in accord with the general aim of the Companies' Creditors Arrangement Act. The intention was to prevent any manoeuvres for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed.

10

14 In *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.), the stay Order authorized Quintette to pay its trade creditors who were owed less than $200,000 on the basis that these creditors were mostly small local businesses which would face insolvency themselves if they were not paid. Trade creditors which were owed in excess of $200,000 complained that the Order did not maintain the status quo and they applied to be paid the first $200,000 of the debt owed to them by Quintette. In dismissing the application ThackrayJ. said the following about the status quo at p. 109:

> While it is a compelling argument to suggest that the status quo should be maintained between *classes* of creditors, I do not believe that I should be blinkered by such a narrow view. The overall design of the C.C.A.A. is to preserve the debtor as a viable operation and to reorganize its affairs to the benefit of not only the debtor but also its creditors. With that design in mind, I do not believe that Wachowich J. was suggesting that every detail of the status quo would be maintained. Indeed he went on to note that [p. 220] "The intention was to prevent any manoeuvres for positioning among creditors during the interim period".
>
> What is meant by maintaining the status quo is that the debtor will be able to stay in business, and that they will have breathing space in which to develop a proposal during which time there will be a stay under any bankruptcy or winding-up legislation, a restraint of all actions against the company, and no realization of guarantees or other rights against the company. In this case the order also restrained creditors from exercising any right of set-off.

15 An unusual case relating to the maintenance of the status quo is *Re Alberta-Pacific Terminals* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.). In that case the owner of the facilities at which the insolvent company carried on business made application for an Order compelling the insolvent company to make the ongoing monthly payments under the operating agreement between the parties. The payments were the equivalent of rental payments under a lease. The insolvent company did not have sufficient funds to make the payments, in part because it was making the interest payments on the pre-stay debt of one of its lenders. The company had agreed to make the interest payments in exchange for the agreement of the lender to continue providing an operating credit facility. Huddart J. dismissed the application and she said the following about the status quo at p. 105:

> The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

16 This case is unusual because one would normally expect during a reorganization period that ongoing rental payments would be made and that interest on pre-stay debt would not be paid. However, the particular circumstances of the case meant that the preservation of the status quo produced a different result. The payment of the interest was considered to be a preservation of the status quo because the company required the continuation of the operating credit facility in order to survive and attempt to reorganize. The non-payment of the monthly amounts under the operating agreement was considered to be a preservation of the status quo because the company did not have sufficient funds and could not have continued if it had been required to make the payments.

17 It is my view that the maintenance of the status quo is intended to attempt to accomplish the following three objectives:

1. To suspend or freeze the rights of all creditors as they existed as at the date of the stay Order (which, in British Columbia, is normally the day on which the CCAA proceedings are commenced). This objective is intended to allow the insolvent company an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor.

2. To postpone litigation in which the insolvent company is involved so that the human and monetary resources of the company can be devoted to the reorganization process. The litigation may be resolved by way of the reorganization.

3. To permit the insolvent company to take certain action that is beneficial to its continuation during the period of reorganization or its attempt to reorganize or, conversely, to restrain a non-creditor or a creditor with rights arising after the stay from exercising rights that are detrimental to the continuation of the company during the period of reorganization or its attempt to reorganize. This is the objective recognized by *Quintette* and *Alberta-Pacific Terminals*. The first case to recognize that the maintenance of the status quo could affect the rights of non-creditors was *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20 (Alta. Q.B.). This is the objective that takes into account the broad constituency of interests served by the CCAA. As the overriding intent of the CCAA is to facilitate reorganizations, this is the overriding objective of maintaining the status quo and it may produce results that are not entirely consistent with the other objectives. The most common example of an inconsistency is a situation where the giving of effect to this objective results in an unequal treatment of creditors.

There are exceptions to the maintenance of the status quo but they are not relevant to this case.

18 Apart from consideration of s. 81.1 of the B & I Act, there is no justification for the creation of the trust fund. It would not serve to maintain the status quo. To the contrary, it would give the suppliers an advantage over other creditors of Woodward's. It would not be beneficial to the continuation of Woodward's business during the reorganization period or Woodward's attempt to reorganize. Indeed, it was the position of Woodward's on these applications that the creation of a trust fund in the amount of $30 million would make any reorganization impossible.

