Court File No. 01-CL-4313

ONTARIO
SUPERIOR COURT OF JUSTICE

- COMMERCIAL LIST

IN THE MATTER OF
RELIANCE INSURANCE COMPANY

AND IN THE MATTER OF THE
***INSURANCE COMPANIES ACT*, S.C. 1991, C.47, AS AMENDED**

AND IN THE MATTER OF THE
***WINDING-UP AND RESTRUCTURING ACT*, R.S.C. 1985, C.W-11, AS AMENDED**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

RELIANCE INSURANCE COMPANY

Respondent

BOOK OF AUTHORITIES OF THE LIQUIDATOR

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1. *Kansa General International Insurance Company Ltd. et. Alfieri*, [2004] Q.J. No. 9807 (Sup. Ct.)).
2. *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519 (Sup. Ct. J.).
3. *Kansa General International Insurance Company Ltd. et Alfieri*, [2003] Q.J. No. 14726 (Sup. Ct.).
4. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 2000 ABQB 440, 269 A.R. 49.
5. Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2013-2014 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013).

6. *Re Cie d'assurances générales Kansa Internationale*, 2008 QCCS 100, 2008 CarswellQue 807.

7. *Canada (Attorney General) v. Northumberland General Insurance Co.* (1986), 56 O.R. (2d) 609 (H. Ct. J.).

8. *Re AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443.

TAB 1

Case Name:

Kansa General International Insurance Company Ltd. et Alfieri

IN THE MATTER OF THE WINDING-UP OF: KANSA GENERAL INTERNATIONAL INSURANCE COMPANY LTD., debtor
and
FERDINAND ALFIERI, liquidator/respondent
and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, claimant/petitioner
and
AMERICAN HOME ASSURANCE COMPANY, TORONTO DISTRICT SCHOOL BOARD and IVACO INC., intervenors

[2004] Q.J. No. 9807

[2004] R.J.Q. 2999

J.E. 2004-2065

No.: 500-05-002760-955

Quebec Superior Court
District of Montreal

The Honourable Roland Durand, J.S.C.

September 1, 2004.

(45 paras.)

Bankruptcy and Insolvency -- Order -- Clarification -- Transitory Law -- Retroactivity.

HMQ is filing a motion for clarification of an Order of the Court in relation to her motion to amend proof of a claim which she filed with the Liquidator in this matter. HMQ asks whether a finding of liability is a contingency in the meaning of the law, what her obligation is in that case and whether a reasonable estimate of the value of the damages to the Liquidator would satisfy this obligation. The Liquidator opposes this motion, seeing it as an attempt to modify clear directions of the Order.

HELD: Motion dismissed with costs. A finding of liability is not a contingency, it is a certainty. A future judicial finding unknown at the time of filing of the proof of claim is a contingency. The second and third questions should not have been addressed to this Court but to the liquidator. The 1996 version of the law is not retroactive, but rather retrospective. It simply took effect immediately as of June 28th 1996. Since that date, a creditor can only file proof of a claim if the debt had been in

existence at the commencement of the winding-up. Any debt which came into existence after March 3rd 1995, in our case, is not admissible in proof, absent special circumstances. If a creditor can only file a proof of claim for a debt which existed on the date the bankrupt became bankrupt or which arose later but due to an obligation existing before the aforementioned date, it follows that a creditor in a winding-up a file should also be restricted to those debts which existed on the date the petition for winding-up was filed.

Statutes, Regulations and Rules Cited:

Act to amend, enact and repeal certain laws relating to financial institutions, 45 Elizabeth II, c. 6, s. 1, s. 9, s. 71(1), s. 71(2), s. 153, ss. 159 to 172, s. 161

Bankruptcy and Insolvency Act, R.S.C. (1985), c. B-3, s. 121

Canada Deposit Insurance Corporation Act

Winding up and Restructuring Act, R.S.C. (1985), c. W.11, s. 71(1), s. 75

Counsel:

Jean-François Lépine and Alain Létourneau, Q.C., counsel, (Cain Lamarre Casgrain Wells), for petitioner.
Eugène Czolij and Réjean Lizotte (Desjardins Ducharme Stein Monast), for respondent.
Nick Krnjevic (Robinson Sheppard Shapiro), for American Home Assurance Company.
Marc-André Sansregret (Langlois Kronstrom Desjardins), for the Toronto District School Board.
Diane Quenneville (Fraser Milner Casgrain), for Ivaco Inc.

JUDGMENT

1 Petitioner (HMQ) has filed a Motion for clarification of an Order which I gave on August 1, 2003 further to her Motion to amend the proof of claim with she had filed with the Liquidator in this matter.

2 Although Her Motion was then continued sine die, I identified four items being the minimum information that she had to include in Her proof of claim in compliance with s. 71(1) of the Winding-up and Restructuring Act[1] (W.U.R.A.). One of these items concerned a contingent claim in which case the contingency had to be described.

3 I mentioned in paragraph 11 of my Order that:

> "If these instructions are not clear enough, HMQ is hereby authorized to ask further clarification from me."

4 Hence Her Motion, paragraph 4 of which reads as follows:

> "By this proceeding, the Petitioner is respectfully seeking clarification of the following questions:

(a) In the context of a liability claim against Ontario, is a finding of liability, or of partial liability, a "contingency" in the meaning of the Act?
(b) If the answer to question (a) is in the affirmative, other than advising the Court of the existence of this contingency, is the Petitioner obliged to provide any other information?
(c) Is the August 1, 2003 Order satisfied by providing the Liquidator a reasonable estimate of the value of the damages in the underlying liability claims against it, if available?

5 The Liquidator opposes this Motion on the main grounds that it is an attempt to modify the clear directions of the August 1, 2003 decision and that the current winding-up is subject to subs. 71(1) of the W.U.R.A. as amended on June 28, 1996. He suggests that I simply refer HMQ to this new section which requires no further explanation.

6 The Intervenors second this Motion and ask that the Liquidator's contestation be dismissed.

7 In the course of their oral arguments as well as in their subsequent Notes and authorities, Petitioner and Intervenors greatly enlarged the scope of this matter. On the first day of hearing, HMQ filed a "Summary of issues" which does not refer to Her original three questions but describes 8 new items with supporting authorities. In her later "Summary of argument" (running to 88 foolscap pages) these arguments have grown to 12 which have little or nothing to do with the original Motion.

8 In order to avoid further separate proceedings, I authorized HMQ and the Intervenors to argue these various points but I intend to address solely the original questions and some of the later arguments in order to help the parties in filing their proofs of claim. The arguments which to my mind have not been properly presented and pleaded will be addressed at a later date, if necessary.

9 The Winding-up Act[2] (W.U.A.) was modified by an "Act to amend, enact and repeal certain laws relating to financial institutions" (the "Act") which was assented to on May 29, 1996[3].

10 This statute, as its name implies, replaced, amended or repealed many sections of the W.U.A. including s. 1 which changed its name to the Winding-up and Restructuring Act (the W.U.R.A.), s. 153 which replaced the text of s.71(1) and s. 161 which completely replaced all of Part III by the new sections 159 to 172.

11 On June 20, 1996, an Order-in-Council fixed June 28, 1996 as the day on which most sections of the Act would come into force, including sections 46 to 161, and therefore s. 153.

12 In my decision of August 1, 2003, I referred to the Winding-up and Restructuring Act but although I cited s. 71(1) and 75(1) of this Act, I inserted mistakenly the wording of s. 71(1) before the 1996 amendment. I take it for granted that this did not affect the learned attorneys concerned in this file who know of the amendments of 1996 especially since their clients have received from the Liquidator a Notice under s. 75 including the full text of the new s. 71(1).

13 The new s. 71(1) reads as follows:

"71. (1) When the business of a company is being wound up under this Act, all debts and all other claims against the company in existence at the commencement of the winding-up, certain or contingent, matured or not, and

liquidated or unliquidated, are admissible to proof against the company and, subject to subs. (2), the amount of any claim admissible to proof is the unpaid debt or other liability of the company outstanding or accrued at the commencement of the winding-up."

14 The new s. 159(1) reads as follows:

"159.1 (1) This Part applies only to insurance companies.

(2) This Part applies only in respect of applications for winding-up orders that are made after the date of coming into force of this subs., and applications for winding-up orders that were made on or before that date shall be dealt with in accordance with the provisions of this Part as they read immediately before that date."

THE THREE QUESTIONS

15 HMQ did not elaborate on these even though they were the only ones mentioned in Her Motion and neither did the Intervenors. I shall deal with them briefly.

16

Question a) seeks an interpretation of the word "contingency".

Questions b) and c) should not have been directed to me.

17 The words "contingent" and "contingency" are defined as follows:

"Webster's: Contingent: 1) likely but not certain to happen;

[...]

4) dependent on or conditioned by something else;

Contingency: 1) the quality or state of being contingent;

2) a contingent event or condition: as an event (as an emergency) that is of possible but uncertain occurrence.

Shorter Oxford Dictionary: Contingent: 2. liable to happen or not.

[...]

8. (Law): Dependent on a probability; conditional; not absolute.

Contingency: 3. The quality or condition of being contingent.

[...]

6. A thing or condition of things contingent upon an uncertain event.

18 Question a): this question seems to be an oxymoron as the Liquidator states at paragraph 25 of his Notes. Once a finding of complete or partial liability has been handed down the contingency no longer exists and the claim is no longer contingent on same: the uncertain event has occurred.

However, if HMQ refers to a future judicial finding unknown at the time of the filing of the proof of claim, my answer would be a tentative "Yes" in which case s. 71(2) would have to be used. It reads as follows:

> "In case of any claim subject to any contingency or for unliquidated damages or which for any other reason does not bear a certain value, the court shall determine the value of the claim and the amount for which it shall rank."

19 Questions b) and c) should have been directed to the Liquidator.

I take this opportunity to remind H.M.Q. that a proof of claim is filed with the Liquidator, for his information, and that he is the one who decides whether it is complete and admissible or not. In the latter case, it may be presented to the Court under s. 75.

20 The new s. 71(1) came into force on June 28, 1996. HMQ proposes that it cannot have any retroactive effect and the Intervenors agree but use the word "retrospective".

They are right.

21 A statutory provision does not have a retrospective effect, absent a clear indication that the legislator intends it to be so, or necessary implication.

22 In the case of Gustavson Drilling (1964) Ltd. v. M.N.R.[4], the Supreme Court dealt with the following situation, explained on pages 273 and 277:

> "This is an income tax case concerning the right of the appellant Gustavson Drilling (1964) Limited to deduct in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years drilling and exploration expenses incurred by it from 1949 to 1960.
>
> [...]

> In summary, therefore: Company A incurred drilling and exploration expenses; Company B acquired the property of Company A in 1960 but because of the manner in which the transaction was carried out Company B did not at that time qualify as a successor company and did not become entitled to deduct from its income the undeducted drilling and exploration expenses of Company A; in 1962 and thereafter, if the contentions of the Minister prevail, Company B qualified as a successor company and as such became entitled to claim such expenses as a deduction; Company A was denied such right by the concluding words of subs. (8a)."

Dickson J., as he then was, writes, on page 279 and following:

> "First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The s. as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute.
>
> [...]
>
> The appellant concludes that the right to deduct the said expenses remains with it in perpetuity. I cannot agree. It is immaterial that the appellant company had a particular status as the result of previous legislation. Parliament, acting within its competence, has said that as of 1962 and for the purposes of calculating taxable income in future years, the appellant has a different status.
>
> [...]
>
> Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched required such a construction: Spooner Oils Ltd. v. Turner Valley Gas Conservation Board [1933] S.C.R. 629, at p. 638.
>
> [...]

> It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception.
>
> [...]
>
> The burden of the argument on behalf of appellant is that appellant has a continuing and vested right to deduct exploration and drilling expenses incurred by it, yet it must be patent that the Income Tax Acts of 1960 and earlier years conferred no rights in respect of the 1965 and later taxation years. One may fall into error by looking upon drilling and exploration expenses as if they were a bank account from which one can make withdrawals indefinitely or at least until the balance is exhausted. No one has a vested right to continuance of the law as it stood in the past;
>
> [...]
>
> The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued.

[Emphasis added]

23 In the case of A.G. (QUE) v. Expropriation Tribunal[5], Chouinard J. writes, at page 742:

> "In my opinion the right which the Crown had to unilaterally discontinue, and which it had not exercised at the time the new Act came into effect, is not a vested right.
>
> A vested right is one which exists and produces effects. That does not include a right which could have been exercised but was not, and which is no longer available under the law. The courts and scholarly commentators distinguish between a vested right and what they call either a possibility or an option."

[Emphasis added]

He then reviews the judgment in the case of Gustavson Drilling and writes at page 743:

> "Applying these principles to the case before the Court, it follows that appellant had no vested right to a unilateral discontinuance. After 1970 and until the new Act came into effect, he could have unilaterally discontinued. At the time appellant wished to discontinued. At the time appellant wished to discontinue, he had to seek the Tribunal's authorization."
>
> He concludes on page 747:

> "I consider that as in Gustavson Drilling, Acme Village School and Bellechasse Hospital, [1975] 2 S.C.R. 454, the case at bar is one in which the statute applies immediately and not retroactively and that s. 55 of the Expropriation Act required that, in order to discontinue, appellant should obtain the Tribunal's authorization."

24 In the case of Venne v. Quebec (CPTA)[6] Beetz J. writes, on page 909:

> "Appellant for its part maintained that Division IX of the Act, and in particular s. 101, defines all the acquired rights which can be set up against application of the Act. Appellant cited the following authorities in support of its argument: Commander Nickel Copper Mines Ltd. v. Zulapa Mining Corp., [1975] C.A. 390, at p. 392, and Ouellet v. Procureur général du Québec, Sup. Ct. Québec, No. 200-05-0007470803, July 11, 1980. To these authorities should be added the judgment rendered by the Court today in Veilleux v. Quebec (Commission de protection du territoire agricole)[7], in which the Court accepted the Commision's argument that "since the Act specifies the situations in which acquired rights can be invoked, these situations are the only ones that can confer acquired rights which derogate from the provisions of the Act" (p. 851). The Court held, inter alia, at p. 852:
>
> > The Act itself specifies the circumstances giving rise to acquired rights and other rules developed by the courts accordingly cannot have the effect of conferring acquired rights other than those specified by the Act or of conferring them in a way not contemplated by the Act.
>
> I thus think that appellant's position is correct."

He continues, on page 914:

> "It is not unprecedented for a statute to affect agreements entered into or legal relationships created before it takes effect, without that making the statute retroactive.
>
> Thus, in Acme Village School District (Board of Trustees of) v. Steele-Smith, [1933] S.C.R. 47, a s. of the School Act provided that, except in June of each year, no notice terminating a teacher's employment could be given by a school board without an inspector's prior authorization. It was held that this provision applied to a notice give after the new act came into effect with respect to a contract of employment entered into before it.
>
> In Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, supra, a majority of the Court applied the new provisions of the Income Tax Act to appellant with respect to expenses incurred before the provisions came into effect, and held that it was not thereby giving them retroactive effect. Dickson J., as he then was, wrote for the majority at p. 279:

> An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time, [Emphasis added by Beetz J.]

He concludes on page 915:

> "In the case at bar, the Commission is not arguing that the Act applies to alienations that took place before that Act came into effect. It is also not contending that the "Contracts for Deed" were unlawful or invalid. What it is saying, and in my opinion correctly, is that they cannot in view of s. 29 be lawfully implemented by an alienation made without its authorization after the Act came into effect.
>
> Other examples could be given where the Act affects prior agreements on the date it takes effect, without thereby being retroactive. The following example comes to mind. S.s 70 and 72 of the Act prohibit the removal of topsoil and lawn turf for purposes of sale unless the Commission has issued a permit authorizing this. If, before the Act took effect, the owner of a lot had concluded a contract with a contractor to remove the topsoil on his lot, if the Act had taken effect before the contract was performed and if the Commission denied the permit requested, such a contract surely could no longer be lawfully implemented. This consequence would result not from the retroactivity of the Act but from its immediate application."

25 In the case of Wasserman, Arsenault Ltd. v. Sone[8], Weiler, J.A., wrote on pages 158 and 159:

> "35. The appellant alleges, secondly, that Farley J. applied s. 136(1)(b) retroactively. S. 136(1)(b), which gives priority to the fees of a person acting under the direction of the Superintendent over the trustee, came into force on September 30, 1997. Prior to this amendment the expenses of a trustee had first priority. Rumanek submits that on a number of files its work was substantially completed, with only certain procedural or administrative steps remaining, and that it had a vested right to payment for these files prior to the coming into force of s. 136(1)(b). Accordingly, Rumanek submits that it is entitled to payment on these files in priority to the Guardian, and that Farley J. erred in not recognizing this.
>
> 36. The commentary in Dreidger on the Construction of Statutes, 3rd ed. (1994) at p. 517 is helpful in dealing with this submission. It states:

> Legislation clearly is retroactive if it applies to facts all of which have ended before it comes into force. Legislation clearly is prospective if it applies to facts all of which began after its coming into force. But what of on-going facts, facts in progress? These are either continuing facts, begun but not ended when the legislation comes into force, or successive facts, some occurring before and some after commencement. The application of legislation to on-going facts is not retroactive because, to use the language of Dickson J. in [Gustavson Drilling (1964) Ltd. v. M.N.R., [1977] 1 S.C.R. 271], there is no attempt to reach into the past and alter the law or the rights of persons as of an earlier date. The application is prospective only to facts in existence at the present time. Such an application may affect existing rights and interests, but is not retroactive.
>
> Legislation that applies to on-going facts is said to have "immediate effect". Its application is both immediate and general: "immediate" in the sense that the new rule operates from the moment of commencement displacing whatever rule was formerly applicable to the relevant facts, and "general" in the sense that the new rule applies to all relevant facts, on-going as well as new."

37. I agree with Farley J. that these files should be viewed as a continuing fact situation. Rumanek ceased its work prior to the enactment of s. 136(1)(b), but the files were not complete by that date. They were on-going in varying degrees. The Guardian was appointed to complete the administration of these files. Certificates of completion had not been filed. Strictly speaking, there is not entitlement to compensation and hence no vested right to payment until a certificate of completion has been filed. It is at the time of payment that priority is determined and, hence, the application of s. 136(1)(b) does not have retrospective effect. Rumanek does not have a vested right to any fees or disbursements arising from the completion of the Sone estates by the Guardian. Farley J. did not err in his appreciation of s. 136(1)(b)."

26 Two very recent judgments, decided last year but reported this year, deal with the 1996 amendments to the W.U.A.

27 In the case of Canada (Attorney general) v. Security Home Mortgage Corp.[9], Fraser J. considers the meaning of the former s. 95 WUA and of the new s. 95(2) added to the WURA. He writes at page 359:

> "14. The provision of the amending Act that added s. 95(2) came into force on June 28, 1996, which was after service of the petition in this proceeding."

He continues on page 370:

"58. The facts in this matter were successive (as opposed to short-term or continuing) as at the coming into force of s. 95(2). An explanation of successive situations is given in Sullivan and Driedger on the Construction of Statutes, 4th ed. by Ruth Sullivan (Markham, Ont.: Butterworths, 2002) beginning at 550:

> Successive situations consist of facts, whether short-term or continuing, that occur at separate times. A situation defined in terms of successive facts is not complete and does not become part of the past until the final act in the series, whether short-term or continuing, comes to an end.

59. This definition is accepted with the result that the winding-up of SHMC which was begun in 1996 has been continuing and is not yet complete. In this context the application of new legislation to a successive fact situation would not be retroactive unless the final act in the series, whether short-term or continuing, has come to an end. As stated by Pierre-André Côté, in The Interpretation of Legislation in Canada, 3rd ed. (Scarborough: Carswell, 2000) at 138:

> When facts subsequent to commencement are required for the statute to apply, there is no retroactivity.

60. The Ontario Court of Appeal in Wasserman, Arsenault Ltd. v. Sone (2002), 33 C.B.R. (4th) 145 (Ont. C.A.), at p. 158, affirming 2000 Carswell Ont. 4934, 22 C.B.R. (4th) 153 (Ont. S.C.) recently considered the application of an amendment to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") which changed the priorities between the fees and expenses of a guardian and those of a trustee in bankruptcy, such that the trustee's fees became subordinate to those of the guardian.

61. The Court in Wasserman found that the fact situation was continuing and held that the amendment had immediate effect as the bankruptcies were not complete as of the date of the amendment. This finding was made notwithstanding that:

a. the administration of the ongoing bankruptcies was substantially complete on a number of files as at the date of the amendment of the BIA; and
b. the trustee had ceased to work on the files by the time the amendment came into force.

He concludes his analysis on page 372:

"65.

It is clear from the WURA that Parliament considered the issue of ongoing liquidations. This is because s. 159.1(2) of the WURA provides that the new Part III (dealing with the winding-up of insurance companies) applies only in respect of applications for winding-up orders that are made after the date of coming into force of s. 159.1(2). This signalled a Parliamentary intention that provisions in the amending statute, which were not limited to prospective application, would apply retroactively as well.

66. There is no similar transitional provision with respect to the application of the revised legislation to financial institutions other than insurance companies. The existence of s. 159.1(2) applying as it does only to insurance companies is strong evidence of Parliamentary intent that the provisions of WURA (other than Part III) should have immediate effect."

[Emphasis added]

In the case of Canada (Attorney General) v. Confederation Trust Co.[10] Blair R.S.J. deals also with the new s. 95(2). He writes on page 202:

"15. To answer the questions posed above, it is necessary, in the first place, to determine whether or not subs. 95(2) of the Winding-up and Restructuring Act (the "Act") applies to the Confederation Trust liquidation.

16. Prior to the enactment of subs. 95(2) in 1996, the Winding-up Act did not contain any provision for the payment of post-liquidation interest. S. 95 (now subs. 95(1) read as follows: (citation)

17. In 1996, at the same time as the Act was renamed the Winding-up and Restructuring Act, subsection 95(2), providing for the payment of interest out of surplus, was added..."

He continues on page 204:

"24. It is not necessary to pursue this line of enquiry further, however, because subsection 95(2) of the Winding-up and Restructuring Act applies to the Confederation Trust liquidation, in my opinion.

25. To say this is not to give the provision retroactive effect. Although it is not free from doubt, I do not accept the contention that the Claimants acquired a vested right to post-liquidation interest at the Liquidation Date. In my opinion, they acquired, at best, a contingent right to the payment of post-liquidation interest conditional upon there being a surplus in the liquidated estate after payment of all the Company's

debts and obligations and of the costs associated with the liquidation. The condition cannot be determined and satisfied until the liquidation of the estate is at least substantially completed.

26. Here, the liquidation of the Confederation Trust estate was active and ongoing, and far from substantially completed in June 1996, when the amendment adding subsection 95(2) to the Act came into effect. It was not known at that time there would be a surplus. The processing of the estate was a continuing fact situation, and the application of a law that comes into effect during such a situation has "immediate", as opposed to "retroactive" effect."

[Emphasis added]

And he concludes on page 206:

"28. Similarly, in this case, the winding-up of the Confederation Trust estate may be "viewed as a continuing fact situation" that is "on-going in varying degrees". There is no entitlement to post-liquidation interest on the part of the Claimants unless and until a surplus emerges in the estate, and hence there is "no vested right to payment" of such interest until that condition of entitlement has been satisfied. Thus, subsection 95(2) of the Winding-up and Restructuring Act applies to the situation because it has "immediate" and not "retroactive" effect in the circumstances."

28 The reasoning in all these case clearly applies to our own. The petition for the Winding-up of Kansa was approved on March 8, 1995 to take effect on the date of filing which was March 3, 1995.

On June 28, 1996 this liquidation was a continuing fact and indeed it is still one today.

29 S. 71(1) is not subject to the new Part III of the WURA and it took effect immediately on June 28, 1996.

30 On pages 21 and following of Her summary, HMQ asserts that Part I is subject specifically to sections 161, 162, 166 and 168 "and under those sections, claims can be made until the filing of a statement and even after, until the completion of the liquidation".

A simple reading of the description in the margins of these four sections shows that they do not say what HMQ believes:

a) s. 161: Order of priority for payment of claims

For any claim to be paid it must first be proven. This section does not affect s. 71(1);

b) s. 162: Reinsurance of contracts by Liquidator

Again this has nothing do to with the filing of claims for acceptance by the Liquidator;

c) s. 166: Liquidator to prepare statement of claimants and creditors

This statement is prepared by the Liquidator "without the filing of any claim, notice or evidence of or the taking of any action by any person". It is a list of "all the persons appearing by the books and records of the company to be creditors of the company or to be claimants...".

The operative words are "appearing by the books and records of the company". Again, nothing to do with s. 71.

d) S. 168: Copy of statement to be filed

This section determines what happens to a debt already entered in the statement but about which a new claim is presented after the filing of the statement.

It has nothing to do with s. 71(1) or, at best, it may be an exception to it because of its pre-entry on the books of the company.

31 It is common ground that Bankruptcy legislation and Winding-up legislation are closely related. At page 14 of Her summary, HMQ quotes s. 121 of the Bankruptcy and Insolvency Act"[11] (the BIA) part of which reads as follows:

"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.

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 s. 135.

3)

> A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted."

[Emphasis added]

Again the operative words are "the day on which the bankrupt becomes bankrupt" which are the counter-part of "in existence at the commencement of the winding-up" in s. 71(1).

Incidentally, it is interesting to note that the word "contingent" is also used in the BIA.

32 It seems to me that the legislator amended s. 71 in 1996 to bring it closer to s. 121 BIA: both statutes have now a cut-off date at which debts or claims may be admissible to proof and we know that both the Trustee and the Liquidator may be authorized to make a general call for claims in order to finally close their files.

33 Considering the above, I conclude that s. 71(1) of the W.U.R.A., as amended on June 20, 1996, did not have a retrospective effect, but that it applied to on-going and new cases of winding-up immediately upon coming into force.

