Court File No. CV-12-9761-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTHSTAR AEROSPACE, INC. NORTHSTAR AEROSPACE (CANADA) INC., 2007775 ONTARIO INC. and 3024308 NOVA SCOTIA COMPANY

Applicants

RESPONDING FACTUM OF HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTRY OF ENVIRONMENT

(Motion returnable April 18, 2013)

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TO: ATTACHED SERVICE LIST

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(Applicants)

SERVICE LIST
(as at January 28, 2013)

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PART I – OVERVIEW OF THE CROWN'S POSITION

1. Her Majesty the Queen in right of Ontario as represented by the Ministry of the Environment (the "**MOE**"), files this factum in response to the motion brought by all of the former directors and officers of Northstar Aerospace (Canada) Inc. ("**Northstar Canada**") and Northstar Aerospace, Inc. ("**Northstar Inc.**"), except Thomas Connerty (the "**Former D&Os**"), against whom the MOE Director issued an order (the "**Director's D&O Order**") on November 14, 2012. The Former D&Os seek:

(i) an order that the MOE's Proof of D&O claim dated October 19, 2012, be adjudicated by the Honourable Mr. Justice Morawetz in the within proceeding;

(ii) an order that the MOE's Proof of D&O claim includes the Director's D&O Order; and

(iii) an order permanently staying the appeals made by the Former D&Os to the Environmental Review Tribunal (the "**ERT**").

2. The Director's D&O Order was issued against the Former D&Os personally to require them to comply with their own obligations under the *Environmental Protection Act*, R.S.O. 1990, c. E-19 ("**EPA**"). The Director's D&O Order does not require the Former D&Os to comply with the obligations of Northstar Canada and Northstar Inc. pursuant to the order that the Director issued against the two corporations on March 15, 2012.

3. The EPA establishes a specific appeal process to the ERT to address disputes arising from orders issued by the MOE Director. This Honourable Court has no jurisdiction to intervene in that ongoing administrative process. There is a statutory right

of appeal on questions of law once the ERT proceedings are concluded. However, that appeal lies to the Divisional Court, not this Court. There are no further issues under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") for this Court to determine vis-à-vis the Former D&Os even if the ERT upholds the Director's D&O Order. This Court has already held that the Former D&Os do not have any claim for indemnification from a $1.75 million D&O Charge Reserve established from the proceeds of the sale of substantially all of the assets of Northstar Canada, Northstar Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "**CCAA Entities**").

4. The stay issued by this Court preventing claims against the Former D&Os from proceeding while the CCAA Entities completed their asset sale transaction expired before the Director's D&O Order was issued. There was no plan of arrangement compromising the Former D&Os' personal liability for their own obligations under the EPA. The ERT proceedings are, therefore, not a collateral attack on orders made by this Court under the CCAA.

5. Nor is there any constitutional impediment to the ERT proceedings continuing. Bankruptcy and insolvency is not one of the federal heads of power to which interjurisdictional immunity applies. Even if it were, the personal liability of directors and officers of an insolvent company for failing to comply with their independent obligations under the EPA is not part of the core of the federal power over bankruptcy and insolvency. As well, enforcing EPA orders against the Former D&Os personally once the CCAA Entities have sold substantially all of their assets and Northstar Canada has been adjudged bankrupt does not impair the core of the federal power.

6. With regard to paramountcy, there is no in-force CCAA order that precludes the ERT proceedings from continuing. Therefore, there is no operational conflict between the EPA and the CCAA. Nor is there any frustration of the purpose of the CCAA. There was no plan of arrangement and thus no intention to immunize the Former D&Os from being required to comply with their personal obligations under the EPA.

7. Essentially, the Former D&Os are asking this Court to intervene in a proceeding which properly lies before a provincial administrative tribunal with the mandate and expertise to decide all of the issues raised by the Former D&Os in their statutory appeal of the Director's D&O Order. That proceeding concerns solely the personal liability of the non-insolvent Former D&Os. There are no further CCAA issues to be determined by this Court that relate to the Former D&Os. Accordingly, this Court has no jurisdiction to intervene in the ERT proceedings and should not permit its process to be used to collaterally attack the ERT proceedings.