19 I am not prepared to order the creation of the trust fund on the basis of the allegations of events that took place prior to the commencement of these proceedings or on the basis of the timing of the commencement of these proceedings. There is no evidence in this case of fraud that could justify the preservation of assets by way of the creation of a trust fund. If the allegations were proven, it could possibly be argued that there has been an abuse of process or that Woodward's has not come to Court with clean hands. But these would not justify the creation of a trust fund for the benefit of the suppliers. The likely result would be that the Court would decline to exercise its discretion to afford Woodward's the protection it requires to reorganize and no one is suggesting that Woodward's should not be given an opportunity to attempt to reorganize its business and financial affairs.

20 That brings me to s. 81.1 of the B & I Act. In order to decide whether the creation of a trust fund will preserve rights of the suppliers, I must consider the rights that exist as a result of s. 81.1. I am reluctant to make definitive comments regarding s. 81.1 because I am not required to make a decision under that section and I do not wish to constrain another judge who is required in the future to make such a decision. I am particularly sensitive because s. 81.1 has only been in force for 1 1/2 months and I am not aware of any cases that have considered it. However, I must make some comments about the likelihood of the Courts making certain Orders in relation to s. 81.1 because I must determine what rights are to be preserved.

21 I begin by making the observation that on December 11 when these proceedings were commenced, the suppliers had no rights under s. 81.1 that could have been acted upon because Woodward's was not in bankruptcy or receivership. In *Re Westar Mining Ltd.* (unreported, June 16, 1992, B.C. Supreme Court Action No. A921164, Vancouver Registry) [reported 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331], Macdonald J. was faced with an argument by the Crown that he

should not have created a charge against Westar's assets to secure credit being extended during the reorganization period by Westar's suppliers because it would alter the priorities that would prevail in a bankruptcy of Westar. Macdonald J. rejected this argument in the following manner at p. 9 [p. 11 B.C.L.R.]:

> But, the company was not in bankruptcy on June 10 when the charge was created. The Crown claims which are not afforded the protection of a statutory lien are not yet preferred. The June 10 order creating the charge does not purport to alter the priorities which will apply between the claims of the Crown and the unsecured trade creditors as at May 14.

22 The suppliers argue that the rights that I must preserve are the right to crystallize their position under s. 81.1 by way of the appointment of an interim receiver and the right to have the Court make an Order for the creation of a trust fund pursuant to s. 81.1(8). I must therefore consider the likelihood of the Court appointing an interim receiver or making an Order for the creation of a trust fund in the event that Woodward's had filed a notice of intention to file a proposal under the B & I Act.

23 I agree with the submission of Mr. Fitch that s. 81.1 was intended to give suppliers the right to repossess goods that they had sold to the insolvent company if the company is to be liquidated by way of a bankruptcy or a receivership. Parliament directed its mind to the possibility that an insolvent company may first attempt to reorganize its affairs and it enacted subs. (4) of s. 81.1. Parliament decided that the period of the attempted reorganization should not be counted as part of the 30-day period under subs. (1) of s. 81.1. Parliament was silent as to the potential appointment of an interim receiver so that the suppliers could exercise their repossession rights during the reorganization period. Parliament was also silent as to the creation of a trust fund to be held for the benefit of the suppliers in the event that the reorganization is not successful. It must therefore be inferred in my view that Parliament intended that the insolvent company could continue to sell its goods in the ordinary course of business and utilize the sale proceeds to continue carrying on business pending its reorganization attempt.

24 It is my view that the likelihood of a Court appointing an interim receiver for the purpose of enabling suppliers to repossess the goods they supplied during the preceding 30-day period is low. The repossession of such goods would be counter-productive to the company's reorganization effort because it would deprive the company of assets it requires to continue carrying on business and to make a viable reorganization proposal. I can envisage a case where the Court may be willing to take such a step if it is concerned that the reorganization attempt may not be bona fide and the Court wishes to have an interim receiver to oversee the collection and disbursement of funds and to preserve the rights of suppliers if it is proven that the reorganization attempt was not bona fide. In this case there is no suggestion that Woodward's attempt to reorganize is not bona fide. In addition, I have reservations about whether an interim receiver is a receiver within the meaning of s. 243(2) of the B & I Act. An interim receiver is very different from a (permanent) receiver.