34 Accordingly I am of the view that in the matter of the winding-up of a company, a creditor could, until June 27, 1996, file a proof of claim, whether or not the debt existed before or after the date of the Winding-up Order but that, since June 28, 1996, he can only file a proof of claim if the debt had been "in existence at the commencement of the winding-up".

35 Any debt or claim which came in existence after such date, March 3rd, 1995, in our case, is not admissible in proof, absent special circumstances.

36 This makes sense because otherwise a Liquidator would have to keep his file open for an excessive duration. This would thwart the very underpinnings of the law which are "to insure an orderly, cost effective and speedy liquidation of the assets of the company being wound-up".

THE ADDITIONAL ARGUMENTS

37 This conclusion and the answers to the three questions asked by HMQ should satisfy the original points at issue here but as I stated in paragraph 8, it is better to consider some of these arguments now than later.

1. I.B.N.R.s (Incurred but Non-Reported losses) are "claims" under the W.U.A./W.U.R.A.

   This was not mentioned in H.M.Q.'s Motion nor in the Liquidator's contestation. It is a serious matter which deserves a full examination. This will be done later if necessary.

2. When dealing with an insurance company in liquidation, Part I of the W.U.A./W.U.R.A. is subject to Part III, in accordance with s. 9 W.U.A./W.U.R.A., and specifically to s. 161, 162, 166 and 168 W.U.A./W.U.R.A. and under those sections, claims can be made until the filing of a statement and even after, until the completion of the liquidation. The declaratory relief sought by the Liquidator ignores Part III of the W.U.A./W.U.R.A. and undermines the legislative intent.

   H.M.Q. seems to overlook the difference between claims admissible to proof and claims admitted once proven;

   a) S. 161 establishes the "order of priority for payment of claims": obviously these must have been admitted previously;
   b) S. 162 authorizes the Liquidator to arrange for reinsurance: this is has nothing to do with a proof of claim;
   c) S. 166 and 168 deal with the statement which the Liquidator prepares "without the filing of any claim": he simply makes a list of what is in the books and records of the company and those persons mentioned on the order of collocation have a right to the amount mentioned by the Liquidator, again "without filing any claim". It is only those dissatisfied with the collocation who may file an additional claim.

   None of these sections contradicts s. 71 which, with s. 74 and 75, regulates the filing of claims to be admitted to proof. The Liquidator's conclusion in his contestation does not "undermine the legislative intent".

3. Part III of the W.U.R.A. does not apply to ongoing insurer liquidations because of s. 159.1 of the 1996 amendments. Furthermore, because Part I is subject to Part III, by virtue of s. 9 of the Act, the necessary implication is that if s. 71 of the W.U.R.A. effected a change in the law, it cannot apply to a pending insurer liquidation, such as Kansa.

   It is quite true that the new Part III does not apply to Kansa since its application for a Winding-Up Order was made before June 28, 1996 but that is all that the new s. 159(2) says. If the legislator had intended the new s. 71(1) not to apply to an insurance company, he would have said so.

   The former s. 71(1) applied to an insurance company because it was not in Part III of the W.U.A. For the same reason, the new s. 71(1) also applies to an insurance company.

4. Presumption in favour of the stability of both the common law and the statute law (s. 161 W.U.A./W.U.R.A.) and construction of s. 71

W.U.R.A.: I.B.N.R.s are provable claims in a liquidation and are to be satisfied out of the assets of a liquidating insurance corporation.

Same answer as I gave to question 1.

5. Construction of Statutes: strong presumption against retroactive effect and consideration of accrued/accruing rights, presumption against unfair results, absurdity and in favour of coherence and legislative intent. Therefore S. 153 S.C., 1996, c.6 (Bill C-15) cannot apply retroactively against H.M.Q.

I have already dealt with this matter: the new s. 71.1 does not have a retroactive effect, it simply took effect immediately as of June 28, 1996 and in this connection there is no such thing as an accrued right because, to quote Dickson J. in Gustavson Drilling[12] and Chouinard J. in A.G. (QUE)[13]:

> "The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued."
>
> "No one has a vested right to continuance of the law as it stood in the past"; and
>
> "A vested right does not include a right... which is no longer available under the law".

5a) Specifically on the presumption in favour of coherence, the Liquidator's interpretation of the amendment creates multiple internal inconsistencies and contradictions within the Act; it therefore constitutes a breach of the presumption and must be rejected.

I disagree and part of this argument refers to I.B.N.R.s.

6. Changes to the law do not affect Orders which pre-date them nor can they cause a reinterpretation of an Order made prior to the change.

This argument again deals with I.B.N.R.s.

6a) The adoption of the Liquidator's interpretation of s. 71 W.U.R.A. would require that this Honourable Court presume that the public body charged with developing and administering the Act fundamentally misunderstood its own legislative initiatives and disregarded their consequences.

I disagree.

7. Construction of Bilingual Statutes: the common and shared meaning of S. 71 W.U.R.A. as a bilingual statutory provision does not support the

Liquidator's position and the declaratory relief sought by the Liquidator fails to pay proper regard to the French text of s. 71. f the W.U.R.A., as amended.

I agree entirely with HMQ's quotation of Houlden and Morawetz of what the Court must do if the meaning of one version is not the same as the other's. However, I do not see any difference and even less any contradiction between the French and English versions of s.71. The styles may be different, which is not unusual, but the substance is the same.

This new section reads:

"71. (1) When the business of a company is being wound up under this Act, all debts and all other claims against the company in existence at the commencement of the winding-up, certain or contingent, matured or not, and liquidated or unliquidated, are admissible to proof against the company and, subject to subsection (2), the amount of any claim admissible to proof is the unpaid debt or other liability of the company outstanding or accrued at the commencement of the winding-up.

71. (1) Dans la liquidation des affaires d'une compagnie sous le régime de la présente loi, est admissible contre la compagnie la preuve de créance et de réclamations qui existaient au commencement de la liquidation, qu'elles soient certaines ou assujetties à une condition, exigibles ou non, ou liquidées ou non. Le montant des réclamations admises en preuve constitue, sous réserve du paragraphe (2), à toutes fins utiles une obligation existante au commencement de la liquidation."

HMQ acknowledges that there is no difference between the two until the words "subject to subsection (2)" and "ou liquidées ou non". She adds that: "in the English language section, the words "outstanding or accrued" are used only on the first proposition, not in the final one." This is obviously an error.

My understanding of the wording in English is that for each claim admissible to proof (i.e., existing at the commencement of the winding-up) there is an equivalent debt unpaid at the same date, while the French text says that the counter-part of the total of these claims is an equivalent debt of the company determined also at the commencement of the winding-up.

Assuming that the new s. 71. (1) was drafted in English, it seems clear to me that the French translation is quite correct and states, although in different words, that both an admitted claim and the corresponding debt of the company have to be "in existence at the commencement of the winding-up".

8. The Liquidator is estopped from bringing his argument, nine (9) years after the commencement of the winding-up, and a finding in favour of the Liquidator would be grossly unfair after the Liquidator dealing with policyholders for nine (9) years without ever suggesting to policyholders that their claims would not be dealt with in accordance with the law in effect at the date of liquidation.

The Liquidator has filed five notices under s. 75 W.U.R.A. to the parties herein, two to HMQ on September 2, 1998 and September 13, 2002, one to American Home on August 7, 2000, one to Toronto District School Board on October 24, 2002 and one to Ivaco also on October 24, 2002. They all refer to s. 71(1) as amended and quote its text in full.

On page 70 of Her summary HMQ lists four claims she sent to the Liquidator to which he objected by saying that they are not based on "occurrences or accidents" within the meaning of Kansa's insurance policies or do not constitute "occurrences or accidents which occurred during the policy period stipulated in Kansa's insurance policies".

She goes on to say that the same type of objection was presented against the claims filed by the Toronto District School Board.

She quotes in full, on page 71, a letter dated November 30, 1998 she received from Kansa's claims manager referring to yet another claim which had been sent to him on October 2, 1998. It is worth quoting excepts from this letter:

> Upon review of the documentation received on October 20, 1998 including the subject Statement of Claim, we note the Plaintiff makes the following assertion in the Statement of Claim:
>
> "13. The plaintiff further pleads that it was only in the past two years that he has fully come to appreciate the impact of the said sexual assault upon his life and, more specifically, the nexus between the said assault and the depression, anger and other indicia of the abuse evident in his life."
>
> As your are aware the last insurance policy issued by Kansa to the HMQ, which expired on March 31, 1990, states the following: (citation)
>
> [...]
>
> In view of the preceding and the information provided in the Statement of Claim issued in October 1998 regarding the allegations against the HMQ and the damages allegedly suffered by the Plaintiff, it is evident that the claim does not constitute

> the materialization of a loss during the policy periods covered by the policies issued by Kansa."

It is obvious from those examples given by HMQ Herself that Kansa objected to these claims and to those of the Toronto District School Board because they were not "occurrences or accidents" within the meaning of the policies or because they did not occur during the policy period which expired on or about March 31, 1990, 6 years before the amendment to s. 71.

And yet HMQ concludes with this non sequitur on page 72:

> "From this evidence, its (sic) is apparent, not that the Liquidator concealed the amendments to s. 71 W.U.R.A. to policyholders, but rather that Kansa's policyholders were induced in error by not being told, ahead of time, that the Liquidator would be adopting this interpretation of the amended s. 71 W.U.R.A. or, in other words, that he would not be considering claims that were not reported to him on June 28, 1996, to continue to file and pursue their claims against Kansa.
>
> Policyholders and claimants have relied on the conduct of the liquidation to their detriment in terms of: (a) the costs they have incurred, (b) in terms of not being able to clarify this point at an earlier stage of the proceedings so they could understand what their rights are, and (c) the possibility of pursuing PACICC instead".

How can estoppel lie under the real circumstances? Where is Kansa's fault? Where is the prejudice to claimants? Where is the connection between the two?

38 Arguments 9 and 10 need not be examined.

39 Each Intervenor concurs with HMQ's Summary and adds some argument of its own, two of which, both by American Home, must be answered:

a) The Liquidator's interpretation creates contradictions between s. 71(1) new and sections 161, 162, 166 and 168. This reasoning is vitiated by a failure to note that s. 71(1) refers to claims which may be admissible to proof whereas the other sections refer to claims once they have been admitted. HMQ made the same error and I have already dealt with it.

b) The Liquidator's interpretation of s. 71. (1) contradicts the Order which was endorsed on August 2, 2001 on the first page of the Notice under S. 75

which the Liquidator had served on American Home on/or about August 2, 2001. This Order reads:

> "On or before October 4, 2001, American Home Assurance Company shall file with the Liquidator of Kansa a proof of claim in respect of all its claims against Kansa of which it had knowledge or should reasonably have had knowledge as of September 20, 2001."

Without going into the reasons for this Order which was rendered by consent of both parties and shows once again that the Liquidator is usually ready to grant the delays which claimants may ask,

this again does not show any contradiction: "any claim of which American Home has or should have knowledge as of September 20, 2001" does not mean that such a claim will be admitted, but only that American Home may present it to the Liquidator for his decision.

40 In February 1995, the Department of finance tabled in Parliament a "white paper" intended to bring up to date various federal financial institutions and to explain the various modification proposed to several statutes including the Winding-up Act and the Canada Deposit Insurance Corporation Act.

On page 46, there is reference to s. 71 of the W.U.A. which reads:

"S. 71 - What debts may be proved

Amendment:	Provide expressly that claims are to be calculated as of the date of the commencement of the winding-up.
Explanation:	The Winding-up Act does not state whether creditor's claims are to be proved as of the date the winding-up order is made or the date the winding-up commenced. This amendment will clarify the question."

On page 58, several subparagraphs of s. 14 of the CDIC Act read:

"S.s 14 (2.3) Conformity with the Winding-up Act

and 14 (2.5.1)

Amendment:	Clarify that where the CDIC Act refers to the payment of interest (including the case of discretionary payments), such a payment shall be included in the payout only to the date of notice of the petition to wind-up.
Explanation:	Currently, the relevant date is the date of a winding-up order. This amendment will bring the CDIC Act in conformity with the Winding-up Act.

S. 14 (2.9) Conformity with the Winding-up Act

Amendment:	Add a new provision to clarify that "insurance" is to be measured at the date of notice of the petition to wind-up.
Explanation:	This modification will assist CDIC in preventing problems regarding the aggregation of principal sums on payout and will assist the Corporation in its proof of claims."

The intent of the legislator is clearly expressed: there will be conformity with s. 121 (1) of the Bankruptcy Act, claims under the W.U.R.A. are to be calculated as of the date of the commencement of the winding-up and the CDIC Act will include the same provisions in order to conform with the W.U.R.A.

41 The proposed amendments were incorporated in the Act of 1996[14] and are meant to bring these various federally regulated financial institutions on the same footing.

42 This makes particularly good sense in matters of insolvency legislation where there has to be a defined beginning and a defined end of the existence of debts.

If a creditor can only file a proof of claim for a debt which existed on the date the bankrupt became bankrupt or which arose later but due to an obligation existing before the aforementioned date, why should a creditor in a winding-up a file not be restricted also to those debts which existed on the date the petition for winding-up was filed?

43 As for the similarity of actions to close these files, the trustee publishes a notice to all creditors when authorized to do so by the inspectors and the Liquidator sends a general call for claims when ordered to do so by the Court.

44 The fundamental intent of the legislator has been clearly enunciated in the case of Coopérants Life Insurance Society v. Dubois[15], where Gonthier J., for the Court, writes at page 915:

> "It is necessary to refer to the purpose of the statute in this regard.
>
> In Re J. McCarthy & sons co. of Prescott Ltd. (1916), 38 O.L.R. 3, at p. 9, the Ontario Court of Appeal described this purpose as follows:
>
> > The purpose of the Act is to wind up, finally, the affairs of the company as inexpensively and speedily as possible, in the interests of the creditors, and all others concerned in it, primarily; and, for the common good, all are equally deprived of some of their ordinary rights, including a right of action, and all that may follow upon that right, such as mode of trial, right of appeal, etc., and all are confined to the remedies which the Act provides or permits.
>
> The purpose of the statute is to arrange for the closing down of the company's business in an orderly and expeditious manner while minimizing, as far as possible, the losses and harm suffered by both the creditors and other interested parties and by distributing the assets in accordance with the Act."

45 One last comment. In the case of Kansa General International Insurance Co. (Liquidation of)[16] Beauregard J. for the majority wrote on page 1584:

> "[7] Le devoir d'un liquidateur est de liquider le plus rapidement puisqu'en marge de toute liquidation il y a des créanciers qui attendent d'être payés.
>
> [8] Il y a plus de trois ans et demi que le liquidateur de Kansa General International Insurance Company Ltd. a demandé à la province de l'Ontario

de faire valoir devant le tribunal les droits qu'elle prétend avoir aux termes d'une police d'assurance-responsabilité contre Kansa.

[9] L'Ontario n'a pas encore accepté l'invitation du liquidateur.

[10] Il faut se lever de bon matin pour être capable de suivre les nombreux actes de procédure des parties et leurs répétitions."

This decision was rendered on May 30, 2002. That was over two years ago. We do not seem to be much further ahead.

FOR THESE REASONS, THE COURT:

DISMISSES Petitioner's Motion for Clarification; WITH COSTS.

DISMISSES the conclusions of American Home Insurance Company's intervention praying to maintain Petitioner's Motion and to dismiss Respondent's contestation; WITH COSTS.

DISMISSES the conclusions of The Toronto District School Board's intervention praying to maintain Petitioner's Motion and to dismiss Respondent's contestation; WITH COSTS.

DISMISSES the conclusions of Ivaco Inc.'s intervention praying to maintain Petitioner's Motion and to dismiss the Respondent's contestation; WITH COSTS.

GRANTS Respondent's contestation; WITH COSTS; and

DECLARES that all debts and all other claims against Kansa in Canada in existence as at March 3, 1995, certain or contingent, matured or not, and liquidated or unliquidated, are admissible to proof against Kansa in Canada and (subject to subs. (2) of s. 71 of the Winding-up and Restructuring Act) the amount of any claim admissible to proof is the unpaid debt or other liability of Kansa in Canada outstanding or accrued at the aforementioned date.

ROLAND DURAND, J.S.C.

cp/i/qw/qlnep/qllfr/qlhcs

1 R.S.C. [1985] ch. W.-11.

2 R.S.C. [1985], ch. W-11.

3 45 Elizabeth II, ch. 6.

4 [1977] 1 S.C.R. 271.

5 [1986] 1 S.C.R. 732.

6 [1989] 1 S.C.R. 880.

7 [1989] 1 S.C.R. 839.

8 33 C.B.R. (4th), page 145.

9 [2004] 231 D.L.R. (4th) 353.

10 [2004] 44 C.B.R. (4th) 198.

11 R.S.C. [1985], ch. B-3.

12 supra, note 3.

13 supra, note 4.

14 supra, note 3.

15 [1996] 1 S.C.R. 900.

16 [2002] R.J.Q. 1581.

TAB 2

2003 CarswellOnt 2523
Ontario Superior Court of Justice

Canada (Attorney General) v. Confederation Trust Co.

2003 CarswellOnt 2523, [2003] O.J. No. 2754, 44 C.B.R. (4th) 198, 65 O.R. (3d) 519

IN THE MATTER OF CONFEDERATION TRUST COMPANY

AND IN THE MATTER OF THE TRUST AND LOAN COMPANIES ACT, S.C. 1991, C.45

AND IN THE MATTER OF THE WINDING-UP ACT, R.S.C. 1985, C. W-11, AS AMENDED

THE ATTORNEY GENERAL OF CANADA (Applicant) and CONFEDERATION TRUST COMPANY (Respondent)

Blair R.S.J.

Heard: April 17, 2003
Judgment: June 27, 2003
Docket: 97-CL-000543A

Counsel: Robb C. Heintzman, C.D. Mathias for PricewaterhouseCoopers Inc., Liquidator for Confederation Trust Company
Graham Smith, Gale Rubenstein for KPMG Inc., Liquidator for Confederation Life Insurance Company
Michael J. MacNaughton for Canada Deposit Insurance Corporation

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Corporations --- Winding-up — Under Dominion Act — Claims of creditors — Miscellaneous issues

Corporation in liquidation unexpectedly had surplus available for distribution — Winding-up and Restructuring Act was amended after liquidation commenced to allow for payment of post-liquidation interest — Act was silent as to method of calculation of interest — Liquidator applied for directions respecting payment of interest — Directions were provided — Payment of interest did not involve retroactive application of Act — Claimants' right to interest at time of liquidation was conditional upon there being surplus after payment of all debts — Liquidation was ongoing and existence of surplus was unknown at time of amendment — Application of Act to continuing fact situation had immediate effect — Surplus was to be applied first to payment of interest and then to payment of principal — Claimants were entitled to be placed in same position as they would have been if debts had been paid on date of winding-up — Alternative would result in unfair windfall for shareholders.

Table of Authorities

Cases considered by *Blair R.S.J.*:

Bower v. Marris (1841), Cr. & Ph. 351, 41 E.R. 525 (Eng. Ch.) — referred to

Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1993), 11 Alta. L.R. (3d) 371, 21 C.B.R. (3d) 12, [1993] 7 W.W.R. 607, 143 A.R. 266, 1993 CarswellAlta 423 (Alta. Q.B.) — considered

Downey v. Maes (1992), 8 O.R. (3d) 440, 1992 CarswellOnt 1102 (Ont. Gen. Div.) — distinguished

Humber Ironworks & Shipbuilding Co., Re (1869), 4 Ch. App. 643 (Eng. Ch. Div.) — considered

Illingworth v. Elford (1996), 1996 CarswellOnt 2978 (Ont. Gen. Div.) — distinguished

In re Cardelucci (2002), 285 F.3d 1231 (U.S. C.A. 9th Cir.) — referred to

In re Fine Industrial Commodities Ltd. (1955), [1956] Ch. 256 (Eng. Ch. Div.) — referred to

McDougall, Re (1883), 8 O.A.R. 309 — referred to

McGregor v. Gaulin (1848), 4 U.C.Q.B. 378, 1848 CarswellOnt 27 (U.C. Q.B.) — referred to

Robertson v. Carlile Ltd. (1949), 30 C.B.R. 60, [1949] 1 W.W.R. 903, (sub nom. *Robertson v. Carlisle Ltd.)* [1949] 2 D.L.R. 525, 1949 CarswellAlta 4 (Alta. C.A.) — referred to

Wasserman, Arsenault Ltd. v. Sone (2000), 2000 CarswellOnt 4934, 22 C.B.R. (4th) 153 (Ont. S.C.J. [Commercial List]) — referred to

Wasserman, Arsenault Ltd. v. Sone (2002), 2002 CarswellOnt 989, 157 O.A.C. 183, 33 C.B.R. (4th) 145 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Canada Deposit Insurance Corporation Act, R.S.C. 1985, c. C-3
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

s. 128 — referred to

s. 130 — referred to

Trust and Loan Companies Act, S.C. 1991, c. 45
Generally — referred to

Winding-up Act, R.S.C. 1970, c. W-10
Generally — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

Pt. III — referred to

s. 95 — considered

s. 95(1) — referred to

s. 95(2) [en. 1996, c. 6, s. 155] — considered

APPLICATION by liquidator under Winding-up and Restructuring Act for directions respecting payment of post-liquidation interest.

Blair R.S.J.:

"This is a curious point which cannot often have arisen and is not likely to arise with any frequency hereafter. The strange feature of the case is that a company in the process of being wound up on the footing that it was an insolvent company now finds itself in the position, in the person of its liquidator, being in possession of a substantial surplus" [1]

Overview

1 Such is the case here.

2 Confederation Trust Company is in liquidation. Its Liquidator reasonably expects, however, that after all contested claims have been resolved there will be about a $30 million surplus available for distribution following the payment in full of all proper claims against the estate.

3 This application involves a fight over the quantum of interest to be paid out of that surplus, and the method by which such payments, if any, are to be calculated. The Liquidator for Confederation Trust, PricewaterhouseCoopers Inc., makes the following recommendations to this Court and seeks declaratory relief accordingly. It recommends:

a) that the holders of all proper claims against Confederation Trust's estate receive out of any surplus, post-liquidation interest on the outstanding balances of their claims for the period from the date of liquidation (August 14, 1994) to the date on which final payment of the full principal amount of their claims is made;

b) that post-liquidation interest be paid at the rate provided for in any contract between a creditor of the estate and Confederation Trust or, in the absence of any contractual provision, at the rate provided for in the *Courts of Justice Act* [2]; and,

c) that, depending on the amount of the available surplus, distributions to creditors should first be made on account of interest and thereafter on account of the principal balances of their claims, all as more particularly set out in the Liquidator's Reports No. 36 and No. 36A.

4 The Liquidator's recommendations are opposed by KPMG Inc., the Liquidator of the estate of Confederation Life Insurance Company, and by Canada Deposit Insurance Corporation.

5 Confederation Life is the 100% indirect parent of Confederation Trust, as well as a significant creditor. In its parental capacity, it thus stands to benefit to the extent that a greater portion of the Confederation Trust surplus is available for distribution to the insolvent corporation.

6 Canada Deposit Insurance Corporation ("CDIC") is Confederation Trust's largest creditor. It has a subrogated claim against the estate by reason of having complied with its obligations under the *Trust and Loan Companies Act* [3] to guarantee the payment of Confederation Trust's deposits.

7 What is at issue in this application is,

(a) whether post-liquidation interest is payable out of the surplus in accordance with subsection 95(2) of the *Winding-up and Restructuring Act*,[4] (at 5% per annum) or in accordance with a combination of contractual and "pre-judgment interest" type of rates; and,

(b) whether surplus payments are to be made to claimants based upon a "payment of interest first" or a "payment of principal first" methodology.

8 Depending upon the answers to these questions, the parties calculate the range of payments to claimants to be between about $4.5 million and $35.5 million. The answers are therefore of some significance both to the claimant creditors of Confederation Trust and to Confederation Life and CDIC, as the beneficiaries of the return of any surplus to the insolvent company.

Facts

9 Confederation Trust - together with its parent Confederation Life - was placed in liquidation under the *Winding-up Act* in August 1994. The liquidator of Confederation Trust was required to realize upon the property of two types of funds, one known as the "Guarantee Fund", the other as the "Company Fund".

10 The Guarantee Fund was comprised of property held by the Company in trust for depositors. These deposits were in the form of guaranteed investment certificates (the "Deposit Certificates") issued by Confederation Trust to investors. They constituted "guaranteed trust funds" under the *Trust and Loan Companies Act* and were insured by CDIC. They were for varying terms and called for repayment of principal on the stipulated maturity dates. Interest was payable on each of the deposits at the rate set out in the Deposit Certificates to their date of maturity, but none provided for interest after maturity. Each Deposit Certificate stated that Confederation Trust "guarantees payment of interest at the rate and terms shown from the date of issue to the date of maturity [but Confederation Trust] will not be liable for interest after maturity date".

11 The balance of Confederation Trust's assets consisted of its own property and comprised what is known in the liquidation as the Company Fund.

12 On February 23, 1995, the Court approved a scheme of distribution for the Guaranteed Fund and, as well, a first distribution out of that Fund. In August 1997, a claims procedure was approved respecting the Company Fund claims. By order dated April 22, 1998, a fifth and final distribution from the Guarantee Fund was approved, and the shortfall claims were admitted as claims against the Company Fund.

13 This was followed in April 2000 by what is known as "the Co-operation Agreement" between Confederation Life and CDIC, whereby they settled their respective claims as creditors of Confederation Trust. This settlement broke the log jamb in the Confederation Trust liquidation and facilitated the payment of 100 cents on the dollar to Company Fund claimants on account of their proven claims, together with the payment of post-liquidation interest. Under the Cooperation Agreement, Confederation Life and CDIC have agreed, as between themselves, on a split of the surplus proceeds. CDIC therefore finds itself in the position of supporting Confederation Life in its opposition to the recommendations put forward here by the Liquidator of Confederation Trust.