PART II – STATEMENT OF FACTS

A. TCE Contamination of Northstar Canada's Cambridge Property and the Bishop Street Community

8. From about 1981 to about 2009, Northstar Canada and its predecessor companies operated an aircraft parts manufacturing and processing facility at a property located in Cambridge, Ontario (the "**Site**"). Trichloroethylene ("**TCE**") used in Northstar Canada's operations at the Site caused contamination of the groundwater under the Site which flowed beneath approximately 652 residential properties (the "**Bishop Street Community**") that are situated directly adjacent to and south of the Site. TCE is a human carcinogen.

Affidavit of Phil Shewen sworn July 18, 2012 (**"Shewen Affidavit"**) at paras. 9, 11, 14 – 20, Former D&Os' Motion Record, Vol. 1, Tab 7.

9. The groundwater beneath the Site and flowing beneath the Bishop Street Community is contaminated with levels of TCE that greatly exceed standards found in Ontario Regulation 153/04 as amended enacted under the EPA. The groundwater contamination has impacted the Grand River. Elevated levels of TCE vapour have also been measured in the basements of hundreds of homes in the Bishop Street Community.

Shewen Affidavit at para. 36, Former D&Os' Motion Record, Vol. 1, Tab 7.

10. Commencing in 2005, Northstar Canada and its parent company, Northstar Inc., undertook remediation activities in order to repair the environmental damage and mitigate the adverse health effects on the residents of the affected properties.

Shewen Affidavit at paras. 31, 36 – 40, 44 and 47 – 51, Former D&Os' Motion Record, Vol. 1, Tab 7.

11. On March 15, 2012, the MOE issued the Director's Order against Northstar Canada and Northstar Inc. pursuant to sections 17, 18(1), 18(2) and 196(1) of the EPA which, *inter alia*, ordered the two corporations to develop and implement a plan to clean-up the contaminated groundwater that has migrated off the Site into the Bishop Street Community and continue the remediation activities that they had already undertaken in relation to the Site and within the Bishop Street Community.

Shewen Affidavit at para. 52, Former D&Os' Motion Record, Vol. 1, Tab 7.
Director's Order dated March 15, 2012 – Exhibit "U" to Shewen Affidavit, Former D&Os' Motion Record, Vol. 1, Tab 28.

B. Northstar CCAA Proceedings

12. On June 14, 2012, the CCAA Entities sought and obtained protection from their creditors under the CCAA. Pursuant to the Initial Order, Ernst & Young Inc. was appointed to act as the Monitor (the "**Monitor**").

> Shewen Affidavit at para. 5, Former D&Os' Motion Record, Vol. 1, Tab 7.
> Initial Order dated June 14, 2012 – Exhibit "D" to affidavit of Jane Glassco sworn September 20, 2012 ("**Glassco Affidavit**"), Former D&Os' Motion Record, Vol. 2, Tab 36.

13. The Initial Order authorized the CCAA Entities to conduct a sales process to solicit offers for substantially all of their assets, with the assistance of the Monitor. On June 14, 2012, the CCAA Entities and their direct and indirect subsidiaries in the United States entered into an agreement (the "**Heligear Transaction**") to sell substantially all of their assets to Heligear Canada Acquisition Corporation and Heligear Acquisition Co. (collectively "**Heligear**"). The Site and all environmental liabilities associated with the Site were expressly excluded from the Heligear Transaction.

> Shewen Affidavit at para. 6 – 8 and 57 – 58, Former D&Os' Motion Record, Vol. 1, Tab 7.
> Initial Order dated June 14, 2012 – Exhibit "D" to Glassco Affidavit, Former D&Os' Motion Record, Vol. 2, Tab 36.