25 Similarly, I believe that the likelihood of a Court making an Order under s. 81.1(8) for the creation of a trust fund is low. This would again be counter-productive to the attempt of the company to reorganize. I also doubt that it was intended by Parliament that the filing of a notice of intention to file a proposal would be considered to be an act aggrieving a supplier within the meaning of s. 81.1(8) unless, possibly, the filing was not bona fide.

26 I was referred to two Quebec decisions dealing with the CCAA and the revendication rights of suppliers in Quebec. The first case was *Century Industries Inc. v. Enterprises Union Électrique Ltée* (unreported April 29, 1992, Que. S.C. Action No. 500-05-005804-925). I have been provided with a translation of the decision. Archambault J. ordered that the proceeds from the sale of any merchandise delivered in the 30 days prior to the service of the application before him be deposited in a trust account and that the monies in the trust account not be disbursed without further Court Order. The paragraph containing the reasoning of Archambault J. reads as follows (at p. 9):

> Le tribunal doit s'assurer que le statu quo est maintenu. Si une ordonnance n'était pas rendue, la requérante pourrait, si les marchandises étaient vendues dans l'intervalle par Union Électrique, perdre ses droits quant à la revendication des marchandises qui furent vendues et livrées à Union Électrique dans les derniers 30 jours. De plus, il serait

> fondamentalement injuste de permettre à Union Électrique de continuer de vendre ces marchandises qui ne lui appartiennent peut-être pas, au détriment des personnes qui en sont véritablement les propriétaires.

The translation for this paragraph with which I have been provided reads as follows:

> The Court must ensure that the status quo is maintained. If no order were given, the Applicant might, if the merchandise was sold by Union Électrique in the interim, lose its rights of revendication of the goods which were sold and delivered to Union Électrique within the last 30 days. Moreover, it would be fundamentally unjust to permit Union Électrique to continue to sell merchandise which perhaps does not belong to it, to the detriment of those who are the true owners.

27 I do not believe that the last sentence of the above paragraph relates to the right of revendication. In addition to merchandise that had been delivered within the previous 30 days, the applicant had sold goods to Union Électrique by way of conditional sale and title to these goods had not passed to Union Électrique.

28 I am not familiar with the details of a supplier's right of revendication in Quebec but I think that there is an important distinction between it and the right afforded by s. 81.1 of the B & I Act. The distinction is that the right of revendication is not dependent upon the bankruptcy or receivership of the purchaser of the goods. Thus, the applicant in the *Union Électrique* case had an existing right to repossess the goods supplied by it at the time the CCAA were commenced. Archambault J. was preserving that right when he made the Order that he did. In the present case, the suppliers did not have a right to repossess the goods supplied by them at the time these proceedings were instituted.

29 The second Quebec case took a different approach. In *Steinberg Inc. v. Colgate-Palmolive Canada Inc.* (1992), 13 C.B.R. (3d) 139, a supplier made application for leave under s. 11 of the CCAA to exercise its right of revendication with respect to goods delivered to the insolvent company within the previous 30 days. The Quebec Superior Court dismissed the application. The headnote, which is consistent with the translation of the decision provided to me, reads as follows:

> The power conferred on the judge under the Act applies to all proceedings likely to affect the survival of a company. The individual interest of any creditor must be weighed against the objects of the Act and must yield to the collective interests of all creditors. Granting the application would impose on the court an obligation to do the same for all 30-day suppliers. Therefore, an arrangement proposal submitted to the judge at the time of the order might fail before it was presented to all creditors, and might cause the debtor to go bankrupt. It followed that the goods in question should not be allowed to be seized prior to judgment.

This reasoning is similar to my reasoning in concluding that it is unlikely that a Court would appoint an interim receiver or order the creation of a trust fund when an insolvent company is attempting to reorganize pursuant to the B & I Act.