14 By order dated January 30, 2001, the Court authorized an interim payment of post-liquidation interest at the rate of 5% on the proven claim amounts of all admitted claims against the Company Fund, on deposits determined by CDIC to be uninsured, and to CDIC with respect to the amounts paid by it on account of insured deposits.

Analysis

Subsection 95(2)

15 To answer the questions posed above, it is necessary, in the first place, to determine whether or not subsection 95(2) of the *Winding-up and Restructuring Act* (the "Act") applies to the Confederation Trust liquidation.

16 Prior to the enactment of subsection 95(2) in 1996, the *Winding-up Act* did not contain any provision for the payment of post-liquidation interest. Section 95 (now subsection 95(1)) read as follows:

> The Court shall distribute among the persons entitled thereto any surplus that remains after the satisfaction of the debts and liabilities of the company and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the *Act*, charter or instrument of incorporation of the company, any property or assets remaining after the satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company.

17 In 1996, at the same time as the Act was renamed the *Winding-up and Restructuring Act*, subsection 95(2), providing for the payment of interest out of surplus, was added. It states:

> Any surplus referred to in subsection 95(1) shall first be applied in payment of interest from the commencement of the winding-up at the rate of 5% per annum on all claims proved in the winding-up and according to their priority.

18 KPMG Inc., as Liquidator of the Confederation Life estate, and CDIC contend that subsection 95(2) applies to the Confederation Trust liquidation. PricewaterhouseCoopers Inc., as Liquidator of the Confederation Trust estate, contends that it does not.

19 Counsel for PricewaterhouseCoopers Inc. submits that subsection 95(2) does not have retroactive effect and therefore does not apply to the Confederation Trust liquidation because it came into effect after August 14, 1994, the date of liquidation (the "Liquidation Date"). In this respect he relies upon two rebuttable presumptions of statutory interpretation, namely, the presumption against retroactivity and the presumption against interfering with vested rights. Parliament has not expressly stated its intentions regarding the retroactive impact of the amendment, he says, and the right to assert a claim is not to be adversely affected by a statute that comes into force after the right to assert the claim arises, in the absence of sufficient evidence of Parliament's intention to the contrary. Here, he submits, there is no sufficient evidence to the contrary and the creditors' rights to assert their claim for interest arose as at the Liquidation Date, the date as of which the validity of all claims and the rights of all claimants are to be determined. The amendment, therefore, cannot interfere with those vested rights.

20 In rebuttal, the Respondents make three submissions. First, they argue Parliament has indicated its intention in the language of subsection 95(2). When read in the context of other provisions in the Act, namely, the express choice to provide in Part III that other amendments applying to the winding-up of insurance companies would operate *only* prospectively, thus signaling that provisions such as subsection 95(1), which are not limited to applying only prospectively, were to apply retroactively as well. Secondly, they claim that subsection 95(2) has immediate effect in the circumstances of this case because it is being applied to an incomplete and continuing fact situation - the ongoing liquidation of the Confederation Trust estate - and therefore does not have any retroactive effect at all. Finally, the Respondents submit that claimants cannot be said to have acquired a "vested right" to post-liquidation interest as at the Liquidation Date because the existence and extent of any surplus is uncertain and contingent, and cannot be determined until the end of the liquidation process - a point in time *after* the enactment of subsection 95(2), in the circumstances of this case.

21 At common-law the "interest stops" rule applied in winding-up proceedings. The rule provided that interest on provable claims stops as at the commencement of the winding-up and that no interest is payable on claims from that date forward, unless there is a surplus in the estate. In the event of a surplus, post-liquidation interest was payable on debts in respect of which there was a right to interest prior to the liquidation. That right could arise contractually, or by virtue of a course of conduct or a judgment, or by some statutory provision. In the absence of such a right, however, no interest was payable for the period following the commencement of the liquidation. See *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), at 645-647; *Bower v. Marris* (1841), Cr. & Ph. 351 (Eng. Ch.); *Robertson v. Carlile Ltd.*, [1949] 2 D.L.R. 525 (Alta. C.A.); *McDougall, Re* (1883), 8 O.A.R. 309; O'Donovan J., *The Law of Company Liquidation*, 3d ed. (1987) at 368-369.

22 Thus, even without specific reference to post-liquidation interest in winding-up legislation, there *were* circumstances at common-law where such interest could be paid out of surplus. Indeed, it is not contested that, in the Confederation Trust context, the claimants are entitled to *some* post-liquidation interest out of the surplus liquidation proceeds. On consent, the

Court approved payment of such interest, on an interim basis, at the rate of 5% by Order dated January 30, 2001. The dispute is over whether the interest is to be paid in accordance with the provisions of subsection 95(2), or on some other basis, and whether the surplus proceeds should be applied utilizing an "interest first" or a "principal first" focus as a starting point.

23 In addition to the common-law exception, PricewaterhouseCoopers Inc. argues that the Court has power to authorize the payment of post-liquidation interest to those claimants who do not have a contractual or other right to interest existing at the Liquidation Date, on the basis of its power under ss. 128 and 130 of the *Courts of Justice Act* to award pre-judgment interest. It is the combination of this power plus the exceptional power of the courts at common-law that forms the basis for the recommendation that post-liquidation interest should be payable at the rates provided for in the Deposit Certificates to their dates of maturity and at the *Courts of Justice Act* rates thereafter.

24 It is not necessary to pursue this line of enquiry further, however, because subsection 95(2) of the *Winding-up and Restructuring Act* applies to the Confederation Trust liquidation, in my opinion.

25 To say this is not to give the provision retroactive effect. Although it is not free from doubt, I do not accept the contention that the Claimants acquired a vested right to post-liquidation interest at the Liquidation Date. In my opinion, they acquired, at best, a contingent right to the payment of post-liquidation interest conditional upon there being a surplus in the liquidated estate after payment of all the Company's debts and obligations and of the costs associated with the liquidation. The condition cannot be determined and satisfied until the liquidation of the estate is at least substantially completed.

26 Here, the liquidation of the Confederation Trust estate was active and ongoing, and far from substantially completed in June 1996, when the amendment adding subsection 95(2) to the *Act* came into effect. It was not known at that time there would be a surplus. The processing of the estate was a continuing fact situation, and the application of a law that comes into effect during such a situation has "immediate", as opposed to "retroactive" effect.

27 In *Wasserman, Arsenault Ltd. v. Sone* [5], the Ontario Court of Appeal upheld a decision of Farley J. holding that a guardian appointed by the Superintendent of Bankruptcy under the *Bankruptcy and Insolvency Act* (the "BIA") [6] to complete the administration of a complicated series of estates was entitled to priority for its fees over the claim of a prior trustee in bankruptcy [7] for its fees. The BIA had been amended to provide specifically for such priority, but the amendment came into force after the prior trustee had substantially completed its work on the estates. The argument that to give priority to the guardian's claim would be to give the amendment retroactive application was rejected. The following passage from the judgment of Weiler J.A., at pp. 158-159 explains why, and the principles enunciated there apply equally to the winding-up of the Confederation Trust estate, in my opinion:

> The appellant alleges, secondly, that Farley J. applied s. 136(1)(b) [of the BIA] retroactively. Section 136(1)(b), which gives priority to the fees of a person acting under the direction of the Superintendent over the trustee, came into force on September 30, 1997. Prior to this amendment the expenses of a trustee had first priority. Rumanek submits that on a number of files its work was substantially completed, with only certain procedural or administrative steps remaining, and that it had a vested right to payment for these files prior to the coming into force of s. 136(1)(b). Accordingly, Rumanek submits that it is entitled to payment on these files in priority to the Guardian, and that Farley J. erred in not recognizing this.
>
> The commentary in *Driedger on the Construction of Statutes*, 3rd ed. (1994) at p. 517 is helpful in dealing with this submission. It states:
>
> > Legislation clearly is retroactive if it applies to facts all of which have ended before it comes into force. Legislation clearly is prospective if it applies to facts all of which began after its coming into force. But what of on-going facts, facts in progress? These are either continuing facts, begun but not ended when the legislation comes into force, or successive facts, some occurring before and some after commencement. The application of legislation to on-going facts is not retroactive because, to use the language of Dickson J. in [*Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271], there is no attempt to reach into the past and alter the law or the rights of persons as of an earlier date.

> The application is prospective only to facts in existence at the present time. Such an application may affect existing rights and interests, but is not retroactive.
>
> Legislation that applies to on-going facts is said to have "immediate effect". Its application is both immediate and general: "immediate" in the sense that the new rule operates from the moment of commencement displacing whatever rule was formerly applicable to the relevant facts, and "general" in the sense that the new rule applies to all relevant facts, on-going as well as new.

I agree with Farley J. that these files should be viewed as a continuing fact situation. Rumanek ceased its work prior to the enactment of s. 136(1)(b), but the files were not complete by that date. They were on-going in varying degrees. The Guardian was appointed to complete the administration of these files. Certificates of completion had not been filed. Strictly speaking, there is no entitlement to compensation and hence no vested right to payment until a certificate of completion has been filed. It is at the time of payment that priority is determined and, hence, the application of s. 136(1)(b) does not have retrospective effect. Rumanek does not have a vested right to any fees or disbursements arising from the completion of the Sone estates by the Guardian. Farley J. did not err in his appreciation of s. 136(1)(b).

(Underlining added.)

28 Similarly, in this case, the winding-up of the Confederation Trust estate may be "viewed as a continuing fact situation" that is "on-going in varying degrees". There is no entitlement to post-liquidation interest on the part of the Claimants unless and until a surplus emerges in the estate, and hence there is "no vested right to payment" of such interest until that condition of entitlement has been satisfied. Thus, subsection 95(2) of the *Winding-up and Restructuring Act* applies to the situation because it has "immediate" and not "retroactive" effect in the circumstances.

The Calculation of Interest under subsection 95(2)

29 The traditional rule in insolvency situations is that dividends are to be applied first to the payment of interest and then to the payment of principal. This is said to prevent injustice, promote equity amongst the creditors, and protect the contractual relationship between the parties. See *Bower v. Marris* at 527-528; *Humber Ironworks & Shipbuilding Co., Re, supra*, at 645. PricewaterhouseCoopers Inc. submits the traditional rule should be applied to the payment of post-liquidation interest pursuant to subsection 95(2). The Respondents contest this interpretation of the provision and contend for the reverse methodology.

30 There is nothing in the language of s. 95 of the *Winding-up and Restructuring Act* itself to indicate that Parliament intended to alter this traditional methodology in the case of a post-liquidation surplus. The Respondents submit, however, that post-liquidation interest is only payable after payment in full of all proven claims and that there is nothing in the legislation to suggest a recalculation is to be done regarding distributions already made (which would be necessary if the interest portion of the surplus is to be distributed on a "payment of interest first" basis). Section 95 therefore mandates that distributions are to be credited, first, to the proven claim amounts, they say. Consistent with its choice of a common and consistent rate of interest (5%), Parliament has chosen not to differentiate between claimants based upon the composition of claims as between principal and interest. Such a methodology is also consistent with the statutory regime of pre-judgment interest under provincial legislation, where interim payments are credited towards payment of unliquidated claims for damages first, then to interest: see, for example, *Downey v. Maes* (1992), 8 O.R. (3d) 440 (Ont. Gen. Div.); *Illingworth v. Elford*, [1996] O.J. No. 2893 (Ont. Gen. Div.).

31 *Downey v. Maes* and *Illingworth v. Elford*, though, involved the affect of pre-payments on the calculation of pre-judgment interest in insurance cases involving claims for unliquidated damages. In my view, this principle is not of much assistance in considering the methodology for calculating interest payments out of a surplus in a winding-up proceeding. Claims proven in a liquidation are for the most part liquidated claims, arising out of a debtor-creditor relationship. In the case of the claims proven against the Confederation Trust Guaranteed Fund, they were all liquidated. Absent a stipulation as to the manner of allocation of payments on a debt - by agreement, course of conduct, or statute - the general rule in debtor-creditor relationships is the same as the general rule in insolvency situations, namely that payments are credited on account of interest first, then principal: see *McGregor v. Gaulin* (1848), 4 U.C.Q.B. 378 (U.C. Q.B.), per Robinson C.J. at 384.

32 I see no reason why s. 95 should be interpreted in a fashion that departs from the traditional approach. The general purpose of winding-up legislation is to ensure the rateable distribution of the assets of the insolvent company, in accordance with the creditors' priorities. In the rare circumstance of a winding-up surplus, creditors who have proven their claims ought to be placed - as closely as the surplus permits - in the same position they would have been in if the proven claims had been paid on the date of the winding-up. The comments of Wachowich A.C.J. (as he then was) in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1993), 21 C.B.R. (3d) 12 (Alta. Q.B.), at 24, are apt:

> The passage of time alone should not alter the ratio of the funds available to the different classes of creditors. In the present circumstances, the priority creditors have been deprived of their funds for nearly a decade. As Mutual Life pointed out, the unsecured creditors as a class will be enriched with every passing year of delay in the distribution of the estate. One might add to Lord Selwyn's statement [8] "that no person should be prejudiced by the accidental delay which, in consequence of the form and proceedings of the Court and other circumstances, actually occur in realizing the assets" a further caution: no person should be so prejudiced by such delay in the *distribution of assets*. (Emphasis in original.)

33 In the circumstances of this case, it is not so much the unsecured creditors who will be enriched by the passing of time as it is Confederation Life in its capacity as the 100% indirect shareholder of Confederation Trust (and CDIC, as a result of the Co-operation Agreement between it and Confederation Life). While I agree with the Respondents' submission that there is no inherent policy or goal of maximizing post-liquidation interest so as to minimize any recovery to the debtor or the shareholder of the debtor pursuant to subsection 95(1) of the *Winding-up and Restructuring Act*, I do not see why the insolvent company and its shareholders should receive a windfall out of the insolvency before the Claimants have been made as whole as possible in the circumstances. I am satisfied that "the interests of fairness, equality and predictability" amongst the creditors and as between the debtor company and its creditors, call for the application of the generally accepted rule for the allocation of payments made: see *In re Cardelucci* [(2002), 285 F.3d 1231 (U.S. C.A. 9th Cir.)], 2002 U.S. App. LEXIS 6770, at p. 2.

34 In its Report 36A, PricewaterhouseCoopers Inc. has calculated the post-liquidation interest payable from the available surplus, depending upon various assumptions respecting the rate and methodology to be applied. On the assumption that subsection 95(2) applies and that the applicable rate is 5%, the Liquidator calculates the total post-liquidation interest payable in respect of all admitted claims to be as follows:

a) $4,459,032, if distributions are applied first on account of principal; and,

b) $17,866,181, if distributions are applied first on account of post-liquidation interest and then on account of principal.

35 The Liquidator estimates the surplus available for the payment of post-liquidation interest will be approximately $30 million.

Conclusion and Disposition

36 I therefore conclude that the Confederation Trust surplus should be applied first (before the distribution of any remaining surplus to the shareholders) towards the payment of interest at the rate of 5% per annum on all claims proved in the winding-up in accordance with their priority. The post-liquidation interest is to be calculated on the basis of a "payment of interest first" methodology which, according to the Liquidator, leads to an additional payment to creditors in the aforesaid amount of $17,866,181.

37 It is not clear to me from the materials whether the foregoing amount includes the payment of post-liquidation interest in respect of what the parties have referred to as the "Stub Period". The Stub Period represents the time between the Liquidation Date and the date on which CDIC satisfied its obligations under the CDIC Act to Depositors in respect of insured deposits. The Insured Depositors retain their claims against Confederation Trust for post-liquidation interest for the Stub Period and should, in my opinion, be treated in the same fashion as all other claimants against the Confederation Trust estate.

38 There will therefore be an Order,

a) declaring that post-liquidation (being interest on valid claims against Confederation Trust Company in respect of the period following the issuance of the Order winding-up the Company) is payable on all Court-approved Guaranteed Fund and Company Fund claims (as defined in the Liquidator's Report No. 36);

b) authorizing the Liquidator of Confederation Trust Company to allocate payments to Claimants as between principal and post-liquidation interest in the manner described in paragraph 11 of Report No. 36;

c) authorizing the Liquidator of Confederation Trust Company to calculate post-liquidation interest in accordance with the provisions of subsection 95(2) of the *Winding-up and Restructuring Act* and on a "payment of interest first" methodology, as set out in Column 1B of Schedule B to the Liquidator's Report No. 36A.

39 If costs are an issue I may be spoken to in that regard.

Order accordingly.

Footnotes

1 *In re Fine Industrial Commodities Ltd.* (1955), [1956] Ch. 256 (Eng. Ch. Div.), per Vaisey J. at 260.

2 R.S.O. 1990, c. C.43, as amended.

3 S.C. 1991, c.45, as amended.

4 R.S.C. 1985, c. W-11, as amended by S.C. 1966, c. 6, s. 155. The *Winding-up Act* was renamed the *Winding-up and Restructuring Act* in 1996.

5 (2002), 33 C.B.R. (4th) 145 (Ont. C.A.), at p. 158, affirming 2000 CarswellOnt 4934, 22 C.B.R. (4th) 153 (Ont. S.C.J. [Commercial List]).

6 R.S.C. 1985, c. B-3, as amended

7 Also appointed by the Superintendent in Bankruptcy.

8 *Humber Ironworks & Shipbuilding Co., Re (sub. nom. Warrant Finance Company's Case), supra*, at 645-646.

TAB 3

Case Name:

Kansa General International Insurance Company Ltd. et Alfieri

IN THE MATTER OF THE WINDING-UP OF: KANSA GENERAL INTERNATIONAL INSURANCE COMPANY LTD., debtor
and
FERDINAND ALFIERI, liquidator-petitioner
and
AMERICAN HOME ASSURANCE COMPANY, respondent-cross petitioner

[2003] Q.J. No. 14726

J.E. 2003-1804

No.: 500-05-002760-955

Quebec Superior Court
District of Montreal

The Honourable Roland Durand J.S.C.

August 28, 2003.

(29 paras.)

Counsel:

Eugène Czolij (Desjardins, Ducharme, Stein, Monast), for the debtor and the liquidator.
Nicholas J. Krnjevic (Robinson, Sheppard, Shapiro), for the respondent.

JUDGMENT

1 The Respondent, (American Home) in answer to the Liquidator's "Motion to bar certain claims", has moved for permission to examine on discovery a representative of the debtor. The motion is based on three main grounds:

> "a. the contestation of its proof of claim that the Liquidator has served on it gives no clear indication on what defect it is based;

b. section 109 of the Winding-up and Restructuring Act (WUA)[1] clearly authorizes such discovery; and

c. fundamental principles of fairness and natural justice militate in favour of such an application."

2 The Liquidator who has served a Notice under section 75 WUA upon American Home, three years ago, and feels that he has contested with sufficient particulars the proof of claim filed in this matter, argues that American Home is estopped from presenting its motion not only because sections 109, 116, 118 and 122 do not apply in the circumstances, but also because American Home does not have, to quote its motion "the unfettered right to conduct the equivalence of an Examination After Plea of a representative of Kansa". The sections referred here read:

75. (1) The liquidator may give notice in writing to creditors who have sent in their claims to him or of whose claims he has notice, and to creditors whose claims he considers should not be allowed without proof, requiring them to attend before the court on a day to be named in the notice and prove their claims to the satisfaction of the court.

(2) Where a creditor does not attend in pursuance of the notice given under subsection (1), his claim shall be disallowed, unless the court sees fit to grant further time for the proof thereof.

(3) Where a creditor attends in pursuance of the notice given under subsection (1), the court may on hearing the matter allow or disallow the claim of that creditor in whole or in part.

109. The proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding within the jurisdiction of the court.

116. In any action, suit, proceeding or contestation under this Act, the court may order the issue of a writ of supoena ad testificandum or of subpoena duces tecum, commanding the attendance, as a witness, of any person who is within Canada.

118. A court may, after it has made a winding-up order, summon before it or before any person named by it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company or supposed to be indebted to the company or any person whom the court deems capable of giving information concerning the trade, dealings, estate or effects of the company.

122. The court or a person named by it may examine, on oath, either by oral or written interrogatories, any person appearing or brought up in the manner described in section 119, concerning the affairs, dealings, estate or effects of the company, and may reduce to writing the answers of the person and require him to subscribe the answers.

3 A review of the events in this file is quite instructive:

- August 7, 2000: American Home is served with a Notice under section 75 and required to attend before the court on September 7, 2000;
- August 29: American Home's attendance is postponed to September 29;

- September 29: American Home advised it must file a complete proof of claim with the Liquidator no later than 30 November;
- February 8, 2001: delay to file claim postponed to March 1st.
- March 1st: delay postponed to April 20 "without prejudice to American Home's right to file Petition to obtain informations from Liquidator".
- Delay postponed to June and then to August.
- August 2: delay to file postponed to October 4.
- October 2nd: in view of the events of September 11, delay finally set for October 16.
- October 16, 2001: American Home does serve its proof of claim on the Liquidator.

It is to be noted that all the postponements, except the last one, were granted at the request of American Home, who apparently had great difficulty gathering the necessary information.

4 On February 28, 2002 the Liquidator serves a Notice of Contestation to American Home of all the claims mentioned in its proof of claim, which, it must be said, is very elaborate and contains a wealth of information about what is referred to as "crystallized re-insurance claims" and "contingent insurance claims".

5 American Home does not answer this contestation and on August 2, 2002, the Liquidator serves it with a Motion to bar claims due to this failure not only to answer the contestation, but to request a hearing from the court to decide whether to allow or disallow its claim.

6 This motion is presentable on August 9 but, again at the request of American Home, is postponed to September 6, then September 13, then October 22 and finally November 12, 2002, when it is argued before me.

7 The parties are authorized to file notes and authorities with the right of reply and the last one is delivered to me on April 22, 2003.

8 The two factums presented by the attorney for American Home, and the one he prepared in rebuttal to the one filed by the attorney for the Liquidator, are researched very thoroughly and are very interesting, but I believe they do not help his arguments not only because none of the references to judgments involving insurance companies, which were mostly delivered in the United States, do not involve an insurance company which is in liquidation but also because in the decision of the B.C. Court of appeal in the case of Canada Deposit Insurance Corp. v. Commonwealth Trust Co. (in Liquidation), the determination of the scope of section 109 is based on a set of facts quite different from those in the present case and relies specifically on two different rules of the B.C. Supreme court which provide for the filing of affidavits and of various documents.

9 In my opinion, the sections of the WUA cited above, except for section 75 of course, and the rules of the B.C. Supreme court, apply to a third party but not to the Liquidator himself.

10 In Re Sovereign Bank of Canada, Newman's Case[2], Boyd J. writes, at page 761:

> "Section 117 (now section 118) of the Winding-up Act, R.S.C. 1906, ch. 144, is copied from English legislation, and confers a special power, of inquisitorial character, intended to be used by the liquidator for his own

> guidance in the conduct of the liquidation. It has been spoken of by the English Judges as the means of conducting a preliminary inquiry for the information of the liquidator alone; and that it is a compulsory proceeding for the purpose, not of taking evidence, but of getting information. It is also intimated that it is not to be used for the purpose of establishing a claim adverse to the liquidator, which would be contrary to its spirit and objects."

11 In Re McMillan Grain Co.[3], chief Justice Mathers writes, at page 231:

> "This legislation was taken from the Imperial Companies Act. 1862 (Imp.) c. 89 ss. 115 et seq., and its scope has been discussed in numerous cases. It has been construed as conferring upon the Court a new inquisitional power to be used, not necessarily for the purpose of procuring evidence, but for the purpose of obtaining information which the liquidator needs for the purpose of the winding-up proceedings."

12 In Re Associated Investors of Canada Ltd[4], Berger J. writes, at page 32:

> "The Bankruptcy Act specifically provides mechanisms and procedures to inquire into or investigate the conduct of the bankrupt, the cause of his bankruptcy and the disposition of his property. The trustee in bankruptcy may examine persons under oath and may compel the production of documents. Sections 119-123 of the Winding-up Act provide similar mechanisms."

13 Fraser & Stewart[5], write at page 935:

> "After a winding-up order has been made, the court may summon the persons described in s. 118 to give information concerning the trade, dealings, estate or effects of the corporation.
>
> The section confers a special power, of an inquisitorial character, intended to be used by the liquidator for his own guidance in the conduct of the liquidation. It is a proceeding not for the purpose of taking evidence, but for obtaining information. On this ground, creditors were refused, under the corresponding provisions of the English Companies Act, 1962, leave to attend at the examination to obtain information for the purpose of establishing a claim against the corporation.
>
> The application, when made by the liquidator, is ex parte without affidavit; but where a contributory desires to put the section in force, he must give notice to be liquidator, and semble, the person summoned to be examined has no locus standi to appeal against the order directing his examination.
>
> The issuing of a summons is a matter wholly in the discretion of the court."

14 If a creditor is not entitled to attend at the discovery of a third party, it seems that he is even less entitled to examine the Liquidator.

American Home's motion asks to be authorized to examine "a representative of Kansa" but in fact, it is the Liquidator that it wishes to examine since it complains that the contestation signed by him does not contain sufficient information to prepare properly the trial of its claims. However, if I am wrong and an employee of Kansa or of the Liquidator is to be examined, the result will be the same = the winding-up of Kansa will not proceed in accordance with the WUA and the decision of Chief-Justice Poitras, dated March 24, 1995 appointing me in this matter.

15 Two of the principles underlying the WUA apply in the present case:

a. when the winding-up of a company is in effect, the ordinary rules of conflict no longer apply; and
b. the Liquidator and the court must consider the interest of all creditors even if occasionally this may cause a certain inconvenience to a creditor in particular.

16 In Re J. McCarthy & Sons Co. of Prescott Ltd[6], the Ontario Court of Appeal's decision says in part[7]:

> "The purpose of the Act is to wind up, finally, the affairs of the company as inexpensively and speedily as possible, in the interests of the creditors, and all others concerned in it, primarily; and, for the common good, all are equally deprived of some of their ordinary rights, including a right of action, and all that may follow upon that right, such as mode of trial, right of appeal, etc., and all are confined to the remedies which the Act provides or permits."

17 In Stewart v. LePage 7, Idington J. writes at page 345:

> "The ascertainment of the assets distributable amongst the creditors, so far as unsecured, is part of the duty of the liquidator under the direction of the court. He cannot do that efficiently if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation."
>
> Brodeur J. writes, at page 351 of the same decision:
>
> "The object of this legislation is to prevent litigation being carried on by anyone prejudicial to the estate, to prevent the assets being dissipated by law suits, and to have all such matters decided promptly by a summary petition (sec. 133)." (now section 135; a Notice under section 75 often has the same result).

18 In Coopérants Life Insurance Society v. Dubois[8], Gonthier J., writing for the Supreme court, cites at page 915, the extract of the judgment in the case of McCarthy & Sons that I have just cited and adds:

> "The purpose of the statute is to arrange for the closing down of the company's business in an orderly and expeditious manner while minimizing, as far as possible, the losses and harm suffered by both the creditors and other interested parties and by distributing the assets in accordance with the Act. The mechanism provided consists in requiring the court's leave for

proceedings by the creditors (s.s. 21 and 22) and giving responsibility for the company's affairs to a court-appointed liquidator, who acts as an officer of the court, under its control and in accordance with its directives (s. 19)."

19 The principal duty of a liquidator is to ensure an orderly, cost effective and speedy liquidation of the assets of the company being wound-up. One of the duties of the judge who supervises him is to render such orders as may be necessary to help him in this endeavour.

To paraphrase the cases of McCarthy and of Stewart quoted above, all creditors, including American Home, are therefore equally deprived of some of their ordinary rights, including a right of action, and are not at liberty to interfere with the liquidator and pursue their own notions of their rights of litigation.

20 In the present case, American Home does not go as far as to state that it is not able to present the proper proof to bolster its claims, it declares that it will be lengthy, cumbersome, time consuming and expensive to present it in open court.

21 I disagree. American Home is not an ordinary, inexperienced, creditor, it is an insurance company, it operates in the same fashion as Kansa did before being wound-up and most of its demands herein are for the payment of re-insurance claims. It knows and understands the exclusions which may be part of these policies and it must know how to present evidence in support of its claims.

An examination out of court would be a waste of time and of money, especially if objections are made to some questions, then debated before a judge and, then mayhap, before the Court of appeal.

22 American Home cannot be granted what has been refused to other claimants and may be refused to future claimants.

23 In the course of the hearing on his Motion to bar claims and on American Home's Opposition and Cross-petition, even although the latter had been served less than 24 hours before, the Liquidator suggested, as is his wont, a compromise which would take into account both applications, at least to some extent for the time being, by not granting his Motion in full but ordering American Home to answer his Contestation and to proceed in accordance with section 75. I find this suggestion quite reasonable and will order accordingly.

24 For these reasons, THE COURT:

25 GRANTS in part the Liquidator's Motion to bar certain claims;

26 DECLARES that the Notice of Contestation dated February 28, 2002 (exhibit R-1) gave American Home Assurance Company sufficient information to apprise it of the Liquidator's position;

27 POSPONES to a future date the Cross-petition of American Home Assurance Company requesting permission to examine on discovery a representative of Kansa;

28 ORDERS American Home Assurance Company to serve on the Liquidator the following documents, within forty-five (45) days of the present judgment:

- an Answer to the Liquidator's Notice of Contestation of all the claims of American Home Assurance Company in its October 16, 2001 Proof of Claim; and

- all the evidence that American Home Assurance Company intends to invoke during the hearing in order for the Court to decide whether to allow or disallow all the claims of American Home Assurance Company in its October 16, 2001 Proof of Claim, in whole or in part, in virtue of Section 75 of the Winding-up and Restructuring Act;

29 THE WHOLE with costs.

ROLAND DURAND J.S.C.

cp/i/qw/qlabl/qlana

1 R.S.C. [1985] c.W-11.

2 (1915) 27 D.L.R. 760.

3 [1927] 3 D.L.R. 229.

4 [1988] 68 C.B.R. (n.s.) 30.

5 Company Law of Canada, 6th edition, 1993.

6 (1916) 38 O.L.R. 3 at 7.

7 (1916) 53 S.C.R. 337.

8 [1996] 1 S.C.R. 900.

TAB 4

2000 ABQB 440
Alberta Court of Queen's Bench

Canada Deposit Insurance Corp. v. Canadian Commercial Bank

2000 CarswellAlta 641, 2000 ABQB 440, [2000] 9 W.W.R. 472, [2000] A.W.L.D. 523, [2000] A.J. No. 765, 269 A.R. 49, 34 C.E.L.R. (N.S.) 127, 82 Alta. L.R. (3d) 382

In the Matter of the *Winding-Up Act*, R.S.C. 1970, c. W-10 as Amended

In the Matter of the Winding-Up of Canadian Commercial Bank

Canadian Deposit Insurance Corporation, Petitioner and Canadian Commercial Bank, Respondent

Wachowich A.C.J.Q.B.

Judgment: June 23, 2000
Docket: Edmonton 8503-23319

Counsel: *Charles P. Russell* and *Kevin Ozubko*, for PricewaterhouseCoopers Inc.
Robert M. Curtis, Q.C., for Bank of Canada.
Kirk N. Lambrecht, Q.C., for Government of Canada.
Barbara C. Howell, for Canada Deposit Insurance Company.
James Rout, Q.C., for Alberta Justice.
Brad Crawford, Q.C., for Bank Support Group.

Subject: Corporate and Commercial; Torts; Insolvency; Environmental

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Practice --- Judgments and orders — Declaratory judgments or orders — Jurisdiction of court

Bank was ordered to be wound up and petitioner was appointed liquidator of bank's estate — Bank owned properties in United States that were realized during course of liquidation — Liquidator also acted as agent for creditor to realize security — Due to change in environmental legislation, liquidator brought motion for direction with respect to potential liability for environmental claims against U.S. properties — Motion was amended to include alternative request for declaration that potential liability lay with creditor rather than liquidator — Motion granted — Amendment to motion had not taken parties by surprise, was clearly addressed in argument and did not affect jurisdiction to deal with motion — Court had wide breadth of jurisdiction to assist in expeditious completion of liquidation, despite absence of any actual environmental claims.

Banking and banks --- Termination of business by bank — On insolvency of bank — Procedure on winding-up

Bank was ordered to be wound up and petitioner was appointed liquidator of bank's estate — Bank owned properties in United States that were realized during course of liquidation — Liquidator also acted as agent for creditor to realize security — Due to change in environmental legislation, liquidator brought motion for direction with respect to potential liability for environmental claims against U.S. properties — Motion was amended to include alternative request for declaration that potential liability lay with creditor rather than liquidator — Motion granted — Section 76(2) of Winding-up and Restructuring Act was interpreted not to protect liquidator against environmental claims arising out of liquidation — Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 76(2).

Agency --- Relationship between principal and agent — Rights of agent — Reimbursement and indemnity

Bank was ordered to be wound up and petitioner was appointed liquidator of bank's estate — Bank owned properties in United States that were realized during course of liquidation — Liquidator also acted as agent for creditor to realize security — Due to change in environmental legislation, liquidator brought motion for direction with respect to potential liability for environmental claims against U.S. properties — Motion was amended to include alternative request for declaration that potential liability lay with creditor rather than liquidator — Motion granted — Creditor was obliged to indemnify liquidator for any liability that might arise from liquidator's discharge of duties as creditor's agent.

Table of Authorities

Cases considered by *Wachowich A.C.J.Q.B.*:

Bomasuit, Re, 31 C.B.R. 212, [1951] O.W.N. 667 (Ont. S.C.) — considered

Carter Oil & Gas Ltd. (Trustee of) v. 400133 B.C. Ltd. (1998), (sub nom. *Carter Oil & Gas Ltd. (Bankrupt) v. 400133 B.C. Ltd.)* 217 A.R. 135, 72 Alta. L.R. (3d) 285, [2000] 1 W.W.R. 410 (Alta. Q.B.) — referred to

Carter Oil & Gas Ltd. (Trustee of) v. 400133 B.C. Ltd. (1998), 64 Alta. L.R. (3d) 269, 228 A.R. 1, 188 W.A.C. 1, [1999] 4 W.W.R. 523 (Alta. C.A.) — referred to

Deacon v. Driffil (1879), 4 O.A.R. 335 (Ont. C.A.) — referred to

Ford v. Earl of Chesterfield (1856), 52 E.R. 924, 31 Beav. 426 (Eng. Ch.) — referred to

Glasgow Navigation Co. v. Iron Ore Co. (1909), [1910] A.C. 293 (Scotland H.L.) — referred to

Henning v. Calgary (City) (1974), [1975] 3 W.W.R. 493, 51 D.L.R. (3d) 762 (Alta. C.A.) — considered

Hoffman v. Ohlson Ranch Ltd. (1995), 165 A.R. 68, 89 W.A.C. 68 (Alta. C.A.) — considered

Hydro-Québec c. Churchill Falls (Labrador) Corp., [1982] 2 S.C.R. 79, 43 N.R. 541, 137 D.L.R. (3d) 577 (S.C.C.) — considered

Joly-Sac Inc., Re (1991), 42 Q.A.C. 140, 12 C.B.R. (3d) 182 (Que. C.A.) — referred to

Kansa General International Insurance Co. (liquidator of) v. Maska U.S. Inc. (May 4, 1998), Doc. C.A. Que. 500-09-005527-973, 500-09-005962-972 (Que. C.A.) — considered

MacPherson (Trustee of) v. Ritz Management Inc. (March 16, 1992), Doc. 61959/90Q (Ont. Gen. Div.) — referred to

Smith v. Ontario (Attorney General), [1924] S.C.R. 331, 42 C.C.C. 215, [1924] 3 D.L.R. 189 (S.C.C.) — referred to

Toronto (City) v. Wade, 14 C.B.R. 48, [1932] O.R. 500, [1932] 3 D.L.R. 509 (Ont. C.A.) — considered

Vic Priestly Landscaping Contracting Ltd. v. Elder (1978), 19 O.R. (2d) 591, 85 D.L.R. (3d) 720 (Ont. Co. Ct.) — considered

Wright v. Kirby (1857), 53 E.R. 182, 23 Beav. 463, 29 L.T.O.S. 46, 3 Jur. (N.S.) 851, 5 W.R. 391 (Eng. Ch.) — referred to

Statutes considered:

Bankruptcy Act, 1949, S.C. 1949, c. 7 (2nd Sess.)
s. 83(1) — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 14.06(2) [rep. & sub. 1997, c. 12, s. 15(1)] — considered

s. 14.06(4)(a) [en. 1997, c. 12, s. 15(1)] — considered

s. 14.06(8) [en. 1997, c. 12, s. 15(1)] — considered

s. 41(8) — considered

s. 121 — referred to

s. 121(1) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.8(8) [en. 1997, c. 12, s. 124] — considered

Interpretation Act, R.S.C. 1985, c. I-21
s. 15 — considered

Judicature Act, R.S.A. 1980, c. J-1
s. 11 — considered

Winding-up Act, R.S.C. 1927, c. 213
Generally — referred to

Winding-up Act, R.S.C. 1970, c. W-10
ss. 78-84 — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

s. 35(1)(h) — considered

s. 71 [am. 1996, c. 6, s. 153] — considered

s. 75 — referred to

s. 76 [am. 1999, c. 28, s. 83] — referred to

s. 76(1) [rep. & sub. 1999, c. 28, s. 83] — considered

s. 76(2) — considered

s. 80 — referred to

s. 84 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 132 — considered

R. 133 — considered

R. 518 — referred to

MOTION by liquidator for directions and declaration in winding-up of bank.

***Wachowich A.C.J.Q.B.*:**

1. Introduction

1 This is an application by PricewaterhouseCoopers (PWC) for advice and direction in the liquidation of the estate of the Canadian Commercial Bank (CCB). After argument on the issue, counsel for PWC, the liquidator, submitted an amended Notice of Motion in which it requested a declaration. The particulars of the amended Notice of Motion are reproduced below. Also, the present application deals only with the U.S. properties that were realized during the course of the liquidation. The question before me has to do with the liability of the liquidator for environmental claims in respect of those properties.

2 The Court of Queen's Bench of Alberta ordered that CCB be wound up on September 3, 1985. Price Waterhouse Limited, Now PWC, was appointed liquidator of the estate and effects of CCB. Since that time, there has been a great deal of change in environmental law. Legislation has been passed throughout North America that imposes liability for actions that damage the environment. The liquidator canvassed some of this legislation in its July 1999 Report to the Court. I do not propose to review that information. However, in light of this legislation, the liquidator has raised legitimate concerns as to its potential liability for environmental claims. The liquidator now turns to this Court for advice and direction on the following questions as stated in its Amended Notice of Motion:

> (i) do PWC as liquidator of CCB and the Estate of CCB itself, have responsibility for potential environmental liability claims which may hereafter be asserted in connection with PWC's administration of the affairs of CCB in the United States and the affairs of its U.S. affiliates CCB Business Credit, Inc., CRC Development Corporation, Westlands Diversified Bancorp, Inc. and CCB Bancorp, Inc. (which amalgamated and continued as CCB Bancorp, Inc.), Automated Processing & Development Corp., Commercial Center Bank and CCB Realty, Inc. or does such responsibility rest solely with Bank of Canada as a secured creditor of CCB by virtue of all the monetary benefit derived from such administration flowing to Bank of Canada rather than to the Estate of CCB?
>
> (ii) does the answer to (i) depend in part on the determination of whether Bank of Canada stood outside of the liquidation of CCB in the enforcement of its security, or came into the liquidation to value and retain its security utilizing the procedures outlined in sections 78-84 of the ***Winding-up Act***, and if so does that impact of the question of liability?

(iii) if the answer to the first part of (ii) is yes, did Bank of Canada stand outside of or come into the liquidation of CCB for the purposes of realizing on its security?

(iv) does the fact that no monetary recoveries flowed directly to Bank of Canada from PWC's administration of the affairs of CCB Bancorp, Inc.'s subsidiary Commercial Center Bank impact on the answer to (i), or is it sufficient that Bank of Canada obtained all benefit from the Consolidation Accounting Decision rendered by this Court on January 14, 1994 (upheld by the Court of Appeal of Alberta, leave to appeal to the Supreme Court of Canada refused) and all benefit from the trust created by this Court by Order dated December 22, 1994, thereby indirectly benefiting from the administration undertaken by PWC of such entity?

(v) does the fact that the Estate of CCB benefited from realization upon:

(1) CCB's loans to its employees in the United States;

(2) CCB's U.S. dollar denominated mortgage loans recorded on Item 13 of CCB's Schedule J Returns filed with the Office of the Inspector General of Banks prior to the commencement of the liquidation; and

(3) the shares held by CCB in a U.S. entity known as El Camino Bancorp; impact upon the answer to (i)?

(vi) if the answer to (i) is that a liquidator of CCB and the Estate itself have no responsibility for any such potential environmental claim, and such responsibility rests solely with Bank of Canada as a secured creditor of CCB, should PWC apply to convert some portion of the Advance Payment Plan to final dividends?

(vii) if PWC is to make an application as contemplated in (vi) above, should such application await further clarification of potential exposure in Canada to environmental claims against the Estate of CCB or PWC as liquidator of CCB and if so should PWC undertake a process similar to that process set out in Schedule "3" of the Liquidator's Report dated July 26, 1999 or should some other process be adopted, and if so what?

(viii) if PWC is to make an application as contemplated in (vi) above, what is the impact of Bank of Canada retaining "excess security" over and above its proven debt, to satisfy environmental or other claims which may hereafter be asserted against it in its capacity as a secured creditor, and how is that excess security to be dealt with in converting Advance Payments to final dividends?

3 In the amended notice of motion, PWC added the following request for relief:

In the alternative, a declaration that Bank of Canada has responsibility for potential environmental liability claims which may hereafter be asserted in connection with PWC's administration of the affairs of CCB in the United States and the affairs of its U.S. affiliates.

I will canvass the issues and the law and then return and answer the questions the liquidator posed in its Amended Notice of Motion.

2. Jurisdiction of the Court to issue a declaration

4 The Bank of Canada submitted that this Court does not have the jurisdiction to give advice and direction and to issue a declaration because there is no actual claim. The Court should not attempt to answer questions that are entirely hypothetical. In *Smith v. Ontario (Attorney General)*, [1924] S.C.R. 331 (S.C.C.), at 336, Duff J. cited *Glasgow Navigation Co. v. Iron Ore Co.* (1909), [1910] A.C. 293 (Scotland H.L.):

It is not the function of a court of justice to advise parties as to their rights under a hypothetical state of facts.

5 Further, Bank of Canada submitted that because there is no actual claim at present, it is premature for this Court to make an order. It is impossible to ascertain the actual liabilities of the parties before the specific facts of an actual claim are reviewed.

6 There is merit to this argument. It is difficult to ascertain the liabilities of parties when there are no specific facts available. Nevertheless, it is also clear that this Court's jurisdiction to issue a declaratory judgment is very broad. Section 11 of the *Judicature Act*, R.S.A. 1980, c. J-1, states:

> 11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

7 In *Henning v. Calgary (City)* (1974), 51 D.L.R. (3d) 762 (Alta. C.A.), the Alberta Supreme Court, Appellate Division discussed the breadth of the courts' power to issue a delaration. McDermid J.A. stated at 764:

> In ***Kent Coal Co. ltd. et al v. Northwestern Utilities***, [1936] 4 D.L.R. 337 at p. 354,... McGillivray, J.A., giving the judgment of the majority of this Division, reviewed the authorities as to the jurisdiction of the Court to grant a declaratory judgment and quoted the remark of Lord Sterndale in ***Hanseon v. Radcliffe Urban District Council***, [1922] 2 Ch. 490, where he stated:
>
> > In my opinion, under Order XXV., r.5, the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me the discretion is very wide.

8 In *Hydro-Québec c. Churchill Falls (Labrador) Corp.*, [1982] 2 S.C.R. 79 (S.C.C.), the Supreme Court of Canada considered what type of interest was necessary for a party to be entitled to a declaration from the Court. Beetz J. stated at 106:

> Further, it is not necessary for *Churchill Falls* to have already refused to perform the *Power Contract* in order for the Superior Court to rule on the rights of the parties to the contract. The value of the new declaratory action which *Hydro-Quebec* is seeking to use lies precisely in the fact that it allows the litigant to protect a threatened right. As the Commissioners observed, "the interest required to institute proceedings may flow from a right which itself would only be eventual". What matters is that the interest in obtaining a solution to a genuine problem is real. I consider that *Hydro-Quebec* does really possess such an interest.

9 This jurisprudence does not directly address whether a Court may grant a declaration when this request is submitted in an amended Notice of Motion after argument has been heard. Before I review the authority on that issue, I note that the declaration sought by PWC was a direct extension of the argument heard on the original Notice of Motion. This Court's response differs very little as a result of the requested amendment.

10 Amendments to Notices of Motion are made pursuant to Rules 132 and 133 of the *Alberta Rules of Court*:

> 132. The court may at any stage of the proceedings allow any party to alter or amend his pleadings or other proceedings in such manner and on such terms as may be necessary for the purpose of determining the real question in issue between the parties.
>
> 133. The court may at any time, on terms as to costs or otherwise, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

11 In *Hoffman v. Ohlson Ranch Ltd.* (1995), 165 A.R. 68 (Alta. C.A.), the Alberta Court of Appeal allowed an amendment to the Notice of Motion. This was pursuant to Rule 518 which governs amendments on appeal. The power given to the Court of Queen's Bench pursuant to Rules 132 and 133 appears to be equally broad. In the *Alberta Civil Procedure Handbook 2000* (Edmonton: Juriliber, 2000) at 101-102, W.A. Stevenson and J.E. Côté state that the general rule to amend a pleadings is in fact very broad. There are only four exceptions to the rule. First, an exception exists when the amendment would cause serious prejudice that cannot be repaired by a payment of costs. Second, an amendment will not be allowed when it would be hopeless; an amendment that would have been struck out had it been in the pleadings originally will not be allowed. Third, the Court

will disallow the amendment where it would add a new cause of action or a new party outside the limitation period. Fourth, the amendment will be disallowed when it, or the failure to plead it earlier, is indicative of bad faith.

12 The circumstances of the case at bar do not fall within any of the exceptions. This Court accordingly has the authority to allow the amendment to the Notice of Motion. In *Hoffman, supra*, the Court of Appeal further held that it would allow the amendment where it would not take any of the parties by surprise. It is unclear whether that qualification applies to Rules 132 and 133. In light of the commentary in Stevenson and Côté, I am of the view that it does not. Nevertheless, even if it did, as I indicated earlier, this amendment changed very little in the ultimate result. Furthermore, in light of the oral argument, this amendment could not have taken any of the parties by surprise. The issues which arise from the request for a declaration were clearly addressed in argument. Therefore, I hold that this Court has the jurisdiction to provide advice and direction and to issue a declaration.

3. Legislative Protection

13 The paramount issue in this application is the scope of the protection offered by s. 76(2) of the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (*WURA*):

> **Distribution of assets**
>
> 76.(1) After the notices required by sections 74 and 75 have been given, the respective times specified in the notices have expired and all claims of which proof has been required by due notice in writing by the liquidator in that behalf have been allowed or disallowed by the court in whole or in part, the liquidator may distribute the assets of the company or any part of those assets among the persons entitled to them and without reference to any claim against the company, or, in the case of an authorized foreign bank in respect of its business in Canada, that has not been sent to the liquidator.
>
> **Claims not sent in**
>
> (2) The liquidator is not liable to any person whose claim has not been sent in at the time of distributing the assets or part thereof under subsection (1) for the assets or part thereof so distributed.

14 PWC submitted that s. 76(2) protects it from environmental claims that arose against the Estate prior to the liquidation. Section 76(2) does not protect the liquidator from any claims that arose during the liquidation or post-liquidation. The Bank Support Group, an unsecured creditor, suggested an interpretation of s. 76(2) that is far broader in scope. He submitted that the section protects the liquidator from all claims, whether prior to, during, or after the liquidation.

15 PWC suggests that its restrictive interpretation of s. 76(2) is buttressed by the fact that the *WURA* does not contain a section, akin to those found in other insolvency legislation, which specifically protects the representative of creditors from environmental claims which arise from the discharge of its duties. For example, the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*), contains the following sections:

> **Liability in respect of environmental matters**
>
> 14.06(2) Notwithstanding anything in federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred
>
> (a) before the trustee's appointment: or
>
> (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct.
>
> **Non-liability re certain orders**

14.06(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order...

(a) if... the trustee

(i) complies with the order, or

(ii) ... abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage...

Claim for clean up costs

14.06(8) Notwithstanding subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

Effect of discharge of trustee

41.(8) The discharge of a trustee discharges him from all liability

(a) in respect of any act done or default made by him in the administration of the property of the bankrupt, and

(b) in relation to his conduct as trustee,

but any discharge may be revoked by the court on proof that it was obtained by fraud or by suppression or concealment of any material fact.

16 Likewise, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) has a specific section which provides protection to a representative of creditors within the discharge of its function:

11.8(8) Any claim ... for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

17 Courts often look at related statutes when interpreting a provision. In *Dreidger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 285, Ruth Sullivan explains:

The context of a legislative provision includes not only the immediate context and the rest of the Act in which the provision appears but also any other legislation that may cast light on the meaning or effect of the words. Traditionally, the category of related legislation is said to consist of statutes *in pari materia*, that is, statutes enacted by the same legislature and relating to the same subject.

18 And later, she explains the governing principle at 285, 286:

> Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. The governing principle was stated by Lord Mansfield in ***R. v. Loxdale***:
>
> > Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.
>
> In effect, the several statutes are construed together as if they constituted a single Act and the presumptions of coherence and consistent expression apply to these statutes as if they were part of a single Act.

19 Therefore, it is clear that this Court may look at the *BIA*, *supra*, and the *CCAA*, *supra* for guidance in determining the scope of s. 76(2). The sections reproduced above expressly protect the representative of creditors from environmental claims against it. There is no such section in the *WURA*, *supra*. The issue for this Court to decide is what is to be made of this absence. The rules of statutory interpretation are clear in this regard when comparing two provisions within the same Act. If an idea is specifically expressed in a provision, and no mention is made of it in another, it is assumed that Parliament intended the idea to apply only where it is specifically mentioned. Section 15 of the *Interpretation Act*, R.S.C. 1985, c. I-21 states:

> 15.(1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.
>
> (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> (a) as being applicable only if a contrary intention does not appear; and
>
> (b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

20 Therefore, I should not assume that Parliament intended the *WURA* to be interpreted as including sections that were not expressly included. The Court also cannot give existing sections, such as s. 76(2), such a wide scope as to write in sections that Parliament did not include. This is so even though related statutes expressly include such sections. In fact, the absence of such protection only speaks louder in light of the fact that Parliament turned its mind to including such protection in related statutes. I cannot impute an intention to Parliament to include protection in the *WURA* which it simply did not include.

21 Clearly, the lack of express legislative protection against environmental liability is a legitimate source of concern for the liquidator. The Bank Support Group suggested that the correct interpretation of s. 76(2) of the *WURA* is one which is broad enough to incorporate such protection. Unfortunately, there is an extreme dearth of jurisprudence on the interpretation of that section. Only one case, which is quite dated, has come before me. In *Toronto (City) v. Wade*, [1932] O.R. 500 (Ont. C.A.), the Ontario Court of Appeal interpreted the predecessor of the provision which now concerns us. In that case, the Court considered wether the liquidator could be held personally liable for municipal taxes and utility bills which arose against the estate, but which had not been claimed at the time that the liquidator had been discharged. The Court held that, according to the *Dominion Winding-up Act*, there was no recourse against the liquidator personally once it had been discharged and the assets of the estate distributed. The Court sated at 502:

> Now in these circumstances the plaintiffs' right to recover the amounts claimed must be based upon some personal liability of the defendant, either for moneys due the plaintiffs by himself or for damages for some negligence on his part while occupying the office of liquidator. In view of his discharge from all such liability, I cannot see how any action against him as liquidator can lie, and it seems doubtful if, in the circumstances any personal action could lie based upon tort except possibly for fraud in the performance of his duties.