30 The result in the *Steinberg* case is also consistent with the decision of the B.C. Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 [[1991] 2 W.W.R. 136], where the issue involved security under s. 178 of the *Bank Act*. Section 178 security creates a security interest in inventory and the bank has the right to seize and sell the inventory. The right of the bank is therefore similar to the right of revendication enjoyed by a Quebec supplier. If the goods covered by s. 178 security are sold during the period of reorganization, the bank will be prejudiced in the same fashion as a supplier whose 30-day goods are sold during the period of reorganization (except to the extent that proceeds from the sale of inventory are utilized to purchase new inventory which would become covered by the bank's s. 178 security). In *Chef Ready Foods* the B.C. Court of Appeal held that the enforcement of s. 178 security can be stayed by an Order under s. 11 of the CCAA. Gibbs J.A. said the following at p. 92:

> It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the Bank Act which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory.

It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the bank signifies and collects the accounts receivable, Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependent upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted, it is difficult to imagine that the legislators of the day intended that result to follow.

31 The above passage contains persuasive reasoning why the Court is unlikely to appoint an interim receiver or to create a trust fund under the B & I Act if an insolvent company files a notice of intention to file a proposal. The ability to reorganize would be illusory for companies which deal with goods provided on credit by suppliers.

32 Subject to the point on which I will subsequently invite further submissions, I have concluded that there is likely to be no difference in the approach of the Court when dealing with a proposal under the B & I Act from the approach of the Court when dealing with a reorganization under the CCAA as they relate to the rights of suppliers. Therefore, there is no special right of suppliers that needs to be preserved by the creation of a trust fund and there is no abuse in Woodward's choosing the CCAA over the B & I Act. In addition, I repeat that the suppliers did not have any right to repossess the goods supplied by them at the time of the commencement of these proceedings. Accordingly, I dismiss the application of the suppliers for an Order creating a trust fund for their benefit.

33 Subsection 81.1(4) of the B & I Act does attempt to preserve the potential rights of suppliers by providing that the period of reorganization does not count in the computation of the 30-day period under s. 81.1(1). This is consistent with the status quo objective of suspending the rights of creditors during the period of reorganization. No submissions were made to me by the parties as to whether I can make an Order in these proceedings that has the same effect as s. 81.1(4). It may be possible that I could order that the period during which Woodward's is attempting to reorganize will not be counted as part of the 30-day period under s. 81.1(1) with the result that if Woodward's reorganization attempt is not successful and it goes into bankruptcy or receivership, the suppliers would still have the right to repossess goods supplied by them within the 30-day period preceding the commencement of these proceedings that have not been sold by Woodward's in the meantime. I invite counsel to make submissions in this regard.

34 As I have concluded that there are no rights of the suppliers that should be preserved other than a potential postponement of the running of the 30-day period under s. 81.1 of the B & I Act, my interim Order of December 17 should be set aside as it relates to the proceeds from the sale of goods after December 17. Counsel for several of the suppliers has requested that he have the opportunity to seek instructions regarding an appeal before the Order is set aside. Counsel for Woodward's does not object. I therefore set aside my December 17 Order as it relates to the sale proceeds effective 4 p.m. on January 18, 1993 or such later time as I may order.

*Order accordingly.*

# TAB 3

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Nortel Networks Corp., Re | 2013 ONCA 599, 2013 CarswellOnt 13651, 311 O.A.C. 101, 368 D.L.R. (4th) 122, 6 C.B.R. (6th) 159, 235 A.C.W.S. (3d) 391, 78 C.E.L.R. (3d) 43 | (Ont. C.A., Oct 3, 2013)

2012 SCC 67
Supreme Court of Canada

AbitibiBowater Inc., Re

2012 CarswellQue 12490, 2012 CarswellQue 12491, 2012 SCC 67, [2012] 3 S.C.R. 443, [2012] A.C.S. No. 67, [2012] S.C.J. No. 67, 221 A.C.W.S. (3d) 264, 352 D.L.R. (4th) 399, 438 N.R. 134, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, J.E. 2012-2270

# Her Majesty the Queen in Right of the Province of Newfoundland and Labrador, Appellant and 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

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

Heard: November 16, 2011
Judgment: December 7, 2012
Docket: 33797

Proceedings: affirmed *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965, Chamberland J.A. (C.A. Que.); refused leave to appealdemande d'autorisation d'en appeler refusée *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812, Clément Gascon J.C.S (C.S. Que.)