22 This case, while not authoritative, does indicate that an earlier view of this issue was that, except in cases of malfeasance or negligence, a liquidator is not liable for any claims once discharged. PWC argued that this case can be distinguished on its facts. In *Wade*, the claims arose before the liquidation began. Therefore, even if it were followed, PWC submitted, it would be of no value because the potential claims in this case will have arisen during the course of the liquidation. I am of the view

that the statement of liquidator liability in *Wade* is broader than that insofar as it absolves the liquidator of liability for all claims that are identified after it is discharged, with the exception of those which are due to its negligence or malfeasance. Nothing in the *Wade* decision states that the liquidator's liability is limited to claims that arose against the Estate prior to the commencement of liquidation.

23 Unfortunately, the term "claim" is not defined in the current *WURA*. Nonetheless, the way the word is used in other sections may shed light on its scope. For example, s. 71 states:

> 71(1) When the business of a company is being wound up under this Act, all debts and all other claims against the company in existence at the commencement of the winding-up, certain or contingent, matured or not, and liquidated or unliquidated, are admissible to proof against the company...
>
> (2) In case of any claim subject to any contingency or for unliquidated damages or which for any other reason does not bear a certain value, the court shall determine the value of the claim and the amount for which it shall rank.

24 These sections do not aid in clarifying whether the term "claim" is used solely in reference to claims that arose against the insolvent company before liquidation began or whether they may include claims against the liquidator. No other section of the *WURA* is any more helpful.

25 As discussed above, the Courts may look at related enactments to see the definition given to the word "claim". The word "claim" is defined in s. 121 of the *BIA*, *supra*:

> 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.

26 In *Bomasuit, Re* (1951), 31 C.B.R. 212 (Ont. S.C.) the Court interpreted s. 83(1) of the old *Bankruptcy Act*, which was identically worded, and held at para. 12:

> Section 83(1) ... appears to make it clear that only debts, etc. to which the debtor is liable at the date of the bankruptcy or those to which he may become subject at his discharge by reason of an obligation incurred before the bankruptcy would share in the assets of the new business which are now vested in the trustee. Subsequent creditors would have to wait.

27 Accordingly, a claim under the *BIA* only includes claims which arose before the bankruptcy. This is supportive of PWC's position that claims under the *WURA* only include those that arose against the Estate.

28 Absent any other authority for an alternative interpretation, I am of the view that the word "claim" in the *WURA* only includes claims against the Estate. Accordingly, the only interpretation which Parliament could have intended for s. 76(2) is one which excludes protection for the liquidator against environmental claims arising during the liquidation.

4. Agency

29 PWC has also asked for direction as to whether it can be indemnified for any environmental claims arising in relation to properties which it managed not in its capacity as liquidator, but rather in its role as agent for Bank of Canada. Before I deal directly with the indemnification issue, it is necessary to answer the objection raised by the Bank of Canada as to whether the winding-up Court has the jurisdiction to decide an agency matter, relating to the liquidation, between the liquidator and a secured creditor. Essentially, the question is whether this agency falls within the liquidation such that this Court has jurisdiction, or whether it is a contractual matter between two private parties.

a. Jurisdiction of the Court

30 PWC submitted that this Court has jurisdiction for three reasons. First, the Bank of Canada has come into the liquidation and therefore has attorned to the jurisdiction of the winding-up Court. Second, PWC submitted that the scope of the jurisdiction of the winding-up Court pursuant to the *WURA*, *supra*, is sufficiently broad to allow it to decide this matter. Third, s. 11 of the *Judicature Act*, *supra*, gives this Court the authority to decide this matter.

31 First, has the Bank of Canada come into the liquidation? A secured creditor has three options in a liquidation. It can stay outside the liquidation and value its security through other legal avenues. In doing so, it foregoes any unsecured claim for deficiencies. Secondly, it can come into the liquidation and value and retain its security. It may then prove for any deficiency as an unsecured creditor according to the procedure outlined in the *WURA*. Thirdly, it may release its security to the liquidator and prove its claim as an unsecured creditor: H. Sutherland, et al, *Company Law of Canada*, 6th ed. (Carswell: Scarborough, 1993) at 903, *WURA*, R.S.C. 1985, c. W-11; *Deacon v. Driffil* (1879), 4 O.A.R. 335 (Ont. C.A.), at 338.

32 It is clear that the Bank of Canada has come into the liquidation. Bank of Canada brought an application in 1988 to allow it to sue Price Waterhouse (now PWC) outside the liquidation, in order to enforce its security. That motion was withdrawn in 1990. Then, in 1990 PWC applied to this Court for authority to permit Bank of Canada to retain its collateral. That order was sought pursuant to s. 84 of the *WURA*. All parties wishing to participate in the application for the retention of Bank of Canada's security had to file Notices of Appearance. In Bank of Canada's Notice of Appearance, the Bank stated:

> Bank of Canada seeks an Order declaring that the Hypothecation and Assignment Agreements [...] are valid security and that the Bank of Canada has priority with respect to the Collateral covered thereby.

33 It is evident that Bank of Canada was not seeking a declaration by this court that they had remained outside the liquidation. Rather, the Bank sought a declaration that it had priority. The retention order that was granted states, on page 3, that there is a reservation of Bank of Canada's right to rank in the liquidation for any deficiency claim, pursuant to s. 80 of the *WURA*.

34 It is apparent that Bank of Canada opted to pursue the second option. Namely, it came into the liquidation and it valued and retained its security. Further, as indicated by the Retention Order, it retained its right to prove for any deficiency as an unsecured creditor as directed by the *WURA*.

35 I am not convinced that it is relevant to my jurisdiction whether the Bank of Canada has come into the liquidation or not. The winding-up Court, through the liquidator, is given very broad authority to deal with matters pertaining to the liquidation. This power is conferred by s. 35(1)(h) of the *WURA*:

> 35(1) A liquidator may, with the approval of the court, and on such previous notice to the creditors, contributories, shareholders or members of the company as the court orders,
>
> > ...(h) do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets...

36 The express wording of this section indicates that it was Parliament's intention to give the liquidator, and accordingly the Court through whose authority the liquidator acts, a very wide breadth within which to complete the liquidation process quickly and efficiently. In *Kansa General International Insurance Co. (liquidator of) v. Maska U.S. Inc.* (May 4, 1998), Doc. C.A. Que. 500-09-005527-973, 500-09-005962-972 (Que. C.A.) the Court held that s. 35(1)(h) gives the liquidator wide powers and that those powers should not be interpreted as being merely technical or administrative.

37 In light of the wording of the section, I find that it confers the authority upon the liquidator, and therefore the winding-up Court, to take any reasonable action to complete the liquidation. This authority must include the jurisdiction of the winding-up Court to determine the obligations of two parties, both involved in the liquidation in some capacity, pursuant to a contract which, although peripheral to the actual liquidation, pertains directly to it.

38 Third, PWC submits that s. 11 of the *Judicature Act* gives this Court the authority to decide this issue. I do not see how that section has any bearing on this issue. Clearly, as indicated above, that section gives the Court wide powers to issue declaratory judgments. That does not mean that a winding-up Court can issue declaratory judgments on issues that are peripheral to the liquidation. Section 11 gives the Court authority to issue declarations, but that authority must be intended to fall within spheres over which the Court already has jurisdiction.

39 Based on the foregoing, I am of the view that regardless of whether the Bank has stepped into the liquidation or not, I have the jurisdiction to deal with the issue of its indemnification of PWC within the context of the agency relationship between those two parties.

b. Indemnification

40 Bank of Canada engaged PWC as its agent in order to realize its collateral. PWC therefore acted simultaneously as liquidator in respect of the assets of the Estate and as agent for the Bank of Canada. Through the various agreements between the parties it is possible to distinguish which properties PWC dealt with as agent and which properties it dealt with as liquidator. However, since no specific environmental claims have yet been put forth, it is unnecessary to determine those relationships at this point. What the liquidator seeks now is a declaration giving it some certainty that it has a right to indemnification from its principal, Bank of Canada, should a claim arise after PWC has been discharged. Should a claim come forward, clearly the liquidator will have to prove that the property to which the claim related was one administered pursuant to the agency agreement.

41 Bank of Canada appointed PWC as its agent through a general agency agreement contained in a letter dated September 1, 1985. The agreement states:

> Bank of Canada is a major secured creditor of Canadian Commercial Bank and we refer you to the Hypothecation and Assignment Agreements between us and Canadian Commercial Bank executed March 25, 1985 and April 16, 1985. To minimize costs and realization losses due to the difficulty of integrating the realization by the liquidator and the realizations under our security, we request that if you are appointed liquidator of Canadian Commercial Bank you also act on our behalf in realization of our security. In this regard you would not be required to obtain specific releases of our security in the liquidation of the assets subject thereto, but would account separately for the proceeds of realization of such assets.

42 This is clearly a general agency agreement. However, when an agent is retained by its principal, the scope of the agent's authority to act on behalf of the principal is not limited only to the express agreement between the two. Rather, the agent also has implied authority to do all acts which are necessary for it to accomplish the objective of the agency relationship. G.H.L. Fridman, in *The Law of Agency* (Toronto: Butterworths, 1996) explains this implied authority at 68:

> It is possible, indeed in some instances necessary, to read into the agent's express authority a certain implied authority. This may be because what has been expressly stated when the agency relationship was created does not cover the acts performed or required to be performed by the agent. It may be because the only way of construing the document which contains the agent's express authority is by inferring the necessary implications. Moreover, if there is no statement which clarifies exactly what the agent's authority is, then the only way of knowing what authority can properly be attributed to the agent is by inferring a certain implied authority. This is part of an agent's actual authority, which the principal has consented, by implication, that the agent should have. If the principal has not consented to his agent's having this implied authority, and has taken the necessary steps to make the outside world aware of his lack of consent, then the agent will not have such authority. Failing such lack of consent together with notice thereof to third parties, the agent's implied authority is part of the authority which the parties have agreed upon shall be exercised by the agent on the principal's behalf.

43 Therefore, PWC had implied authority to carry out the acts necessary to accomplish the realization of the Bank of Canada's security, despite the fact that this very general agreement does not explicitly outline the scope of PWC's authority as agent.

44 The question which this Court must answer, therefore, is whether PWC may be indemnified for any necessary actions it took as agent for the Bank of Canada, if environmental claims later arise from those actions. Clearly, a principal must indemnify

its agent for any losses or liabilities that arise from the agent discharging its duties express or implied. For instance, Fridman, *supra*, states at 201:

> The principal's duty to indemnify his agent against losses, liabilities and expenses incurred in the performance of the undertaking may be expressly stated in the contract of agency. But it is more usually implied.

45 The agent is not entitled to indemnification where it acted negligently or outside its scope of authority (at 202):

> Thus, the agent in order to make his principle liable to indemnify him in this way, must have acted within its express, implied, or usual authority. ...
>
> However, there is no duty to indemnify an agent who has acted unlawfully, or in breach of his duty, or negligently.

46 Also, in *Vic Priestly Landscaping Contracting Ltd. v. Elder* (1978), 19 O.R. (2d) 591 (Ont. Co. Ct.), at 599, Ferguson, Co.Ct.J. held:

> However, while the Elders may not be able to rely upon the fact of their agency as a defence vis-à-vis the plaintiff, their capacity as agents does entitle them to claim indemnification for any liability from their principals. In *McMillan v. Barton et al* (1890), 19 O.A.R. 602 at 613; affirmed 20 S.C.R. 404, the Court held:
>
> > Every agent is entitled to be indemnified by his principal against loss arising out of the service rendered. The law implies that obligation in the absence of express agreement.
>
> See also 1 C.E.D. (Ont. 3rd) "Agency", para. 14. This principle applies so long as the agent has acted within his authority and the loss does not result from the agent's own neglect or default.

47 The law on this issue is clear. However, because there is no actual claim before this Court it is impossible to state whether or not the Bank of Canada will have to indemnify PWC for a specific loss. It is possible to state that, in relation to the properties that are subject to the agency agreement, insofar as PWC acted within its authority, express or implied, and did not do so negligently, in breach of its duty, or illegally, it will be entitled to indemnification from its principal, the Bank of Canada for any losses or liabilities that may arise.

5. Equitable Benefit

48 PWC also submits that it is entitled to indemnification from the Bank of Canada based on the equitable principle that he who receives the profit should bear the burden. Essentially, the argument is that in relation to the properties which resulted in a benefit to the Bank of Canada, the Bank should be responsible for any loss or liability.

49 Counsel was unable to provide the Court with any equitable benefit case law in a liquidation context. Rather, PWC asked this Court to draw an analogy from related contexts such as bankruptcy, receivership and mortgage foreclosure. Further, these cases all relate to costs: *Carter Oil & Gas Ltd. (Trustee of) v. 400133 B.C. Ltd.* (1998), 217 A.R. 135 (Alta. Q.B.), aff'd(1998), 228 A.R. 1 (Alta. C.A.); *Joly-Sac Inc., Re* (1991), 12 C.B.R. (3d) 182 (Que. C.A.); *MacPherson (Trustee of) v. Ritz Management Inc.* (March 16, 1992), Doc. 61959/90Q (Ont. Gen. Div.); *Ford v. Earl of Chesterfield* (1856), 52 E.R. 924 (Eng. Ch.); *Wright v. Kirby* (1857), 53 E.R. 182 (Eng. Ch.).

50 It is only equitable, in my view, that Bank of Canada be liable to bear any loss in relation to the properties from which it received a benefit. A loss includes an environmental claim that arises from the management of the properties during liquidation. I see no reason not to extend the equitable principle evident in the above noted cases to the liquidation context. However, this principle should only extend insofar as PWC acted reasonably in its management of the properties. Nor do I see why the fact that Bank of Canada benefited indirectly rather than directly should have any bearing. However, the proportion of responsibility for any loss is only equal to that of the benefit received. Where parties shared the benefit arising from a property, they should likewise share the loss.

6. Proposed Investigations

51 Two proposals were made both in the written briefs and oral argument. First, the Bank Support Group proposed that the liquidator should advertise for any environmental claims pursuant to ss. 75 and 76 of the *WURA*. That proposal was not well-received by the parties to the application. I am of the view that that is not a wise course of action. The liquidator has already advertised for claims as is its duty and to do so again would be redundant. The interests of all the parties involved will be best served by an efficient end to this liquidation.

52 That brings me to the second proposal. As indicated earlier, this application dealt only with the U.S. realizations. Accordingly, the liquidator has proposed a scheme whereby it would review its files on the Canadian properties in order to ascertain the degree of risk of a potential environmental claim. In light of my decision in this application, I do not feel that this is a worthwhile endeavour. Again, it is in everyone's best interests that this liquidation be finalized as quickly as possible.

7. Conclusion

53 The liquidator has its advice and directions to the extent set out above. In light of the Court's inability to resolve the issue of liability for particular environmental claims, actual or potential of which PWC has no notice, the application for advice regarding the excess security is premature.

54 If the parties cannot agree as to the costs of this application, they may speak to me within 30 days of the date this decision was rendered.

Motion granted.

End of Document

TAB 5

THE 2013-2014 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

Dr. Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.
of University of British Columbia
Faculty of Law and the Ontario Bar

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

The Honourable L. W. Houlden, B.A., LL.B.
1922-2012, formerly a Judge of the Court of Appeal for Ontario

STATUTES OF CANADA ANNOTATED

CARSWELL®

(1) — Claims Barring Procedure

The court has the authority to fix a deadline for creditors to file claims, often referred to as a claims bar date for the purposes of voting and for distribution under a compromise or arrangement: s. 12.

In *CCAA* proceedings, a claims bar order can be made by the judge in charge of the proceedings. The purpose of the order is, amongst other things, to enable creditors to meaningfully assess and vote on a plan of arrangement and to ensure a timely and orderly completion of the *CCAA* proceedings.

Under a claims bar order, creditors are required to file their claims by a fixed date. The debtor company is directed to send notice of the order to all creditors. The court may also order publication in a newspaper.

It is usual to appoint a claims officer who will be given power to adjudicate disputed claims with the right of appeal to the judge administering the *CCAA* proceedings. In some orders, a creditor is given the right to by-pass the claims officer and to apply directly to the judge for a ruling on its claim.

In *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 192, 2000 CarswellAlta 30 (C.A. [In Chambers]) a claims bar order was made by the court. Two creditors did not file their claims in the time period fixed by the order. The creditors applied for and were granted an extension of time for filing their claims. A large creditor applied for leave to appeal. A judge of the Alberta Court of Appeal granted leave to appeal on the issue whether the lower court judge had erred in exercising the discretion to extend the time for creditors to file their claims. The Court of Appeal dismissed the appeal: see *Re Blue Range Resource Corp.* (2000), 2000 CarswellAlta 1145 (C.A.); additional reasons at (2001), 2001 CarswellAlta 1059 (C.A.); leave to appeal refused (2001), 2001 CarswellAlta 1209, 2001 CarswellAlta 1210 (S.C.C.). The Court of Appeal held that in determining whether or not to grant permission for late filing of claims, the court should apply the following tests:

> 1. Was the delay in filing caused by inadvertence and if so, was the creditor acting in good faith? Inadvertence includes carelessness, negligence and accident but the conduct must be unintentional.
>
> 2. What is the effect of extending the time for filing in terms of the existence and impact of any relevant prejudice caused by the late filing? The test for prejudice is: did the creditors who filed on time lose as a result of the late filing a realistic opportunity to do anything that they might otherwise have done? The fact that the amount available for distribution to creditors has been reduced does not constitute prejudice.
>
> 3. If the late filing has caused relevant prejudice, can it be alleviated by attaching appropriate conditions to the order permitting the late filing?
>
> 4. If relevant prejudice has been caused, which cannot be alleviated, are there any other consideration which could nonetheless warrant an order for late filing?

Leave to file a late dispute notice may be granted where it will not cause hardship to any interested party or prejudice the debtor's reorganization; which is not to say that an extension will usually be granted. Corrective action must be taken forthwith to address delays upon the error being realised, and lying in the weeds is not an option: *Re Air Canada [Late Dispute Notice]* (2004), 49 C.B.R. (4th) 175, 2004 CarswellOnt 1843 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Appeal held that to further the goal of enabling a company to deal with creditors in order to carry on business, the *CCAA* proceedings seek to resolve matters and obtain finality without undue delay, and a claims bar date is one means of bringing disputed

TAB 6

Most Negative Treatment: Reversed
Most Recent Reversed: Cie d'assurances générales Kansa Internationale, Re | 2008 QCCA 1558, 2008 CarswellQue 7778, 172 A.C.W.S. (3d) 1039, EYB 2008-145885, J.E. 2008-1679, [2008] R.R.A. 540 | (C.A. Que, Aug 11, 2008)

2008 QCCS 100
Cour supérieure du Québec

Cie d'assurances générales Kansa Internationale, Re

2008 CarswellQue 191, 2008 CarswellQue 807, 2008 QCCS 100, EYB 2008-128695

Dans l'affaire de la liquidation de: La Compagnie d'assurances générales Kansa Internationale, Débitrice, et Ferdinand Alfieri, ès qualités de liquidateur canadien de la Compagnie d'assurance générale Kansa Internationale, Liquidateur-requérant, c. Toronto District School Board, Intimée, et American Home Assurance Company, Intervenante

Lalonde J.C.S

Heard: 9 octobre 2007 - 21 décembre 2007
Judgment: 22 janvier 2008
Docket: C.S. Qué. Montréal 500-05-002760-955

Counsel: *Me Eugène Czolij*, pour le liquidateur-requérant
Me Marc-André Sansregret, Me Thomas McRae, pour l'intimée
Me Nicholas Krnjevic, pour l'intervenante

Subject: Corporate and Commercial

***Lalonde J.C.S*:**

[UNOFFICIAL ENGLISH TRANSLATION]

1 Through a judgment rendered on June 16, 2006 by The Honourable Chief Justice François Rolland, the undersigned is designated to issue any order useful to complete the winding-up of the assets of Kansa General International Insurance Company ("Kansa").

2 It should be specified that, by virtue of an order subjecting it to the *Winding-up and Restructuring Act* [1] ("*Winding-up Act*"), Kansa has been winding up in Canada since March 3, 1995. The liquidator/applicant Ferdinand Alfieri (the "liquidator" or "Alfieri" [2]) has been responsible for Kansa's assets since that date.

3 Among the many orders rendered since June 16, 2006, one of the later ones (dated August 31, 2006) provides that the bar date for filing any admissible claim against Kansa for the purpose of liquidating its assets pursuant to the Act is December 22, 2006. This stage will enable the liquidator to establish the eventual order of priority for the payment of legally admissible claims. [3]

4 Considered from the perspective of the ordering of admissible claims, one very important question remains unanswered: "Are IBNR(s) [4] admissible to proof in the liquidation of Kansa?"

5 This term refers to losses or events insured against before March 3, 1995 (Kansa's winding-up date), during the period covered by a policy underwritten by Kansa [5] and therefore in effect during the time relevant to the event, but claimed against the insured only after the winding-up date.

6 In factual terms, the documentation reveals that the Toronto District School Board ("TDSB") [6] was insured by Kansa during the period of coverage between January 1, 1980 and January 1, 1983. [7] This was an "occurrence-based policy".

7 During the above-noted period of coverage (1980-1983), students at the school board were allegedly sexually harassed or abused by TDSB employees. The school board maintains that as an insured party it is entitled to expect Kansa to act on its behalf, honour its obligation to defend the board, and pay the claims of third parties if they turn out to be well founded. These claim or claims, however, were disclosed and received by the TDSB after March 3, 1995 (Kansa's winding-up date).

POSITIONS OF THE PARTIES

8 Relying on a judgment rendered on June 6, 2006 by the Quebec Court of Appeal, [8] Kansa argues that the TDSB's IBNR claim or claims are inadmissible because they are subsequent to Kansa's winding-up date, March 3, 1995.

9 Kansa's position is that, at most, the TDSB is creditor of the commuted value of its insurance policy, within the meaning of section 163 of the *Winding-up Act*. [9]

10 TDSB and the intervener American Home Assurance Company ("American Home") are of the view that section 163 of the *Winding-up Act* does not settle the issue regarding IBNRs as it strictly relates to holders of policies unexpired on the winding-up date, which is not the situation in the present case.

11 According to TDSB and American Home, there is a distinction between the value of an unexpired insurance policy and the value of IBNR claims on the date of Kansa's winding-up, namely, March 3, 1995.

12 According to TDSB's argument, [10] Kansa is obliged by the terms of the *Winding-up Act* and the applicable insurance policy to accept IBNRs as admissible claims and to deal with them as though its insurance business were still a going concern by assuming its defence and compensating third parties if appropriate.

ANALYSIS AND DISCUSSION

13 The Court is of the view that neither of the positions presented by the parties is completely defensible.

14 First of all, the Court is not persuaded that section 163 of the *Winding-up Act* settles the IBNR issue. Rather, this provision reveals Parliament's intent to deal specifically with conditions imposed on insured parties according to the liquidator's choice of whether or not to reinsure unexpired policies. From this, the Court understands that the commuted value that the Treasury Board may assign to these policies for the purpose of claims within the meaning of section 161 (collocation) has nothing to do with the value of IBNR claims.

15 It must be recalled that the *Winding-up Act* relates to the winding-up of insolvent (Canadian) companies. The Act was not enacted solely for insurance companies; it applies generally to any insolvent federal company. It is therefore normal that this general act does not contemplate every specific situation (such as IBNRs).

16 No specific provision of the *Winding-up Act* — not even section 71 [11] — singles out IBNRs as admissible claims in the winding-up of an insurance company. To interpret the law otherwise would enable insolvent insurance companies to become solvent merely by erasing an existing obligation (contingency claims) at the beginning of the winding-up. This was not Parliament's intent.

17 Moreover, there is nothing in the *Winding-up Act* that supports TDSB's claim that the IBNRs must be dealt with as though the company were a going concern after the winding-up date (March 3, 1995). On the contrary, section 71 specifically provides that all debts payable and claims against the company that existed at the beginning of the winding-up are admissible to proof against the (insolvent) company.

18 It appears to the Court that the answer to the question is to be primarily, if not entirely, found in the following excerpts from a judgment of the Quebec Court of Appeal, rendered on June 6, 2006:

> [TRANSLATION]
>
> > [7] First, as of the date of the beginning of the winding-up, March 3, 1995, it cannot claim to be in a factual and legal situation tailored to its specific circumstances that was constituted on the effective date of the amending act. Even under the scheme in subsection 17(1) as it existed at the time, the rights of all Kansa policy holders were equally affected by the initiation of the winding-up process. As of that date, they were all equally deprived of some of their ordinary rights.
> >
> > [8] In addition, the application of the Act affects the future execution of all obligations agreed on earlier that have an effect on the assets to be distributed to the creditors, in accordance with the purpose of the Act, which is to wind up the affairs of the company as inexpensively and speedily as possible, in the interests of the creditors and all other persons concerned.
> >
> > [9] The appellant is therefore on the same footing as all other Kansa policy holders. It has not proved that, between March 3, 1995 and June 28, 1996, it had crystallized its right for its claim against the debtor to be assessed at any date other than March 3, 1995.
> >
> > . . .
> >
> > [15] Consequently, the Court is of the view that, contrary to the trial judge's statement in paragraph 34 of his judgment, it is not appropriate to distinguish between the proof of claim filed between March 3, 1995 and June 28, 1996, and those filed after the latter date. Only debts payable and claims against the company that existed at the beginning of the winding-up, that is, on March 3, 1995, are admissible to proof.
> >
> > [16] Even if the appellant, who is a Kansa policy holder, is likely to be sued or have claims brought against it after March 3, 1995, this is nevertheless the date that any possible claim must be evaluated in order to determine the "value of the claim and the amount for which it shall rank" in Kansa's liabilities.
> >
> > [17] The claims to be thus evaluated on March 3, 1995 include not only claims from third parties against parties insured by Kansa that already existed on that date, but also potential future claims that could be faced by an appellant who was insured by Kansa.
> >
> > [18] It then falls to the liquidator to determine how such claims against Kansa will be treated, by taking into account the available assets in the winding-up and the order of priority of all the proved claims as established pursuant to section 161 *WUA*. The Act confers on the liquidator vast powers and in particular, with the approval of a court, the power to make an arrangement for the transfer or reinsurance of all or some of Kansa's policies. . . . [12]
> >
> > (Emphasis added)
> >
> > (Citations omitted)

19 Thus, any third-party claim (IBNR) against Kansa policy-holders that is filed after March 3, 1995 must be assessed as of the winding-up date (March 3, 1995) in order to determine its value so that the liquidator can establish the order of priority and consequently the collocation of the creditors upon the winding-up of Kansa.

20 The real question is not whether IBNRs are admissible claims within the meaning of section 71 of the *Winding-up Act*, but rather how the liquidator intends to deal with these claims in his assessment of the claim of Kansa policy-holders (as an existing obligation) on March 3, 1995, the winding-up date.

21 Other than ruling on a motion for directions from the liquidator or an application for review of the state of the collocation, it is not for the Court to dictate the method to be used by the liquidator to deal with IBNR claims or to arrange for their assessment to be March 3, 1995. In the present case, the Court has not been presented with such a request.

22 The fact remains that the TDSB claim as filed, based on a going concern, is not admissible.

FOR THESE REASONS, THE COURT:

23 *ALLOWS* in part the liquidator's motion to dismiss;

24 *DECLARES* the claim of the Toronto District School Board to be inadmissible as filed (exhibits R-4, R-5, R-6 and R-7);

25 *RESERVES*the respective rights of the Toronto District School Board and American Home Assurance Company to have the IBNR claims assessed by the liquidator as an existing claim on the winding-up date of the Kansa General International Insurance Company, namely, March 3, 1995;

26 *RESERVES* the right of the liquidator to invoke any other preliminary exemption as set out in the Act or the insurance contract that is relevant to counter any IBNR claim that the Toronto District School Board, the American Home Insurance Company, or any other creditor, could file;

27 *DECLARES* that the Toronto District School Board and American Home Assurance Company are bound by the order decreeing that December 22, 2006 is the bar date for the filing of any claim in the winding-up of the Kansa General International Insurance Company of Canada;

28 Subject to recourse and after the time for appeal, *AUTHORIZES* the liquidator to withdraw exhibits R-1 to R-11 form the Court record;

29 *THE WHOLE* without costs;
Solicitors of record:
Lavery De Billy, pour le liquidateur-requérant
Langlois Kronström Desjardins, pour l'intimée
Robinson Sheppard Shapiro, pour l'intervenante

Appendix

Date taken under advisement: December 21, 2007

SCHEDULE A

- *Before June 28, 1996:*

163. (1) Si la réassurance n'est pas effectuée, les porteurs de polices de toutes classes d'assurance qui n'ont donné lieu à aucune réclamation conformément aux termes des polices avant la date de l'ordonnance de mise en liquidation, ont droit de réclamer à l'égard de l'actif de la compagnie la valeur de leurs polices respectives calculée à la date de l'ordonnance de mise en liquidation suivant les bases, méthodes et règles de calcul que le Conseil du Trésor peut estimer justes et équitables, moins tout montant antérieurement avancé par la compagnie sur la garantie des polices.

(2) En prescrivant les bases, méthodes et règles de calcul, le Conseil du Trésor tient compte du montant éventuel des indemnités, prestations et valeurs acquises garanties par les termes des polices de leurs diverses classes, y compris toute gratification ou autre indemnité ou prestation additionnelle, accordée postérieurement à la date de l'émission de la police et subsistant à la date de l'ordonnance de mise en liquidation, ainsi que les profits répartis entre les polices mais non distribués, et tient compte des paiements éventuels de primes, le cas échéant, et des contingences dont peut dépendre le paiement des indemnités, prestations et primes, ainsi que du ou des taux d'intérêt qui peuvent être jugés appropriés. Toutefois, dans aucun cas la valeur qu'un porteur de police peut réclamer ne peut être moindre que la valeur qu'il aurait pu réclamer d'après les termes de sa police, sur annulation de la police, à la date de l'ordonnance de mise en liquidation.

(3) Les bases, méthodes et règles de calcul ainsi prescrites par le Conseil du Trésor lient tous les intéressés, sous la seule réserve de révocation ou modification par le Conseil du Trésor.

(4) Le liquidateur peut requérir le surintendant de calculer les valeurs des polices qui ont donné lieu à réclamation, et les frais de cette évaluation aux taux de trois cents pour chaque police évaluée sont remis par le liquidateur au ministre et affectés au paiement des dépenses du Bureau du surintendant des institutions financières.

163. (1) Where the reinsurance is not effected, holders of policies of all classes of insurance on which no claims have arisen in accordance with the terms of the policies prior to the date of the winding-up order are entitled to claim against the assets of the company for the value of their respective policies computed as of the date of the winding-up order in accordance with such bases, methods and rules of computation as the Treasury Board may deem just and equitable, less any amount previously advanced by the company on the security of the policies.

(2) In prescribing bases, methods and rules of computation, the Treasury Board shall take into consideration the prospective indemnities, benefits and equities guaranteed under the terms of the policies of the several classes thereof, including any bonus or other additional indemnity or benefit granted after the date of issue of the policy and subsisting at the date of the winding-up order and profits apportioned to policies but not distributed, the prospective premium payments, if any, the contingencies on which the payment of indemnities, benefits and premiums may depend, and such rate or rates of interest as may be deemed appropriate, but in no case shall the value for which a policyholder may claim be less than the value for which he might have claimed under the terms of his policy on cancellation thereof as of the date of the winding-up order.

(3) The bases, methods and rules of computation prescribed by the Treasury Board are binding on all concerned, subject only to revocation or amendment by the Treasury Board.

(4) The liquidator may require the Superintendent to compute the values of policies in respect of which claims are made and the expense of such valuation at the rate of three cents for each policy valued shall be paid by the liquidator to the Minister and applied toward payment of the expenses of the Office of the Superintendent of Financial Institutions.

- *After June 28, 1996:*

163. (1) Les réclamations des porteurs de polices de la société à concurrence de la valeur de celles-ci aux termes des sous-alinéas 161(1)*c*)(i) ou (ii) sont calculées par le liquidateur conformément aux méthodes de calcul que le surintendant juge équitables moins les avances faites par la société sur les garanties.

(2) Les méthodes de calcul ainsi prescrites par le surintendant lient tous les intéressés, sous la seule réserve de révocation ou modification de celui-ci.

163. (1) Claims of policyholders of the company to the value of their policies referred to in subparagraphs 161(1)(*c*)(i) or (ii) shall be computed by the liquidator in accordance with such methods of computation as the Superintendent may deem fair and reasonable, less any amount previously advanced by the company on the security of the policies.

(2) The methods of computation established by the Superintendent are binding on all concerned, subject only to modification by the Superintendent.

SCHEDULE B

• *Before June 28, 1996:*

71. (1) Dans la liquidation des affaires d'une compagnie sous le régime de la présente loi, est admissible contre la compagnie la preuve de créance relative à toutes les dettes dont le paiement dépend d'une éventualité, et de toutes les réclamations contre la compagnie, actuelles ou futures, certaines ou éventuelles, et pour les dommages-intérêts liquidés ou non liquidés.

71. (1) When the business of a company is being wound up under this Act, all debts payable on a contingency, and all claims against the company, present of future, certain or contingent, and for liquidated or unliquidated damages, are admissible to proof against the company.

• *After June 28, 1996:*

71.(1) Dans la liquidation des affaires d'une compagnie sous le régime de la présente loi, est admissible contre la compagnie la preuve de créance et de réclamations qui existaient au commencement de la liquidation, qu'elles soient certaines ou assujetties à une condition, exigibles ou non, ou liquidées ou non. Le montant des réclamations admises en preuve constitue, sous réserve du paragraphe (2), à toutes fins utiles une obligation existante au commencement de la liquidation.

71. (1) When the business of a company is being wound up under this Act. all debts and all other claims against the company in existence at the commencement of the winding-up, certain or contingent, matured or not, and liquidated or unliquidated, are admissible to proof against the company and, subject to subsection (2), the amount of any claim admissible to proof is the unpaid debt or other liability of the company outstanding or accrued at the commencement of the winding-up.

Footnotes

1 (R.S., c. W-10 (1993))/R.S.C., 1985, c. W-11/S.C. 1996, c. 6.

2 Family names are used in this judgment to simplify the text; no discourtesy toward the persons concerned is intended.

3 Ss. 71, 75, 76 and 161 of the *Winding-up Act.*

4 Incurred but not reported claims.

5 "An occurrence-based liability insurance policy".

6 Including its legal predecessors.

7 Policy no. 200086.

8 J.E. 2006-1270 (C.A.). The judgment interprets the scope of section 71 of the *Winding-up Act.*

9 The text of section 163 of the *Winding-up Act* is reproduced in Schedule A. This is the wording of the act that was in effect on March 3, 1995, Kansa's winding-up date.

10 At p. 3, 4 and 9.

11 Section 71 is reproduced in Schedule B.

12 *Supra* note 8.

TAB 7

1986 CarswellOnt 749
Ontario Supreme Court, High Court of Justice

Canada (Attorney General) v. Northumberland General Insurance Co.

1986 CarswellOnt 749, 22 C.C.L.I. 36, 31 D.L.R. (4th) 658, 56 O.R. (2d) 609

ATTORNEY GENERAL OF CANADA v. NORTHUMBERLAND GENERAL INSURANCE CO.

Saunders J.

Heard: July 8, 9, and 10, 1986
Judgment: September 5, 1986
Docket: No. 1780/85

Counsel: *C.C. Lax, Q.C., J.A. Carfagnini* and *C. Kochberg*, for liquidator.
D.E. Baird, Q.C. and *R.A. Conway*, for policy holders favouring an early cut-off date.
P.S.A. Lamek, Q.C. and *S.E. Paul*, for policy holders favouring a late cut-off date.
D.H. MacOdrum, and *M. Cavanaugh*, for excess insurers.
W.D. Lilly, Q.C. and *C.J. Morgan*, for reinsurers.
G. Cihra, Q.C. and *G.B. Morawetz*, for the Marsh Group.
L.A. Wittlin and *D.B. Light*, for Reed Stenhouse Companies Limited.
J.W. Mik and *J.A. Johnston*, for Ivanhoe Insurance Managers Limited.
C. Medland, for Connaught Laboratories Limited.
A.G. Formosa, for Uniroyal Limited.
P.D. Lauwers, for Cassiar Mining Corporation.
J.A.M. Judge and *D. Brown*, for Consolidated-Bathurst Inc.
R.B. Lawson, Q.C. and *D. Cheifetz*, for National Sea Products Ltd.
J. Seaborn, for Drake International Inc.
L.J. Levine, Q.C., for Minister of Supply and Services (Canada).

Subject: Insurance; Corporate and Commercial; Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Corporations --- Winding-up — Under Dominion Act — Effect on proceedings against corporation

Bankruptcy — Administration by liquidator — Insurance — Establishment of date for inclusion of claims — Whether potential claims under occurrence-based policy of which policy holder not yet aware could be included in statement filed under Winding-Up Act, R.S.C. 1970, c. W-10.

The Superintendent of Insurance, as provisional liquidator of an insurer, applied to the Court for directions with respect to the establishment of a date for the inclusion of claims for losses in a statement to be filed with the Canadian Department of Insurance in accordance with the Winding-Up Act.

The difficulty in determining such a date arose from the existence of potential claims covered by occurrence-based policies of which the policy holder was not yet aware (or claims incurred but not yet reported, called IBNRs).

The liquidator had given notice to policy holders of its intention to file the statement on September 17, 1985. A policy holder with product liability coverage in an occurrence-based policy had potential claims under its policy of which it would be unaware on September 17, 1985. It obtained an order instructing the liquidator, until further order of the Court, to add to the statement any claims of policy holders which had arisen in accordance with their policies prior to September 17, 1985, and which were reported to the liquidator thereafter (the "Connaught order").

Held:

The Court fixed January 30, 1987, as the last day for sending in claims by policy holders.

In determining an appropriate date, the Court had to consider two issues: the power of the Court now to determine the date considering the effect of the Connaught order and the provisions of the Winding-Up Act, and, if there was such power to determine a date, the status of the policy holders with IBNRs.

The Connaught order was made with jurisdiction and its effect was to permit the addition of claims to the statement after filing, by rectifying the statement under s. 167(2) of the Act. The value of the claims on the statement, as amended from time to time after filing, was the value referred to in s. 169(2) of the Act.

The Court had the power to fix a date in the future for sending in claims to be added to the statement. However, the Court had no jurisdiction to fix a date prior to the hearing of the motion as such an order would conflict with the Connaught order. Even if the Court had the power to set an earlier date, it would not do so because of the number of claims that were filed following the Connaught order.

There would be little or no problem in fixing the date if it were not for the IBNRs. In order to fix an appropriate date, it was essential to determine the extent to which claims could be made with respect to them. IBNR claims could be asserted as future or contingent claims in the winding-up. If not included in the statement, they should have been included and might now be added by the liquidator under s. 167(2) of the Act. Since such contingent claims could be included in the statement, there was no need to delay further the date for sending in claims except in the interest of the orderly administration of the estate.

The Court declined to give direction as to the treatment of claims made after January 30, 1987. The Act made provisions for claims received after the fixed date and it was not necessary to make an order now with respect to the possibility that late claims might be made.

Table of Authorities

Statutes considered:

Winding-Up Act, R.S.C. 1970, c. W-10 —

s. 6

s. 9

s. 33

s. 71

s. 74

s. 76

s. 77

s. 162

s. 164

s. 167

s. 169

Authorities considered:

Jowitt's Dictionary of English Law (2nd ed.), "collocation"

Maxwell on Interpretation of Statutes (12th ed., 1969), p. 199.

MOTION by liquidator of insurer for directions with respect to establishment of date for inclusion of claims for losses in statement to be filed in accordance with the Winding-Up Act.

***Saunders J.*:**

1 This is a motion made pursuant to the order of Mr. Justice Houlden which directed the Superintendent of Insurance, as provisional liquidator of Northumberland General Insurance Company ("Northumberland"), to apply to this Court for directions with respect to the establishment of a date for the inclusion of claims for losses in a statement to be filed with the Canadian Department of Insurance in accordance with the Winding-Up Act, R.S.C. 1970, c. W-10, as amended.

Background Facts

2

1. Northumberland carried on the business of general insurance other than life insurance. The principal categories of such business were:

(a) product liability insurance;

(b) general liability insurance;

(c) property insurance;

(d) marine and inland marine insurance;

(e) professional liability insurance; and

(f) motor vehicle insurance.

2. There were two general types of insurance policies written by Northumberland:

(a) Occurrence-based policies

3 Insurance policies written on an "occurrence basis" are those in which the insurer agrees to protect the policy holder against liability arising from incidents which occur during a specified policy term notwithstanding that the claim which is made against the policy holder may be lodged after the expiration of the term of the policy; and

(b) Claims-based policies

4 Insurance policies written on a "claims basis" are those in which the insurer agrees to indemnify the policy holder against liability for claims made against the insured only during the specific term of the policy.

5 A substantial majority of Northumberland's policies were occurrence-based.

3. At any particular time while it was in business, policy holders might have had a number of actual or potential claims against Northumberland. Such claims might be grouped as follows:

(a) occurrence-based policy holders whose policies had expired might have had claims by reason of occurrences during the policy period of which they were unaware and which accordingly had not been reported to Northumberland;

(b) claims-based policy holders whose policies were in force would have had claims by reason of occurrences of which they were aware;

(c) occurrence-based policy holders whose policies were in force would have had actual claims by reason of occurrences of which they were aware and potential claims by reason of occurrences during the policy period of which they were unaware; and

(d) policy holders whose policy had been cancelled before expiration would have a claim for the unearned premium on the policy in addition to any other actual or potential claims for losses.

6 In this motion, direction is sought as to the appropriate cutoff date for claims by policy holders. The difficulty in determining such a date arises from the existence of potential claims covered by occurrence-based policies of which the policy holder is not yet aware. These claims were variously described as contingent claims, hypothetical claims or claims incurred but not yet reported (IBNRs).

4. On July 24, 1985, Northumberland was wound up pursuant to the Winding-Up Act by order of this Court and the Superintendent of Insurance was provisionally appointed as liquidator by further order of the same date.

5. The Superintendent subsequently appointed Coopers and Lybrand Limited as his agent to assist him in fulfilling his duties and in carrying out the winding-up of Northumberland. The Superintendent of Insurance and Coopers and Lybrand Limited will be referred to collectively in these reasons as the "liquidator".

6. The Winding-Up Act imposes a duty on the liquidator to prepare and file a statement of claimants and creditors (the "Statement") with the Department of Insurance. There is no time prescribed for the filing of the Statement. Based upon its preliminary assessment of the affairs of Northumberland, the liquidator determined shortly after the winding-up order that it was prudent and in the best interests of the estate to file the Statement. In accordance with the statute, a notice of the intention to file appeared in newspapers distributed throughout Canada from the 11th of August to the 17th of August 1985.

7. The notice stated that the Liquidator intended to file the Statement not less than 30 days after the date of publication of the notice. All claimants were required to file their claims immediately with the liquidator and prior to the filing of the Statement. (The text of the notice is set out in Sched. A-1 to these reasons.)

8. The liquidator sent a letter dated August 21, 1985, addressed to all policy holders advising that it anticipated filing a list of policy holders by the following September 17th. The letter stated that only claims of which the liquidator had received

notice by September 17th would be entitled to priority in the liquidation. (The text of the letter is set out in Sched. A-2 to these reasons.)

9. Connaught Laboratories Limited ("Connaught") was a policy holder with product liability coverage in an occurrence-based policy. It had potential claims under its policy of which it would be unaware on September 17, 1985. It applied to this Court for an injunction to enjoin the liquidator from filing the Statement. On September 17, 1985, Associate Chief Justice Parker, as he then was, ordered the liquidator, until further order of the Court, to add to the Statement any valid claims of policy holders which had arisen in accordance with their policies prior to September 17, 1985, and which were reported to the liquidator thereafter (the "Connaught order"). The motion and the making of the Connaught order was unopposed by the liquidator.

10. On September 17, 1985, the liquidator filed the Statement with the Canadian Department of Insurance. The Statement contained in excess of 13,000 claims against Northumberland (excluding U.S. claims) in respect of which the liquidator has now established a reserve of approximately $135 million. The liquidator has continued to receive notice of claims arising prior to September 17, 1985, and has added such claims to the Statement in accordance with the Connaught order. As of May 27, 1986, the liquidator had received approximately 500 claims reported after September 17, 1985. The liquidator has not established a reserve for any of these claims.

11. On September 30, 1985, Mr. Justice Houlden ordered that all outstanding policies of insurance of Northumberland be cancelled as of September 17, 1985 (the "cancellation order") and gave policy holders until December 15, 1985 to object to such order. The liquidator received a total of 81 objections to the cancellation order. The liquidator wrote to the objecting policy holders asking them to indicate the reason for their objection within 45 days; otherwise their objection would be deemed to have been withdrawn. There were 69 responses to that request. The liquidator reports that all objections received relate generally to policy holders' dissatisfaction with losses due to the insolvency of Northumberland and the costs and difficulties experienced by policy holders in replacing coverage.

12. In the cancellation order, Mr. Justice Houlden ordered that notice be given to all policy holders substantially in the form annexed to the order. (The text of the form annexed is set out in the Sched. A-3). On November 15th, a letter was sent addressed to policy holders which substantially was in the terms of the order so far as unearned premiums were concerned. The letter did not deal with claims for losses. The letter advised the policy holders that the liquidator would be writing to them at a later date with respect to those claims. (The text of the letter is set out in Sched. A-4).

13. A letter addressed to "Property and Casualty Policyholders" dated November 21, 1985, was prepared by the liquidator. The Court was advised that it was sent out at various times but that all such policy holders received it no later than May 1, 1986. It is not clear whether the letter was sent to persons with loss claims who had other kinds of policies. (The text of the letter is set out in Sched. A-5).

The Winding-Up Act

7 The sections of the Winding-Up Act referred to in these reasons are set out in Sched. B. What follows is an overview of the scheme of the statute without any attempt to analyze its provisions.

1. The Act applies to Northumberland. It is divided into three parts. Part I is entitled "General" and Pt. III is entitled "Insurance Companies". In the case of Northumberland, the provisions of Pt. I are subject to the provisions of Pt. III (s. 9).

2. There is an order of priority for the payment of claims (s. 162). In the case of Northumberland, and subject to the Winding-Up Act, claims shall be paid in the following order of priority:

(a) first, costs of liquidation;

(b) secondly, claims of preferred creditors;

(c) thirdly, claims of policy holders ranking as follows: claims that have arisen under the policies of Northumberland, in accordance with the terms thereof, prior to the date of the filing of the Statement, and claims of policy holders to the value of their policies computed as provided in the Winding-Up Act.

(d) Creditors other than policy holders, reinsurers and preferred creditors are entitled to receive a dividend on their claims only if the assets are more than sufficient to pay the claims specified in subparas. (a), (b), (c) above.

Section 164 is the only provision in the Winding-Up Act that deals with the computation of claims. Policy holders on which no claims have arisen in accordance with the terms of the policies prior to the date of the winding-up order are entitled to claim against the assets of Northumberland for the value of their respective policies computed as of the date of the winding-up order in accordance with such bases, methods and rules of computation as the Treasury Board may deem just and equitable.

8 Subsection 164(2) requires the Treasury Board to take into account certain matters in prescribing the bases, methods and rules of computation. Among such matters are the contingencies on which the payment of indemnities may depend. In no case shall the value for which a policy holder may claim be less than the value for which he might have claimed under the terms of his policy on cancellation thereof as of the date of the winding-up order.

9 On September 12, 1985, the Treasury Board prescribed the value of a Northumberland insurance policy, in respect of which no claim had arisen in accordance with the terms of the policy, to be an amount equal to the unearned premium. From the argument on the motion, it would appear that in most cases the value so prescribed would be the minimum permitted under s. 164(2). A Treasury Board prescription is binding on all concerned subject only to revocation or amendment by the Board (s. 164(3)).

3. The liquidator may require the Superintendent to compute the value of policies in respect of which claims are made (s. 164(4)).

4. When the business of a company is being wound up, all debts payable on a contingency and all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, are admissible to proof against the company (s. 71(1)).

10 In case of any claim subject to any contingency or for unliquidated damages or which for any other reason does not bear a certain value, the Court shall determine the value of such claim and the amount for which it shall rank (s. 71(2)).

11 As s. 71 is in Pt. I of the Winding-Up Act, its provisions are subject to ss. 162 and 164 which are in Pt. III of that statute.

5. The Statement is provided for in s. 167(1). The liquidator is required to prepare the Statement without the filing of any claim, notice or evidence, or the taking of any action by any person. The Statement is to contain a list of all the persons appearing by the books and records of the company to be creditors of the company or to be claimants under any policy, taking cognizance in this connection of all claims that have arisen in accordance with the terms of the policies of which he has notice. The Statement must show the amount, determined as provided by the Act, for which each such person is to rank as a claimant or a creditor and every such person shall be collocated and ranked as, and is entitled to the right of, a claimant or a creditor for the amount so ascertained by the liquidator, without filing any claim, notice or evidence or taking any action.

12 In Jowitt's Dictionary of English Law (2nd ed.), "collocation" is defined as the order in which creditors are placed and paid. (Nothing turns on the meaning of this word.)

6. There is no time following the winding-up order in which the Statement must be filed. The decision to file is made by the liquidator after preparation. He must first publish notice of his intention to file. A copy of the Statement shall be filed with the Department of Insurance after not less than 30 days of the giving of the notice of intention (s. 169(1)).

7. The collocation may be contested by any interested person and any person who is not collocated, or who is dissatisfied with the amount for which he is collocated, may file his own claim (s. 167(1)).

8. There is no time set out for the initiation of a contestation or for the filing of a claim. The liquidator or the Court may rectify the Statement on account of omissions or errors therein, notified to the liquidator or discovered by him at any time before the completion of the liquidation and only the claims appearing in the Statement or amended Statement shall be regarded in the distribution of the assets (s. 167(2)).

9. Any claim that has arisen under the terms of the policy of which notice is received by the liquidator after the filing of the Statement, shall rank upon the assets of the company only for the value entered in the Statement, unless the assets are sufficient to pay all claimants in full, and in such case, the policy holder shall rank as a creditor for the balance of his claim (s. 169(2)).

10. The Court may fix a certain day on or within which creditors may send in their claims and may direct notice to be given by the liquidator in the manner determined by the Court (s. 74).

11. Section 76 sets out the preconditions to a distribution and provides that the liquidator may distribute without reference to any claim that has not been sent to him. The liquidator is not liable for the assets distributed to any person whose claim has not been sent in at the time of distribution.

12. Any proved and allowable claim sent in after a partial distribution shall rank with other claims in any future distribution (s. 77).

13. The liquidator shall perform such duties in reference to winding up the business as are imposed by the Court or by the statute (s. 33).

14. As ss. 33, 74, 76 and 77 are in Pt. I, their provisions are also subject to Pt. III.

Present Situation

13

1. The Statement has been filed as required by s. 169(1). The Statement is not in evidence. The Court was told that it is not a formal document, but is a computer print-out containing approximately 13,000 actual liability claims and a list of policies under which no claims have arisen of which the liquidator has notice.

2. The Connaught order has not been appealed or varied. Approximately 500 claims have been reported to the liquidator since the date of that order.