Counsel: David R. Wingfield, Paul D. Guy, Philip Osborne, for Appellant
Sean F. Dunphy, Nicholas McHaffie, Joseph Reynaud, Marc B. Barbeau, for Respondents
Christopher Rupar, Marianne Zoric, for Intervener, Attorney General of Canada
Josh Hunter, Robin K. Basu, Leonard Marsello, Mario Faieta, for Intervener, Attorney General of Ontario
R. Richard M. Butler, for Intervener, Attorney General of British Columbia
Roderick Wiltshire, for Intervener, Attorney General of Alberta
Elizabeth J. Rowbotham, for Intervener, Her Majesty The Queen in Right of British Columbia
Robert I. Thornton, John T. Porter, Rachelle F. Moncur, for Intervener, Ernst & Young Inc., as Monitor
William A. Amos, Anastasia M. Lintner, Hugh S. Wilkins, R. Graham Phoenix, for Intervener, Friends of the Earth Canada

Subject: Insolvency; Environmental

APPEAL by province from decision reported at *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965 (C.A. Que.), denying leave to appeal decision dismissing its motion for declaration that claims procedure order issued under *Environmental Protection Act* (Nfld.) did not bar province from enforcing orders requiring debtor to perform remedial work.

 

POURVOI formé par la province à l'encontre d'une décision publiée à *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965 (C.A. Que.), ayant refusé d'accorder la permission d'interjeter appel à l'encontre d'une décision ayant rejeté sa requête visant à faire déclarer que l'ordonnance relative à la procédure de réclamations émise en vertu de l'*Environmental Protection Act* n'empêchait pas la province d'exécuter les ordonnances enjoignant la débitrice d'exécuter des travaux de décontamination.

***Deschamps J.*:**

1 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 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 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 (C.S. Que.), 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 Montreal. 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 the United Mexican States and the Government of the United States of America*, 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 ("*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.

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

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

## II. Positions of the Parties

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

> [Definition of "claim"]
>
> **12.** (1) 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*.
>
> [Determination of amount of claim]
>
> (2) 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; and ...

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 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.

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, 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", 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, *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.

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) *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.

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 *McLarty v. R.*, 2008 SCC 26, [2008] 2 S.C.R. 79 (S.C.C.), 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.

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 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., Re* (1997), 96 O.A.C. 75 (Ont. C.A.). 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 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 *Cie pétrolière Impériale c. Québec (Tribunal administratif)*, 2003 SCC 58, [2003] 2 S.C.R. 624 (S.C.C.) (para. 24). This objection 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 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 (Alta. 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 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 (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 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.

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 Minister 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 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 fuelpowered vehicles 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" (at para. 175), and it was "the hat of a creditor that best [fit] 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 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.

**VI. Conclusion**

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

60 With respect to the law, the Chief Justice would craft a standard specific to the context of environmental orders by requiring a "likelihood approaching certainty" that the regulatory body will perform the remediation work. She finds that this threshold is justified because "remediation may cost a great deal of money" (para. 22). 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.

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.

***McLachlin C.J.C.* (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 (the "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 properties it polluted, the cost of which will fall on the Newfoundland and Labrador public.

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.

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 (the "Province") retained a number of options, including requiring Abitibi to perform the remediation if it successfully emerged from the *CCAA* restructuring.

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 (C.S. Que.)). 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 (C.A. Que.)).

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 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 (Alta. C.A.), 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 citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgement for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.
>
> [Emphasis added, para. 33]

74 The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lumford 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. Bktcy.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), 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. [Commercial List]), at para. 18: "Once [the company] emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

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

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 (Ont. C.A.), *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. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138 (Alta. Q.B.), *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).

**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*. "Creditor" is defined as "a person having a

  

claim ..." (*BIA* s. 2). 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 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 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.

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.

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 (Ont. C.A.) (para. 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. [Commercial List]), 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 "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 Environment had already entered the property at issue and commenced remediation activities to conclude that "[a]ny doubt about the resolve of the MOE's intent to realize upon its authority ended when it began to incur expense from operations" (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" (at para. 81), and could indeed cost several times that. 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: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 74. It is small wonder, then, that courts assessing whether it is "sufficiently certain" that a government will clean up pollution created 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 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 "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 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 question in the same way as I have, his conclusion, based on his objective findings of fact would have been 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 (S.C.C.), 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 site 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.

***LeBel J.* (dissenting):**

98 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. 22). 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 (C.S. Que.)), 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 Labrador (the "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 off-hand 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.*
*Pourvoi rejeté.*

End of Document

# TAB 4

Canada Federal Statutes

Companies' Creditors Arrangement Act

Interpretation

**Most Recently Cited in:**U.S. Steel Canada Inc., Re , 2016 ONCA 662, 2016 CarswellOnt 14104 | (Ont. C.A., Sep 9, 2016)

R.S.C. 1985, c. C-36, s. 2

S 2.

Currency

**2.**
**2(1)Definitions**
In this Act,

**"aircraft objects"** [Repealed 2012, c. 31, s. 419.]

**"bargaining agent"** means any trade union that has entered into a collective agreement on behalf of the employees of a company; *("agent négociateur")*

**"bond"** includes a debenture, debenture stock or other evidences of indebtedness; *("obligation")*

**"cash-flow statement"**, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; *("état de l'évolution de l'encaisse")*

**"claim"** means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; *("réclamation")*

**"collective agreement"**, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; *("convention collective")*

**"company"** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; *("compagnie")*

**"court"** means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench, and

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice;

*("tribunal")*

**"debtor company"** means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of thecompany have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

*("compagnie débitrice")*

**"director"** means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; *("administrateur")*

**"eligible financial contract"** means an agreement of a prescribed kind; *("contrat financier admissible")*

**"equity claim"** means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

*("réclamation relative à des capitaux propres")*

**"equity interest"** means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

*("intérêt relatif à des capitaux propres")*

**"financial collateral"** means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

*("garantie financière")*

**"income trust"** means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act;

*("fiducie de revenu")*

**"initial application"** means the first application made under this Act in respect of a company; *("demande initiale")*

**"monitor"**, in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; *("contrôleur")*

**"net termination value"** means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

**"prescribed"** means prescribed by regulation; *("Version anglaise seulement")*

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

**"shareholder"** includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

**"Superintendent of Bankruptcy"** means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; *("surintendant des faillites")*

**"Superintendent of Financial Institutions"** means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

**"title transfer credit support agreement"** means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

**"unsecured creditor"** means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. *("creancier chirographaire")*

**2(2)Meaning of "related" and "dealing at arm's length"**
For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

**Amendment History**
R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 3); 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 120; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15; 2005, c. 47, s. 124 [Amended 2007, c. 36, s. 105.]; 2007, c. 29, s. 104; 2007, c. 36, ss. 61(1), (2), (4); 2012, c. 31, s. 419; 2015, c. 3, s. 37

**Currency**

Federal English Statutes reflect amendments current to October 5, 2016
Federal English Regulations are current to Gazette Vol. 150:20 (October 5, 2016)

End of Document

Canada Federal Statutes

Companies' Creditors Arrangement Act

Part III — General [Heading added 2005, c. 47, s. 131.]

Claims [Heading added 2005, c. 47, s. 131.]

**Most Recently Cited in:** U.S. Steel Canada Inc., Re , 2016 ONCA 662, 2016 CarswellOnt 14104 | (Ont. C.A., Sep 9, 2016)

R.S.C. 1985, c. C-36, s. 19

S 19.

Currency

**19.**

**19(1) Claims that may be dealt with by a compromise or arrangement**

Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

**19(2)Exception**

A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

 

**Amendment History**
1996, c. 6, s. 167(1)(d); 2005, c. 47, s. 131; 2007, c. 36, s. 69

**Currency**
Federal English Statutes reflect amendments current to October 5, 2016
Federal English Regulations are current to Gazette Vol. 150:20 (October 5, 2016)

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R.S.C. 1985, c. C-36, s. 20

s 20.