3. Eighty-one policy holders have objected to the cancellation of their policies. Sixty-nine responded to the questionnaire and the remaining 12 are regarded by the liquidator as having withdrawn their claim. There is no provision in the Winding-Up Act and no other provision was drawn to my attention which contemplates policy holders objecting to cancellation of their policies on a winding-up. The policy holders were, however, given a right to object which implies some redress in a proper case. Their situation will have to be considered.

4. The liquidator reports that it is unlikely that there will be sufficient assets in the estate to satisfy claims of policy holders entitled to be paid under s. 162(1)(*c*). As at September 17, 1985, the liquidator had on hand a net amount of $34 million. As at May 31, 1986, that amount had increased to approximately $42 million. The reserve set up by the liquidator for the 13,000 known claims is $135 million.

5. There is uncertainty about the status of the IBNR claims in occurrence-based policies. The claims have not been reported because the policy holders are not yet aware of them. It is the position of counsel for the liquidator that while actual claims

for unascertained amounts may be included in the Statement, the Winding-Up Act does not provide for IBNRs. Other counsel expressed a contrary view of the statute.

6. The liquidator also submitted that the statute further limited the claims of policy holders. It is his position that policy holders who have made claims will receive a distribution based on the amount of those claims and policy holders who have not made claims will have their policies valued under s. 164 in the manner prescribed by the Treasury Board. Accordingly, policy holders may not receive a distribution based on both a claim under the policy and a claim for unearned premiums. There is a dispute as to the correctness of this approach to the statute. The problem was referred to by some counsel as the "duality issue".

The Issues

14 The liquidator is under a duty to complete the administration and distribute the assets within a reasonable time. There are two competing interests in determining the date for cutting off further claims. Policy holders with no potential IBNRs would like the date to be as early as possible. Delay means that they will likely receive less on a distribution notwithstanding the increase in the value of the assets held by the liquidator. An amount received today may be worth more to a policy holder than the same amount received several years later, even if it has been invested in the meantime. Delay in distribution may have other serious consequences for policy holders who, at best, are likely to receive only partial indemnity. The policy holders without IBNR's do not, in fairness, advocate an early date on the basis that there would be less [sic] claimants to share, but that would be the case. They take the position that the Court should find the best practical solution consistent with the terms of the statute. All policy holders will suffer and it is suggested that it is impractical and unfair for 13,000 policy holders to wait for a partial indemnity until a relatively few further claims can be made.

15 On the other hand, policy holders with potential IBNRs are concerned that they will lose the right to claim in respect of coverage that they have paid for if their claims are now to be cut off. It may be several years before most of these claims come to light. Some may not be revealed for many years. They submit that fairness should not be sacrificed for expediency or efficiency in administration.

16 The liquidator does not, at present, have any information to provide the Court as to the magnitude of the respective interests of the IBNR policy holders so that the extent of the problem in monetary terms cannot be assessed.

17 Reinsurers and excess insurers also have an interest in the outcome of this motion but are not as directly involved. Reinsurers favour an early cut-off date as that may reduce the claims against them. While that view is understandable, it is not entitled to much weight. The position of the reinsurers is that the statute does not permit the Court to set a date. As to the excess insurers, there is considerable variety of coverage and, accordingly, some excess insurers may favour an early date and some a later date for cutting off claims.

18 All counsel agree that there has to be some date for sending in claims so that the liquidator will have an ability to complete the administration of the estate and make a distribution. It seems to me that in determining an appropriate date, I must consider two issues:

(1) the power of the Court to now determine a date. This requires a consideration of the effect of the Connaught order and the provisions of the Winding-Up Act.

(2) If there is such a power to determine a date, the status of the policy holders with IBNRs must be considered. There must be a determination of whether they are now entitled to claim on the winding-up with respect to those claims. The result of that finding, to a great extent, will determine what will be a reasonable date for sending in claims.

Power of Court to determine date for making claims

(a) The Connaught order

19 When Connaught became aware that the liquidator intended to take steps which might prevent filing of claims covered by its policy, it brought an application for a declaration that it could add to the Statement claims incurred but not reported as at September 17, 1985. On September 17th, it moved for an interlocutory injunction to restrain the filing of the Statement. The Associate Chief Justice, as he then was, directed the liquidator to add, until further order, any valid claims of policy holders which had arisen in accordance with the terms of their policies prior to September 17, 1985, and were reported to the liquidator thereafter. The order in substance grants the relief sought by Connaught on the application although the language is not identical. The liquidator appeared on the motion and did not oppose the making of the order.

20 The Connaught order was not appealed and, provided that there was jurisdiction to make it, it is in full force and effect in accordance with its terms. It is necessary to now consider the jurisdiction that the Court had to make the order.

21 The liquidator is required to perform such duties as are imposed by the Court (s. 33). The Court may fix a time for sending in claims (s. 74). The Winding-Up Act does not provide a time for filing the Statement. It must be filed not less than 30 days after notice of intention has been given. There is no doubt that the Court has power to direct the liquidator to postpone the time of filing. The Connaught order did not, by its terms, restrain the liquidator from filing the Statement which the liquidator did that very day.

22 The action of filing presents a difficulty. The Winding-Up Act does not specifically contemplate additions to the Statement following filing. The liquidator or the Court may rectify the Statement on account of omissions notified to the liquidator or discovered by him (s. 167(2)). It was argued that this subsection should receive a limited interpretation and be confined to correcting errors and omissions in the Statement as filed. Having regard to other provisions of the statute and the winding-up scheme, I consider such an interpretation to be too restrictive. Any policy holder who is not collocated on the Statement or who is dissatisfied with the amount for which he is collocated, may file his own claim (s. 167(1)). If such a claim turns out to be valid, the only way in the statute that it can be effectively dealt with is by rectification under s. 167(2).

23 I am of the opinion that if the liquidator in one way or another becomes aware of a proper claim, he may add it to the Statement.

24 I am, accordingly, of the view that it was within the jurisdiction of this Court to direct that claims could be added until further order.

25 The effect of the Connaught order cannot be fully assessed without consideration of s. 169(2). That subsection provides that any claim that has arisen under the terms of a policy of which notice is received by the liquidator after the date of filing of the Statement shall rank upon the assets only for the value entered in the Statement unless the assets are sufficient to pay all claimants in full which, in this case, they are not.

26 It was argued that the subsection applied to policies rather than claims of which notice was received by the liquidator. That, in my view, would be a questionable interpretation as it is unlikely that there would be any value for such a policy entered in the Statement. I proceed on the basis that the subsection refers to claims of which the liquidator received notice after the date of filing.

27 Section 169(2) would, therefore, apply to most, if not all, of the claims added pursuant to the Connaught order. The effect of the subsection depends on the meaning of the words "value entered in the statement". In my opinion, the section must be interpreted as referring to value in the statement as rectified from time to time by s. 167(2).

28 If the reference in the subsection is to value at the time of filing, the Connaught order would have no practical significance as, any distribution with respect to the added claims would be unlikely. In addition, such an interpretation would, in this liquidation, give no redress to policy holders who contest the collocation as provided for in s. 167(1).

29 With respect to the liquidator, I consider that he has taken too broad an interpretation of s. 169(2) before this Court and in his letters to the policy holders. The subsection is not devoid of useful meaning. It would apply to permit a liquidator

to make payments of claims under s. 162(1) in accordance with a statement without regard to claims that might subsequently come to his attention to the extent they exceeded the value entered in the statement. To go further and interpret the subsection as providing for a deferral of all claims that are not sent to a liquidator until after the filing of the statement would open the way to the possibility of unfair treatment amongst policy holders. In my opinion, clearer language is required to justify such an interpretation.

30 It must be borne in mind that the statement is prepared without the filing of any claim, notice or evidence or the taking of any action by any person (s. 167(1)). The only prior notice of filing that might come to the attention of policy holders is the publication of the notice of intention which is to be made in the Canada Gazette and in the official gazette of each province and in two newspapers issued at or nearest the place of the head office of the company. It is likely that such a notice might not come to the attention of some policy holders whose claims or policies had been omitted from a statement. When such a policy holder does become aware of his right to claim in the distribution, he can make a claim and the statement may be rectified (subss. 167(1) and (2)). Such action would be a meaningless exercise in this case if he was precluded from sharing in the distribution because of s. 169(2).

31 The Connaught order was made with jurisdiction and its effect is to permit the addition of claims to the Statement after filing, by rectifying the Statement under s. 167(2). The value of the claims on the Statement, as amended from time to time after filing, is the value referred to in s. 169(2).

(b) Power of Court to now determine date for making claims

32 The Statement has been filed but claims may be added to it pursuant to the Connaught order and as a result of any contestation of the collocation or the filing of further claims. The Court may fix the time within which creditors may send in their claims (s. 74). The position of creditors who claim after such a date are dealt with in s. 76 and s. 77. Subsection 169(2) may also be applicable in certain circumstances.

33 It was submitted that s. 167 and s. 169(2) in Pt. III provided a code that the Court had no power to fix a date for the filing of claims by policy holders of Northumberland. For reasons already given, I do not accept that submission. The power to fix a date in s. 74 is not, in my opinion, qualified by any provision in Pt. III. Section 169 provides for the filing of a statement prepared in accordance with s. 167. Section 167 provides for contestation of that statement and the filing of further claims with no time limit specified. Section 169(2) provides for the treatment of claims of which the liquidator receives notice after filing. It seems to me that it is appropriate and necessary to fix a time for the sending in of claims and s. 74 provides the power to do so.

34 It was submitted that I had jurisdiction to fix any date, including any date prior to the hearing of the motion and as far back as September 17, 1985. With respect, I do not agree. The Connaught order is in full force and effect and any date earlier than the date of the order to be made in this motion would be in conflict with it. It was said that the Connaught order was only intended to be an interlocutory order to maintain the status quo until the question of the date could be fully considered. That is not what the order says. The language is plain and unambiguous. The liquidator is to add to the Statement claims that have arisen prior to the Statement and are reported to the liquidator thereafter until further order of the Court.

35 Even if I had the power to fix an earlier date, I would not do so. Following the Connaught order, all policy holders were invited to submit claims and it would be inequitable to now put in question those approximately 500 claims that have been subsequently filed.

36 I conclude that the Court has power to fix a date in the future for sending in claims to be added to the Statement.

37 There would be little or no problem in fixing the date if it were not for the IBNRs. In order to fix an appropriate date, I consider it to be essential to determine the extent to which claims may now be made with respect to them.

The Contingent Claims

38 The Winding-Up Act does not contain a provision specifically dealing with IBNRs. The statute was first enacted in 1882 when claims of that nature were unknown and subsequent amendments have not addressed the issue. It is of interest that Bill C-123, introduced in the House of Commons on June 26, 1986, amends s. 162(1)(*c*)(i) to provide for claims that have arisen by reason of the occurrence of an event insured against prior to the date of the filing of the s. 167 statement.

39 Quite apart from the Winding-Up Act, the argument reveals that if an occurrence-based policy holder were to value his policy at the time of its cancellation before expiration, the value would consist of three separate components:

(1) the value of claims for events that had occurred prior to cancellation and were known to the insured and had either been reported to the insurer or would be reported within the required time limit. (Insurers maintain a reserve for such claims.)

(2) the value of claims for events that had occurred prior to cancellation but were unknown to the insured and had, therefore, not been reported to the insurer (IBNRs). (Insurers also maintain a reserve for such claims.)

(3) the unearned premium for the cancelled period of the policy.

40 Section 162 (1)(*c*) provides for payment based on claims that have arisen under the policies in accordance with the terms thereof prior to the date of filing the Statement. Future and contingent claims are admissible to proof subject to the provisions of Pt. III (s. 71). The Treasury Board is required to take contingencies into consideration in valuing policies on which no claims have arisen (s. 164(1)).

41 There is no dispute that the terms of some of the policies provided for IBNRs in that those policies provided for indemnity for an event insured against occurring during the policy period which might not be reported until after the policy period. The right so provided to a policy holder could, in my opinion, be described as either a future claim or a contingent claim. Such claims are admissible to proof against Northumberland subject to the provisions of Pt. III (s. 71). There is no provision in Pt. III that would qualify the right to prove them. They are, in my opinion, claims that have arisen in accordance with the terms of those policies that provide for the making of such claims (s. 162(1)(*c*)). In my opinion, as they are future or contingent claims, they would, where applicable, arise in an occurrence policy on the day the policy is written. In some cases, there may be no such claim at the date of cancellation. For example, a policy holder under an occurrence-based residential fire policy where no fire had occurred at the date of cancellation, would then have no future or contingent claim under the policy. Where, however, there are such contingent or future claims, the practice in the insurance industry is to set up a reserve for them.

42 Future or contingent claims are also, in my opinion, claims of which the liquidator has notice (s. 167(1)) and therefore should have been included by him in the Statement. If they are omitted, the Statement can be rectified (s. 167(2)). I am comforted in this latter view by the terms of Bill C-123. That Bill amended s. 161(1)(*c*) to deal with occurrence claims that have arisen by reason of the occurrence of an event insured against prior to the date of filing the statement. The drafters of the Bill did not feel that it was necessary at the same time to amend s. 167. If the new legislation is passed, it will be clear beyond doubt that such claims can be asserted and therefore it would follow that such claims should be in the s. 167 Statement.

43 If I am wrong in my conclusions that, where appropriate, future and contingent claims have arisen under the policies at the date of filing, then, in my opinion, such contingent or future claims would be valued under s. 164. The Treasury Board must take into consideration contingencies in prescribing the bases, methods and rules of computation of the value of policies. There would be two difficulties if contingent claims were to be valued under s. 164(1). First, the problem of valuing contingent claims when a liability claim has been made (the duality issue); and, second, the Treasury Board prescription in the case of Northumberland does not take contingency claims into consideration and its prescription is binding on all concerned (subss. 164(2) and (3)). It may be that where liability claims have been made that a policy will be valued under s. 164(4). As I have said, the valuation problems require further consideration by all concerned and, if necessary, further directions may be asked for.

44 If the liquidator is right that contingent claims cannot be made under the terms of the present legislation, then the result would be that a substantial number of policy holders would be unable to claim with respect to coverage they have paid for. In my

opinion, that would be an unreasonable and unfair result. An intention to produce an unreasonable result is not to be imported to a statute if there is some other construction available: see Maxwell on Interpretation of Statutes (12th ed., 1969), p. 199.

45 I therefore conclude that IBNR claims can be asserted as future or contingent claims in the winding-up. If not included in the Statement, they should have been included and may now be added by the liquidator under s. 167(2). Even if that is not a correct treatment, the claims then would have to be valued under s. 164 but how that is to be done is not clear and is not part of this motion. I proceed on the basis that the claims should have been in the Statement and may now be added.

Determination of date for inclusion of claims

46 On the basis of my conclusion with respect to the treatment of contingent claims in the Statement, there is no need to delay further the date for sending in claims except in the interest of the orderly administration of the estate. The three letters that have been sent to policy holders do not make clear that IBNR claims may be and should be made. There is also a possibility that a policy holder might, in reading the letters, be confused as to the practical value of asserting any claims after September 17, 1985. I therefore consider it to be advisable for the liquidator to send out a further letter to all policy holders who may be affected to advise them that IBNR claims should be made and valued by the policy holder. Those policy holders who objected to cancellation should also be given an opportunity to make claims. The liquidator said that it would take 45 days to prepare and send out such a letter. A period of 90 days would appear to be reasonable for the making of claims following the sending of the letter. I would, pursuant to s. 74 of the Winding-Up Act, fix January 30, 1987, as the last day for sending in claims by policy holders.

47 The liquidator asked that there be a direction that claims made subsequent to that date be held to be non-priority creditors. I have considerable doubt as to my jurisdiction to make such an order but, in any event, I decline to do so at this time. The statute makes provisions for claims received after the fixed date and it is not necessary to now make an order with respect to the possibility that late claims may be made.

48 The liquidator stated that a date prior to September 30, 1986, would not adversely affect the orderly or timely distribution of the estate. There is no indication of how late the date would have to be to create an adverse effect. There was no suggestion that a further four months would create problems.

49 I have considered that the extended date may be beyond the date in which some policy holders would otherwise have been entitled to claim under their respective policies. In general, they should not be able to take advantage of the extended time but I am concerned that some may have let the time go by because they did not fully appreciate that they were still entitled to make a claim for which there was a possibility of at least partial payment. I think such policy holders should not now be prevented from sending in claims on the understanding that they may, depending on the circumstances, be prevented from participating in the distribution.

50 It seems to me that the so-called duality issue is a matter that need not be now determined. I was advised that there was an understanding amongst counsel that the duality issue would not be dealt with on this motion and that some persons, who might otherwise have done so, did not appear. Once all of the claims have been presented, it will then have to be considered how they are to be treated for the purpose of calculating the distribution. While it would be desirable to clarify the duality issue now so that policy holders could know whether it was worthwhile to present claims, that determination is not essential to fixing the date. While there has already been considerable argument on the issue, the liquidator did not come to this motion prepared to argue it and others may wish to make submissions. The liquidator's position is being attacked by all policy holders. There are important interpretation and policy considerations involved and, in my view, the Court would benefit from further consideration and further argument.

51 It is to be hoped that following January 30, 1987, the liquidator will know the maximum of the claims actual and contingent against Northumberland. He would then be in a position to make an interim distribution to policy holders. As time goes by, the aggregate amount of claims would shrink rather than expand even if a few additional claims were to be made and further distributions could be made from time to time. It is recognized, however, that because of their uncertainty, the making

of contingent claims may impose a severe administrative problem on the liquidator and could delay the distribution of even a relatively small interim dividend. As the liquidator is not carrying on the business, he cannot risk basing a distribution on an estimate or by setting up a reserve for contingent claims but rather must provide for the maximum claim which may, in some cases, be the limit of the policy. The difficulty is that the extent of the problem will not be ascertainable until all the claims have been made. It is likely that further direction will be required. It is noted that in case of claims subject to any contingency or which for any reason do not bear a certain value, the Court has power to determine the value of such claim and the amount for which it shall rank (s. 71(2)).

52 The motion was argued over three days and 17 counsel made submissions. I am aware that I have not dealt fully with the extent or quality of those submissions. More important, I may have overlooked some matter that needs to be dealt with or there may be some new problems arising out of these reasons. It is perhaps unnecessary to say that I will be available if further directions are required.

53 The letter to the policy-holders should be settled with counsel who appeared who are affected by its contents before it is sent out by the liquidator. Any difficulty in settlement could be the subject of an application for further directions.

54 While there were a number of submissions, there was a minimum of duplication and all submissions, if I may say so, were of high quality and useful in helping to determine the issue. All parties appearing by counsel should have their costs of the motion. The costs of the liquidator and the representation counsel will be on a solicitor-and-client basis.

Order accordingly.

Appendix A-1

IN THE MATTER OF NORTHUMBERLAND GENERAL INSURANCE COMPANY

AND IN THE MATTER OF THE CANADIAN AND BRITISH INSURANCE COMPANIES ACT, R.S.C., 1970, C. I-15

AND IN THE MATTER OF THE WINDING-UP ACT, R.S.C. 1970, c. W-10

TO THE POLICYHOLDERS, CLAIMANTS, CREDITORS, SHAREHOLDERS AND CONTRIBUTORIES OF NORTHUMBERLAND GENERAL INSURANCE COMPANY

On July 24, 1985, a Winding-Up Order was granted in the Supreme Court of Ontario against Northumberland General Insurance Company, having its head office in the City of Toronto, in the Province of Ontario.

TAKE NOTICE THAT It is intended that a Statement of Claimants and Creditors shall be filed in the Department of Insurance pursuant to Section 169 of the Winding-Up Act, R.S.C., not less than thirty (30) days after the date of this publication.

All claimants must file their claims immediately with the Agent to the Liquidator and prior to the filing of the Statement.

The Superintendent of Insurance, Provisional Liquidator of Northumberland General Insurance Company, Ottawa, by its Agent, Coopers & Lybrand Limited, 21st Floor, 145 King Street West, Toronto, Ontario, M5H 1V8.

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Appendix A-2

[LETTERHEAD OF COOPERS & LYBRAND LIMITED] August 21, 1985

The Policyholders

NORTHUMBERLAND GENERAL INSURANCE COMPANY ("Northumberland")

On July 24, 1985 an Order was granted appointing the Superintendent of Insurance as Provisional Liquidator to wind-up Northumberland. Coopers & Lybrand Limited has been appointed the Superintendent's agent.

Pursuant to the provisions of the Winding-Up Act, within the next forty-five days we will be filing a list of policyholders and claimants with the Department of Insurance. We are anticipating that this list be filed by September 17, 1985. Once this list has been filed, all policies will, by operation of law, effectively be cancelled. You should, therefore, be arranging to have alternative insurance arranged as soon as possible and to advise us of all claims not already reported. Only claims of which the liquidator has received notice by September 17, 1985 will be entitled to priority in the liquidation.

The Winding-Up Act provides that the following claims of policy holders will rank equally in the distribution of assets:

1. Claims that have arisen under the policies of the company, in accordance with the terms thereof, up to the date of the filing of the list of claimants (outlined above), less any amounts previously advanced by Northumberland on the security of the policies; and

2. The amount of unearned premiums as at July 24, 1985 on policies on which there have been no claims.

At this time, we have no assurance that the assets are sufficient to pay one hundred cents on the dollar to all claimants and policy holders. It is also likely that the distribution will take many months, in view of the complexity of Northumberland's affairs.

You should immediately advise any other party who may have an interest in your policy (e.g. mortgagee, loss payeee or third party claimant) or any other person who holds a certificate of insurance in respect of your policy. We will not be writing directly to them.

Should you have any questions, please address them in writing. We will do our best to answer you as quickly as possible.

Yours very truly,

COOPERS & LYBRAND LIMITED

Agent for the Provisional Liquidator of Northumberland General Insurance Company

(Signature)

R.M.C. Holmes

Senior Vice-President

RMC/rp/xhe

Appendix A-3

[LETTERHEAD OF COOPERS & LYBRAND LIMITED]

TO: Policyholders of Northumberland General Insurance Company ("Northumberland")

On August 21, 1985, we wrote and informed you of the winding-up of Northumberland, the provisional appointment of the Superintendent of Insurance as Liquidator, and our appointment as his Agent.

We further informed you that we anticipated filing a Statement of Policyholders and Claimants (the "Statement") with the Department of Insurance within 45 days and that all policies would then, by operation of law, effectively be cancelled.

We now wish to confirm that the Statement was in fact filed on September 17, 1985. On that same date the Supreme Court of Ontario ordered the Liquidators, until further order of the Court, to add to the Statement valid claims which arose under

the terms of Northumberland policies prior to September 17, 1985, but of which he receives notice subsequent thereto. We therefore emphasize that you should forward to us as soon as possible notice of any new claims which you may have under your policy, which arose prior to September 17, 1985 and which are not set out in the Statement.

The Winding-Up Act provides that any claims which arise under the terms of a policy after the date of filing of the Statement, that is, after September 17, 1985, are unsecured claims and will not receive any distribution unless the assets are sufficient to pay in full policyholders having priority claims. It is not anticipated that there will be sufficient assets to make any payments to unsecured creditors. The Supreme Court of Ontario has now ordered that policyholders may object to the cancellation of their policies by notice in writing to the Agent to the Liquidator in writing, delivered or postmarked by November 30, 1985. The merits of any such objection will be dealt with by the Liquidator or the Court, but will not result in any change to the unsecured status of claims for losses which arise after September 17, 1985.

Pursuant to Section 170 of the Winding-Up Act, the Liquidator is required to advise you of the amount appearing as your claim in the Statement. The amount indicated is based on Northumberland's records and may not reflect recent information from you. The Statement is subject to rectification or amendment by the Liquidator or the Court at any time before the completion of the liquidation. Certain claims have been listed at $1.00 for administrative reasons, arising out of the state of the books and records. *The fact that your claim has been listed for the amount specified is not an admission that the claim will be collocated in this manner by the Liquidator.* You will be notified of any variation in the nature or amount of your claim and will have the right to contest this. You do not have to take any steps at this time. Policyholders with multiple claims may receive a separate letter for each claim.

For those policyholders having first party claims:

The amount shown on the attached is the amount of your claim against Northumberland for either unearned premium or for a claim which has arisen under the terms of your policy, if you have one. The Liquidator will be seeking directions from the Court as to whether a policyholder is entitled to priority for both unearned premium and claim.

For those policyholders who have parties claiming against them: The amount shown on the attached is the estimate of that party's claim against you. Again, the Liquidator will be seeking directions as to a policyholder's entitlement to priority for both unearned premium and payment of claim. Please note that the amount shown is confidential and only an estimate at present. Disclosure to the party claiming against you could void your policy which would result in your having to pay the other party's entire claim yourself. The amount is expressly subject to litigation or settlement with that party with your consent.

In summary, we emphasize the following:

1. You should be immediately forwarding to the Agent for the Liquidator notice of claims which arose prior to September 17, 1985, and of which the Liquidator has not already received notice;

2. Your policy was cancelled effective September 17, 1985. If you have any objection thereto you should notify the Agent to the Liquidator in writing, delivered or postmarked no later than November 30, 1985. Whether your policy is cancelled or not, you will be an unsecured creditor with respect to any claim arising after September 17, 1985;

3. Because it is not anticipated that there will be sufficient assets to pay claims having priority in full, there will likely be no distribution to unsecured creditors; and

4. There will be no distribution for many months.

Yours very truly,

COOPERS & LYBRAND LIMITED, Agent

for the Provisional Liquidator of

Northumberland General Insurance Company,

the Superintendent of Insurance

40H/1863B

Appendix A-4 — [Letterhead Of Coopers & Lybrand Limited]

November 15, 1985

TO: Policyholders of Northumberland General Insurance Company ("Northumberland")

In August 1985, we wrote and informed you of the winding-up of Northumberland, the provisional appointment of the Superintendent of Insurance as Liquidator, and our appointment as his Agent on July 24, 1985.