Currency

**20.**

**20(1) Determination of amount of claims**

For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(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 is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

**20(2)Admission of claims**

Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

**20(3)** [Repealed 2007, c. 36, s. 70.]

**Amendment History**

2005, c. 47, s. 131; 2007, c. 36, s. 70

**Currency**

Federal English Statutes reflect amendments current to October 5, 2016

Federal English Regulations are current to Gazette Vol. 150:20 (October 5, 2016)

End of Document

# TAB 5

**Most Negative Treatment:** Application/Notice of Appeal
**Most Recent Application/Notice of Appeal:** Nortel Networks Inc. v. Pension Protection Fund | 2016 CarswellOnt 14117 | (S.C.C., Jul 29, 2016)

2016 ONCA 332
Ontario Court of Appeal

Nortel Networks Corp., Re

2016 CarswellOnt 6785, 2016 ONCA 332, 130 O.R. (3d) 481, 265 A.C.W.S. (3d) 834, 348 O.A.C. 131, 36 C.B.R. (6th) 1

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

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Alexandra Hoy A.C.J.O., R.A. Blair, S.E. Pepall JJ.A.

Judgment: May 3, 2016
Docket: CA M45307, M45309, M45310 M45311, M45312, M45313

Proceedings: refusing leave to appeal *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 175, 2015 CarswellOnt 7072, 2015 ONSC 2987, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 51, 2015 ONSC 4170, 2015 CarswellOnt 10304, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Sheila Block, Scott A. Bomhof, Andrew Gray, Adam M. Slavens, Jeremy Opolsky, for Moving parties, U.S. Debtors(1)
Richard B. Swan, S. Richard Orzy, Gavin H. Finlayson, for Moving party, Ad Hoc Group of Bondholders
David R. Byers, Daniel S. Murdoch, for Moving party, Conflicts Administrator of Nortel Networks S.A.
Shayne Kukulowicz, Michael Wunder, Ryan Jacobs, Geoffrey Shaw, Jane Dietrich, for Moving party, Official Committee of Unsecured Creditors of Nortel Networks Inc. et al.
Andrew Kent, Brett Harrison, Laura Brazil, for Moving party, Bank of New York Mellon as Indenture Trustee
Steven L. Graff, Ian Aversa, Miranda Spence, for Moving party, Nortel Trade Claims Consortium
Michael E. Barrack, D.J. Miller, John L. Finnigan, Michael S. Shakra, Andrea McEwan, for Responding parties, Board of the Pension Protection Fund and Nortel Networks U.K. Pension Trust Ltd.
Benjamin Zarnett, Jessica Kimmel, Peter Ruby, Peter Kolla, for Responding party, Monitor, Ernst & Young Inc.
Kenneth Kraft, John Salmas, for Responding party, Wilmington Trust, National Association
Derrick Tay, Jennifer Stam, for Responding parties, Canadian Debtors(2)
Kenneth Rosenberg, Lily Harmer, Massimo Starnino, for Responding party, Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund
Mark Zigler, Ari Kaplan, for Responding parties, Former Employees of Nortel and LTD Beneficiaries
Arthur O. Jacques, Paul Steep, Byron Shaw, for Responding party, Canadian Creditors' Committee
Barry E. Wadsworth, for Responding party, CAW-Canada
Matthew P. Gottlieb, Matthew Milne-Smith, for Responding parties, Joint Administrators of the EMEA Debtors(3) other than Nortel Networks S.A.

Subject: Contracts; Estates and Trusts; Evidence; Insolvency; Intellectual Property; International; Property

MOTIONS for leave to appeal from decisions reported at *Nortel Networks Corp., Re* (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) and *Nortel Networks Corp., Re* (2015), 2015 ONSC 4170, 2015 CarswellOnt 10304, 27 C.B.R. (6th) 51 (Ont. S.C.J. [Commercial List]), regarding allocation of proceeds of sale of debtor's assets.

***Per curiam*:**

**A. Introduction**

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

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

- more than 6,800 Nortel former employees or pensioners have died;
- well in excess of $1 billion has been incurred in costs; and
- Nortel's assets have been sold and some $7.3 billion[1] in sale proceeds have been placed in escrow (the "Lockbox Funds").

3 The leave motions now before this court arise from the joint trial dealing with the allocation of the Lockbox Funds. Newbould J. (the "trial judge) of Ontario's Superior Court of Justice (Commercial List) and Judge Gross of the U.S. Bankruptcy Court for the District of Delaware presided over the joint trial.[2] It was held over the course of six weeks. Each judge rendered separate decisions on May 12, 2015. Each concluded that the Lockbox Funds should be allocated on a *pro rata* basis among the various Nortel debtor estates. Although their analysis differed somewhat, the outcome was the same.