We further informed you that it was our intention to take steps which would result in the cancellation of all Northumberland policies.

We now wish to advise that a Statement of Policyholders and Claimants (the "Statement") was filed with the Department of Insurance on September 17, 1985. On that same date the Supreme Court of Ontario ordered the Liquidator, until further order of the Court, to add to the Statement valid claims including those claims for unearned premiums which arose under the terms of Northumberland policies prior to September 17, 1985, but notice of which he receives after September 17, 1985. We therefore emphasize that you should forward to us as soon as possible notice of any new claims which you may have under your policy which arose prior to September 17, 1985 and which were not previously reported to us prior to September 17, 1985, for inclusion in the Statement.

The Winding-up Act provides that any claims which arise under the terms of a policy after the date of filing of the Statement, that is after September 17, 1985, are unsecured claims and will not receive any distribution unless the assets are sufficient to pay in full policyholders having priority claims. It is not anticipated that there will be sufficient assets to make payments to unsecured creditors.

The Supreme Court of Ontario has now ordered that policyholders may object to the cancellation of their policies by notice in writing to the Agent for the Liquidator, delivered or postmarked by December 15, 1985. The merits of any such objection will be dealt with by the Liquidator or the Court, but will not result in any change to the unsecured status of claims for losses which arise after September 17, 1985.

(français au verso)

Pursuant to Section 170 of the Winding-up Act, the Liquidator is required to advise you of the amount appearing as your claim in the Statement. The amount indicated on the enclosed Attachment A101 is for unearned premiums and is based on Northumberland's records; it may not reflect recent information from you. The Statement is subject to rectification or amendment by the Liquidator or the Court at any time before the completion of the liquidation. *The fact that your claim for unearned premium has been listed for the amount specified is not an admission that the claim for unearned premium will be collocated in this manner by the Liquidator.* You will be notified of any variation in the nature or amount of your claim for unearned premium and you will have the right to context this. You do not have to take any steps at this time. Policyholders with more than one policy may receive a separate letter for each policy.

The amount shown on the enclosed Attachment A101 is the amount of your claim against Northumberland for unearned premium which has arisen under the terms of your policy. The amount for unearned premium has been calculated at the earlier of the date of cancellation or July 24, 1985.

We will be writing you at a later date with respect to the amount of your claim for losses, if any. This letter pertains only to your claim(s) for unearned premiums. The Liquidator will be seeking directions from the Court as to whether a policyholder is entitled to priority for both unearned premiums and a loss claim.

Summary

In summary, we emphasize the following:

1. You should be immediately forwarding to the Agent for the Liquidator notice of claims for unearned premium which arose prior to September 17, 1985, and of which the Liquidator has not already received notice:

2. Your policy was cancelled effective September 17, 1985 or such earlier date as cancelled by you. If you have any objection thereto you should notify the Agent for the Liquidator in writing, delivered or postmarked no later than December 15, 1985. Whether your policy is cancelled or not, you will be an unsecured creditor with respect to any claim arising after September 17, 1985;

3. Because it is not anticipated that there will be sufficient assets to pay claims having priority in full, there will likely be no distribution to unsecured creditors; and

4. There will be no dividend distribution for many months.

If you have more than one policy, please notify us in writing should you not receive from us a letter(s) advising of all your claims for unearned premiums. In addition, should you have any questions, please address them in writing. We will do our best to answer you as quickly as possible. For all correspondence, please quote the Policy Number.

Yours very truly,

COOPERS & LYBRAND LIMITED

Agent for the Provisional Liquidator of

Northumberland General Insurance Company

Enc.

Appendix A-5 — [letterhead Of Coopers & Lybrand Limited]

November 21, 1985

TO: Property and Casualty Policyholders of Northumberland General Insurance Company ("Northumberland")

This letter relates to claims for loss. It does not refer to unearned premiums, for which you should have received a separate letter dated November 15, 1985, if applicable.

In August 1985 we wrote and informed you of the winding-up of Northumberland, the provisional appointment of the Superintendent of Insurance as Liquidator, and our appointment as his Agent on July 24, 1985.

We further informed you that we anticipated filing a Statement of Policyholders and Claimants (the "Statement") with the Department of Insurance within 45 days and that all policies would then, by operation of law, effectively be cancelled.

We now wish to confirm that the Statement was in fact filed on September 17, 1985. On that same date the Supreme Court of Ontario ordered the Liquidator, until further order of the Court, to add to the Statement valid claims for loss which arose under the terms of Northumberland policies prior to September 17, 1985, but notice of which he receives after September 17, 1985. We therefore emphasize that you should forward to us as soon as possible notice of any new claims for loss which you

may have under your policy which arose prior to September 17, 1985 and which were not previously reported to us prior to September 17, 1985, for inclusion in the Statement. This could also include claims for loss made by third parties against you which may be covered under the terms of your policy.

The Winding-up Act provides that any claims for loss which arise under the terms of a policy after the date of filing of the Statement, that is after September 17, 1985, are unsecured claims and will not receive any distribution unless the assets are sufficient to pay in full policyholders having priority claims. It is not anticipated that there will be sufficient assets to make payments to unsecured creditors.

Pursuant to Section 170 of the Winding-up Act, the Liquidator is required to advise you of the amounts appearing as your claims for loss in the Statement. The amounts are indicated on the enclosed Attachment Z and may not reflect recent information from you. Attachment Z shows the amounts of your claims against Northumberland which may have arisen under the terms of your policy or, in the case of those policyholders who have parties claiming against them, the amounts shown relate to those third party claims. The Statement is subject to rectification or amendment by the Liquidator or the Court at any time before the completion of the liquidation. *The fact that your claims for loss have been listed for the amounts specified is not an admission that the claims for loss will be collocated in this manner (i.e., accepted at that amount) by the Liquidator.* You will be notified of any variation in the nature or amounts of your claims for loss and you will have the right to contest this; however, you do not have to take any steps at this time.

Certain claims have been listed at $1.00 for administrative reasons, arising out of the state of the books and records. Policyholders with more than one claim for loss may receive a separate letter for each claim.

Summary

In summary, we emphasize the following:

1. You should be immediately forwarding to the Agent for the Liquidator notice of claims for loss which arose prior to September 17, 1985 and which are not included on the enclosed Attachment Z;

2. Whether your policy is cancelled or not, you will be an unsecured creditor with respect to any claim arising after September 17, 1985;

3. Because it is not anticipated that there will be sufficient assets to pay in full those claims having priority, there will likely be no distribution to unsecured creditors; and

4. There may not be a dividend distribution for some time.

Should you have any questions, please address them in writing and we will do our best to answer you as quickly as possible. All correspondence should include the claim number and the date of loss and should be addressed to:

Coopers & Lybrand Limited

re: Northumberland - Attachment Z

Box 126, Postal Station "A"

Toronto, Ontario

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Yours very truly,

COOPERS & LYBRAND LIMITED

Agent for the Provisional Liquidator of

Northumberland General Insurance Company

Enc.

Appendix B — Extracts From The Winding-up Act, R.S.C. 1970, c. W-10

Application

6. This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada, or by or under the authority of any Act of the former Province of Canada, or of the Province of Nova Scotia, New Brunswick, British Columbia, Prince Edward Island or Newfoundland, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada; and also to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, and incorporated trading companies doing business in Canada wherever incorporated and

(a) that are insolvent; or

(b) that are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under this Act.

. . . . .

Part I — General

Limitation of Part

. . . . .

9. In the case of insurance companies the provisions of this Part are subject to the provisions of Part III.

. . . . .

Powers and Duties of Liquidators

33. The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled, and he shall perform such duties in reference to winding up the business of the company as are imposed by the court or by this Act.

. . . . .

Creditors' Claims

71. (1) When the business of a company is being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, are admissible to proof against the company.

(2) In case of any claim subject to any contingency or for unliquidated damages or which for any other reason does not bear a certain value, the court shall determine the value of such claim and the amount for which it shall rank.

. . . . .

74. The court may fix a certain day or certain days on or within which creditors of the company may send in their claims, and may direct notice thereof to be given by the liquidator, and determine the manner in which notice of the day or days so fixed shall be given by the liquidator to the creditors.

. . . . .

76. (1) After the notices required by sections 74 and 75 have been given, and the respective times therein specified have expired, and all claims of which proof has been required by due notice in writing by the liquidator in that behalf have been allowed or disallowed by the court in whole or in part, the liquidator may distribute the assets of the company or any part thereof among the persons entitled thereto and without reference to any claim against the company that has not then been sent to the liquidator.

(2) The liquidator is not liable to any person whose claim has not been sent in at the time of distributing such assets or part thereof for the assets or part thereof so distributed.

77. In case any claim or claims are sent in to the liquidator after any partial distribution of the assets of the company, such claim or claims, subject to proof and allowance as required by this Act, shall rank with other claims of creditors in any future distribution of assets of the company.

. . . . .

Part III — Insurance Companies

. . . . .

162. (1) Subject to this Act, claims shall be paid in the following order of priority;

(a) firstly, costs of liquidation;

(b) secondly, claims of preferred creditors, specified in section 72;

(c) thirdly, claims of policyholders of the company ranking as follows:

(i) if reinsurance is not effected as hereinafter provided [not effected in this case], claims that have arisen under the policies of the company, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Department of Insurance as hereinafter provided, less any amount previously advanced by the company on the security of the policies, and the claims of policyholders to the value of their policies computed as hereinafter provided; or ...

(ii) [not applicable]

(2) Creditors of the company, other than policyholders, reinsurers if any, and the aforementioned preferred creditors, are entitled to receive a dividend on their claims only if the assets are more than sufficient to pay the claims specified in subsection (1).

. . . . .

164. (1) Where the reinsurance is not effected [not effected in this case], holders of policies of all classes of insurance on which no claims have arisen in accordance with the terms of the policies prior to the date of the winding-up order are entitled to claim against the assets of the company for the value of their respective policies computed as of the date of the winding-up order in accordance with such bases, methods and rules of computation as the Treasury Board may deem just and equitable, less any amount previously advanced by the company on the security of the policies.

(2) In prescribing bases, methods and rules of computation, the Treasury Board shall take into consideration the prospective indemnities, benefits and equities guaranteed under the terms of the policies of the several classes thereof (including any bonus or other additional indemnity or benefit granted after the date of issue of the policy and subsisting at the date of the winding-up

order and profits apportioned to policies but not distributed), the prospective premium payments, if any, the contingencies on which the payment of the indemnities, benefits and premiums may depend, and such rate or rates of interest as may be deemed appropriate, but in no case shall the value for which the policyholder may claim be less than the value for which he might have claimed under the terms of his policy on cancellation thereof as of the date of the winding-up order.

(3) The bases, methods and rules of computation so prescribed by the Treasury Board are binding on all concerned, subject only to revocation or amendment by the Treasury Board.

(4) The liquidator may require the Superintendent to compute the values of policies in respect of which claims are made and the expense of such valuation at the rate of three cents for each policy valued shall be paid by the liquidator to the Minister and applied toward payment of the expenses of the Department of Insurance.

. . . . .

167. (1) The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by any person, prepare a statement of all the persons appearing by the books and records of the company to be creditors of the company or to be claimants under any policy including any matured, valued or cancelled policy, taking cognizance in this connection of all claims that have arisen in accordance with the terms of the policies of which he has notice, and such statement shall show the amount, determined as hereinbefore provided in respect of policyholders, for which each such person is to rank as a claimant or a creditor and every such person shall be collocated and ranked as, and is entitled to the right of, a claimant or a creditor for the amount so ascertained by the liquidator, without filing any claim, notice or evidence, or taking any action; but any such collocation may be contested by any person interested, and any person who is not collocated, or who is dissatisfied with the amount for which he is collocated, may file his own claim.

(2) The liquidator or the court may rectify any such statement on account of omissions or errors therein notified to the liquidator or discovered by him at any time before the completion of the liquidation, and only the claims appearing in such statement or amended statement shall be regarded in the distribution of the assets.

. . . . .

169. (1) A copy of the statement mentioned in section 168, certified by the liquidator, shall be filed in the Department of Insurance, after not less than thirty days notice of his intention to do so has been given by the liquidator by notice in the Canada Gazette and in the official gazette of each province, and in two newspapers issued at or nearest the place where the head office of the company or the chief agency of the company in Canada, as the case may be, is situated.

(2) Any claim that has arisen under the terms of a policy of which notice is received by the liquidator after the date of the filing of the said statement, shall rank upon the assets only for the value entered in the said statement, unless the assets are sufficient to pay all claimants in full, and in such case, the policyholders shall rank as a creditor for the balance of his claim.

TAB 8

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

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
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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

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proving claim — Provable debts — Contingent claims

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Crown claims

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Environmental law --- Liability for environmental harm — Nuisance — Liability in particular cases — Miscellaneous

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Faillite et insolvabilité --- Preuve de réclamation — Créances prouvables — Réclamations éventuelles

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Demande initiale — Procédures assujetties à la suspension — Créances de l'État

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

Droit de l'environnement --- Responsabilité pour dommages causés à l'environnement — Nuisance — Catégories particulières de responsabilité — Divers

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

In 2008, A Inc. experienced financial difficulties and announced the closure of a mill in the province. One year later, A Inc. sought protection under the Companies' Creditors Arrangement Act (CCAA), and a claims procedure order was issued. Province's Minister of Environment and Conservation issued five orders under s. 99 of the Environmental Protection Act (the "EPA orders") requiring A Inc. to submit remediation action plans to the Minister and to complete them. The province then brought a motion for a declaration that the claims procedure order did not bar the province from enforcing the EPA orders.

The trial judge dismissed the province's motion. The trial judge found that the EPA orders remained truly financial and monetary in nature and, as such, were subject to the claims procedure order. The province brought a motion for leave to appeal.

The Court of Appeal held that the appeal had no reasonable chance of success because the trial judge had found as a fact that the orders were financial or monetary in nature, and it denied leave to appeal. The province appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Deschamps J. (Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ. concurring): The CCAA provides a single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. In light of wording of the CCAA, the legislative history and the purpose of the reorganization process, to exempt environmental orders would be inconsistent with the insolvency legislation. However, courts will not necessarily conclude that all orders will be subject to the CCAA process. Courts must determine whether the facts indicate that the conditions for inclusion in the claims process are met. There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process. First, there must be a creditor. Here, the province identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt. Here, the environmental damage occurred before the time of the CCAA proceedings.

Third, it must be possible to attach a monetary value to the debt, liability or obligation. Here, the province had not yet formally exercised its power to ask for the payment of money. Thus, the question was whether it was sufficiently certain that the EPA orders would eventually result in a monetary claim. The trial judge relied on a unique and inescapable set of facts — including the fact that the province actually intended to perform the remediation work itself and assert a claim against A Inc. — to conclude that it was. The majority held that the trial judge reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. Therefore, the majority confirmed the trial judge's finding that the province was a creditor with a monetary claim that should be subject to the CCAA process.

The majority noted that subjecting an order to the claims process merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. It does not extinguish the debtor's obligation to pay its debts, it does not exempt the debtor from complying with environmental regulations and it does not invite corporations to restructure in order to rid themselves of their environmental liabilities.

Per McLachlin C.J.C. (dissenting): The CCAA draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised. Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. In narrow circumstances, where a province has done the work or where it is "sufficiently certain" that it will do the work, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the CCAA proceedings. Here, the Minister had neither done the clean-up work nor was it sufficiently certain that he or she would do so. Therefore, the EPA orders were not monetary claims compromisable under the CCAA.

Per LeBel J. (dissenting): The only regulatory orders that can be subject to compromise are those which are monetary in nature. The trial judge's decision was not consistent with the principle that the CCAA does not apply to purely regulatory obligations. Based on the evidence before him, the trial judge could not conclude with "sufficient certainty" that the province would perform the remedial work itself. In fact, it appeared that the trial judge was more concerned with the fact that the arrangement would fail if A Inc. was not released from its regulatory obligations. Therefore, the EPA orders were not monetary claims compromisable under the CCAA.

En 2008, A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province. Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise. Le ministre provincial de l'Environnement et de la Conservation a prononcé, en vertu de l'art. 99 de l'Environmental Protection Act, cinq ordonnances (les « ordonnances EPA ») contraignant A Inc. à présenter au ministre des plans de restauration et à les réaliser. La province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter les ordonnances EPA.

Le juge de première instance a rejeté la requête de la province. Le juge de première instance a conclu que les ordonnances EPA demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations. La province a déposé une requête en permission d'appeler.

La Cour d'appel a estimé que l'appel n'avait aucune chance raisonnable de succès parce que le juge de première instance avait conclu, comme question de fait, que les ordonnances EPA étaient de nature financière ou pécuniaire, et elle a refusé d'autoriser l'appel. La province a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Deschamps, J. (Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, JJ., souscrivant à son opinion) : La LACC prévoit une procédure unique permettant de traiter la presque totalité des réclamations contre un débiteur devant un même

tribunal. Considérant le libellé de la LACC, de l'historique des dispositions législatives et des objectifs du processus de réorganisation, une exemption à l'égard des ordonnances environnementales serait incompatible avec la législation en matière d'insolvabilité. Toutefois, les tribunaux ne vont pas nécessairement conclure que toutes les ordonnances seront assujetties au processus régi par la LACC. Les tribunaux doivent déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions. Premièrement, il doit y avoir un créancier. En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite. En l'espèce, les dommages environnementaux sont survenus avant que les procédures en vertu de la LACC ne soient entamées. Troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. En l'espèce, la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent. Ainsi, la question était de savoir s'il était suffisamment certain que les ordonnances EPA mèneraient éventuellement à la présentation d'une réclamation pécuniaire. En se fondant sur un contexte factuel unique et dont il ne pouvait pas faire abstraction, y compris le fait que la province avait de fait l'intention d'exécuter les travaux de décontamination elle-même pour ensuite présenter une réclamation contre A Inc., le juge de première instance a conclu que c'était le cas. Les juges majoritaires ont estimé que le juge de première instance a examiné tous les principes juridiques et les faits qu'il était tenu de prendre en compte pour statuer sur la question qui se posait en l'espèce. Par conséquent, les juges majoritaires ont confirmé la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC.

Les juges majoritaires ont fait remarquer que le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. Cela n'éteint pas l'obligation du débiteur de payer ses dettes, ni le dégage de son obligation de respecter la réglementation environnementale, ni n'incite les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales.

McLachlin, J.C.C. (dissidente) : La LACC établit une distinction fondamentale entre les exigences réglementaires continues établies en faveur du public, lesquelles continuent de s'appliquer après la restructuration, et les réclamations pécuniaires qui peuvent faire l'objet d'une transaction. Les ordonnances exigeant la décontamination émises aux termes d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. En certaines circonstances particulières, lorsqu'une province a exécuté les travaux ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux, l'exigence réglementaire serait éteinte et la province pourrait produire, dans le cadre de procédures engagées sous le régime de la LACC, une réclamation pécuniaire couvrant le coût des travaux de décontamination. En l'espèce, le ministre n'a pas effectué les travaux de décontamination et il n'était pas suffisamment certain qu'il le ferait. Par conséquent, les ordonnances EPA ne constituaient pas des réclamations pécuniaires pouvant faire l'objet d'une transaction aux termes de la LACC.

LeBel, J. (dissident) : Les seules ordonnances réglementaires pouvant faire l'objet d'une transaction sont celles qui sont de nature pécuniaire. La décision du juge de première instance n'était pas conforme avec le principe selon lequel la LACC ne s'applique pas aux exigences purement réglementaires. En se fondant sur la preuve dont il disposait, le juge de première instance ne pouvait pas conclure avec « suffisamment de certitude » que la province exécuterait les travaux de décontamination elle-même. En fait, il semblait que le juge de première instance était davantage préoccupé par le fait que l'arrangement risquait d'échouer si A Inc. n'était pas libérée de ses exigences réglementaires. Par conséquent, les ordonnances EPA ne constituaient pas des réclamations pécuniaires pouvant faire l'objet d'une transaction aux termes de la LACC.

Table of Authorities

Cases considered by *Deschamps J.*:

AbitibiBowater Inc., Re (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812 (Que. S.C.) — considered

Cie pétrolière Impériale c. Québec (Tribunal administratif) (2003), 5 Admin. L.R. (4th) 1, 310 N.R. 343, (sub nom. *Imperial Oil Ltd. v. Quebec (Minister of the Environment))* 231 D.L.R. (4th) 577, 2003 SCC 58, 2003 CarswellQue 2315, 2003 CarswellQue 2316, (sub nom. *Imperial Oil Ltd. v. Quebec (Minister of the Environment))* [2003] 2 S.C.R. 624, 5 C.E.L.R. (3d) 38 (S.C.C.) — referred to

Confederation Treasury Services Ltd., Re (1997), 43 C.B.R. (3d) 4, (sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re)* 96 O.A.C. 75, 1997 CarswellOnt 31 (Ont. C.A.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) — referred to

McLarty v. R. (2008), [2008] 4 C.T.C. 221, (sub nom. *McLarty v. Minister of National Revenue)* 374 N.R. 311, (sub nom. *Canada v. McLarty)* [2008] 2 S.C.R. 79, 46 B.L.R. (4th) 1, (sub nom. *McLarty v. Canada)* 293 D.L.R. (4th) 659, 2008 CarswellNat 1380, 2008 CarswellNat 1381, 2008 SCC 26, (sub nom. *R. v. McLarty)* 2008 D.T.C. 6366 (Fr.), (sub nom. *R. v. McLarty)* 2008 D.T.C. 6354 (Eng.) (S.C.C.) — referred to

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 1991 CarswellAlta 315, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (Alta. C.A.) — distinguished

Cases considered by *McLachlin C.J.C.* (dissenting):

Air Canada, Re (2003), 2003 CarswellOnt 9109, 28 C.B.R. (5th) 52 (Ont. S.C.J. [Commercial List]) — considered in a minority or dissenting opinion

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — considered in a minority or dissenting opinion

Confederation Treasury Services Ltd., Re (1997), 43 C.B.R. (3d) 4, (sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re)* 96 O.A.C. 75, 1997 CarswellOnt 31 (Ont. C.A.) — referred to

General Chemical Canada Ltd., Re (2007), 228 O.A.C. 385, (sub nom. *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.)* 2007 C.E.B. & P.G.R. 8258, 35 C.B.R. (5th) 163, 61 C.C.P.B. 266, 31 C.E.L.R. (3d) 205, 2007 ONCA 600, 2007 CarswellOnt 5497 (Ont. C.A.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) — referred to

Knight v. Imperial Tobacco Canada Ltd. (2011), 2011 CarswellBC 1968, 2011 CarswellBC 1969, 2011 SCC 42, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 419 N.R. 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 335 D.L.R. (4th) 513, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — referred to

Lamford Forest Products Ltd., Re (1991), 10 C.B.R. (3d) 137, 8 C.E.L.R. (N.S.) 186, 63 B.C.L.R. (3d) 388, 86 D.L.R. (4th) 534, 1991 CarswellBC 443 (B.C. S.C.) — referred to

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 1991 CarswellAlta 315, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (Alta. C.A.) — considered in a minority or dissenting opinion

Shirley, Re (1995), 36 C.B.R. (3d) 101, 18 C.E.L.R. (N.S.) 43, 129 D.L.R. (4th) 105, 1995 CarswellOnt 936 (Ont. Bktcy.) — referred to

Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of) (2005), 47 Alta. L.R. (4th) 138, 12 M.P.L.R. (4th) 167, [2006] 3 W.W.R. 195, 386 A.R. 338, 2005 ABQB 559, 2005 CarswellAlta 1018, 13 C.B.R. (5th) 145, 256 D.L.R. (4th) 536 (Alta. Q.B.) — considered in a minority or dissenting opinion

Statutes considered by *Deschamps J.*:

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

Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "claim provable in bankruptcy" — considered

s. 14 [rep. & sub. 1992, c. 27, s. 9] — referred to

s. 121(1) — considered

s. 121(2) — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

Code civil du Québec, L.Q. 1991, c. 64

art. 1497 — referred to

art. 1508 — referred to

art. 1513 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) "claim" — considered

s. 11 — considered

s. 11.1 [en. 2007, c. 36, s. 65] — referred to

s. 11.1(3) [en. 2007, c. 36, s. 65] — considered

s. 11.8(8) [en. 1997, c. 12, s. 124] — considered

s. 11.8(9) [en. 1997, c. 12, s. 124] — considered

s. 12 — considered

s. 12(1) "claim" — considered

Environmental Protection Act, S.N. 2002, c. E-14.2
Generally — referred to

s. 99 — considered

Statutes considered by *McLachlin C.J.C.* (dissenting):

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 — referred to

s. 14.06(8) [en. 1992, c. 27, s. 9(1)] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.1(3) [en. 2007, c. 36, s. 65] — referred to

s. 11.8(5) [en. 1997, c. 12, s. 124] — considered

s. 11.8(7) [en. 1997, c. 12, s. 124] — referred to

s. 11.8(9) [en. 1997, c. 12, s. 124] — considered

s. 12(1) "claim" — considered

Environmental Protection Act, S.N. 2002, c. E-14.2
Generally — referred to

s. 102(3) — referred to

Statutes considered by *LeBel J.* (dissenting):

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Treaties considered by *Deschamps J.*:

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612
Generally — referred to

Treaties considered by *McLachlin C.J.C* (dissenting):

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612
Generally — referred to

Authorities considered:

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

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

Hohfeld, Wesley Newcomb, *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* new ed. (Burlington, Vt.: Ashgate, 2001)

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

Saxe, Dianne, "Trustees' and Receivers' Environmental Liability Update" (1997), 49 C.B.R. (3d) 138

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

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: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (B.C. S.C.); *Shirley, Re* (1995), 129 D.L.R. (4th) 105 (Ont. 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 (Que. S.C.)), 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.

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THE ATTORNEY GENERAL OF CANADA and **RELIANCE INSURANCE COMPANY**

Court File No: 01-CL-4313

Applicant

Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

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