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

5 Before this court, the six moving parties, led by the U.S. Debtors, seek leave to appeal the trial judge's judgment pursuant to s. 13 of the *CCAA*. They submit that the trial judge made fundamental errors and that the proposed appeal is of significance to the practice of insolvency and to the parties, and will not delay the completion of the *CCAA* proceedings.

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

7 After consideration of each of the factums[3] and other materials filed on the leave motions, we agree with the responding

  

parties that the test for leave has not been met. For the reasons that follow, we dismiss the moving parties' motions for leave to appeal.

**B. Genesis of Dispute**

8 NNC was a publicly-traded Canadian corporation at the helm of a global networking solutions and telecommunications business, and the direct or indirect parent of more than 130 subsidiaries located in more than 100 countries. These companies were collectively referred to as the "Nortel Group" or "Nortel".

9 NNC was the successor to a long line of companies, headquartered in Canada, that date back to the founding of the Bell Telephone Company of Canada in 1883. NNC's principal, direct operating subsidiary was Nortel Networks Limited ("NNL"), also a Canadian company. NNL was the direct or indirect parent of operating companies located around the world. It owned 100 percent of the equity of each of the following entities: NNI, Nortel's operating company in the United States; Nortel Networks UK Ltd. ("NNUK"), Nortel's operating company in the United Kingdom; and, Nortel Networks (Ireland) Ltd. ("NN Ireland"), Nortel's operating company in Ireland. It also owned 91.17 per cent of the equity of Nortel Networks S.A. ("NNSA"), Nortel's operating company in France.

10 Following the insolvency filings, Nortel's initial plan was to downsize and carry on portions of the telecommunications business. However, by June 2009, the decision was made to liquidate Nortel's assets.

11 On June 29, 2009, an Interim Funding and Settlement Agreement ("IFSA") was approved by both the Canadian and American courts. Among other things, it addressed interim funding for NNL and the anticipated sales of Nortel's business lines and residual intellectual property ("IP"). The parties, consisting of the Canadian Debtors, the U.S. Debtors[4], and the EMEA Debtors[5], agreed to cooperate with the sales process and also agreed that the proceeds of sale would be held in escrow. The issue of allocation was deferred.

12 Under the IFSA, there would be no distribution out of escrow without "either (i) agreement of all of the Selling Debtors[6] or (ii) ... determination by the relevant dispute resolver(s) under the terms of the Protocol ... applicable to the Sale Proceeds". The parties were then to negotiate and attempt to reach agreement "on a protocol for resolving disputes concerning the allocation of Sale Proceeds from Sale Transactions (the "Interim Sales Protocol")". Despite numerous attempts at resolution, agreement on both an Interim Sales Protocol and allocation proved to be elusive.

13 Meanwhile, over $7 billion was generated from various asset sales and other realizations. From mid-2009 until March 2011, proceeds of $3.285 billion were generated from the sale of Nortel's various business lines, including some patents. Of that amount, $2.85 billion is available for allocation. In June 2011, proceeds of approximately $4.5 billion were generated from the sale of Nortel's residual intellectual property, consisting of approximately 7,000 patents and patent applications, to the Rockstar consortium. In total, approximately $7.3 billion is currently held in escrow.

14 By orders dated January 21, 2010, the Canadian and U.S. courts approved a "Final Canadian Funding and Settlement Agreement". The Agreement addressed a number of issues and allowed NNI a $2 billion claim against NNL in NNL's *CCAA* proceeding, which claim is not subject to offset or counterclaims.

15 The parties still could not agree on an Interim Sales Protocol or on allocation. In the spring of 2013, the Canadian court and the U.S. bankruptcy court granted orders approving an "Allocation Protocol". The purpose of this Protocol was to set out "binding procedures for determining the allocation of the Sale Proceeds among the Selling Debtors"[7]. It provided for a joint hearing to determine allocation before the Canadian court and the U.S. bankruptcy court.[8] Any party in interest was at liberty to advance any theory on allocation. Leave to appeal that order was denied by this court on June 20, 2013.

16 The issue of allocation of the Lockbox Funds then proceeded to trial.

**C. Trial Judge's Decision**

***(1) Trial Decision***