14. On July 24, 2012, Mr. Justice Morawetz granted orders approving the Heligear Transaction and vesting the assets of the CCAA Entities in Heligear free and clear of all claims. The Heligear Transaction closed on August 24, 2012.

> Approval and Vesting Order dated July 24, 2012 – Exhibit "F" to Glassco Affidavit, Former D&Os' Motion Record, Vol. 2, Tab 38.
> Glassco Affidavit at para. 25, Former D&Os' Motion Record, Vol. 2, Tab 34.

15. Pursuant to the Bankruptcy Order dated August 2, 2012, Northstar Canada was adjudged bankrupt effective upon the closing of the Heligear Transaction. On August

24, 2012, BDO Canada Ltd. ("**BDO**") was appointed as trustee of the estate of Northstar Canada. On the same date, BDO served a Notice of Abandonment giving the MOE notice of its abandonment of the Site in accordance with s. 14.06(4)(a)(ii) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3. As a result of such action, BDO cannot be held personally liable for failing to comply with the Director's Order dated March 15, 2012. Contrary to the assertion of the Former D&Os in paragraph 70(3) of their Factum, the abandonment of the Site by BDO was not approved by this Court but, rather, was a unilateral action taken by BDO.

> Glassco Affidavit at paras. 26 – 27, Former D&Os' Motion Record, Vol. 2, Tab 34.
> Bankruptcy Order dated August 2, 2012 - Exhibit "L" to Glassco Affidavit, Former D&Os' Motion Record, Vol. 2, Tab 44.
> Notice of Abandonment dated August 24, 2012 - Exhibit "M" to Glassco Affidavit, Former D&Os' Motion Record, Vol. 2, Tab 45.
> Former D&Os' Factum at para. 70(3).
> *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, s. 14.06(4)(a)(ii).

16. Pursuant to the Direction to Cause Work to be Done issued by the Minister of the Environment (the "**Minister**") on August 15, 2012 (the "**Minister's Direction**"), effective from August 27, 2012 the MOE engaged a contractor, AET Group Inc. ("**AET**"), to commence the preventative work enumerated in the Minister's Direction (the "**Preventative Work**"), namely the operation, monitoring and maintenance of the existing indoor air mitigation systems in residences in the Bishop Street Community, the soil vapour extraction systems and the groundwater pump and treat system on the Site.

> Glassco Affidavit at paras. 28 – 30, Former D&Os' Motion Record, Vol. 2, Tab 34.
> Minister's Direction dated August 15, 2012 – Exhibit "N" to Glassco Affidavit, Former D&Os' Motion Record, Vol. 2, Tab 46.

17. In paragraphs 36 and 37 of their factum, the Former D&Os state that the purpose of placing Northstar Canada into bankruptcy was to "facilitate the transfer of the Site

and the associated remediation work to the Crown". This is inaccurate. The bankruptcy of Northstar Canada did not dissolve the corporation, nor did it transfer ownership of its property to Ontario. Similarly, the abandonment of the Site by BDO did not effect a transfer to Ontario of ownership of or liability for the Site. Northstar Canada remains the owner of the Site. In order to gain access to the property, on August 16, 2012 the MOE obtained an Order Authorizing Entry Onto Land which permitted AET to enter the Site to perform the work specified in the Minister's Direction.

> Supplementary Affidavit of Ananthan Sinnadurai sworn April 9, 2012 ("**Supplementary Sinnadurai Affidavit**") at para. 4, MOE's Supplementary Motion Record, Tab 1.
> Order Authorizing Entry onto Land - Exhibit "A" to Supplementary Sinnadurai Affidavit, MOE's Supplementary Motion Record, Tab 1A.

18. If a corporation is dissolved, land in Ontario owned by the company at the time of its dissolution escheats to the Crown. Section 1(3) of the *Escheats Act* provides that the Public Guardian and Trustee (the "**PGT**") shall be deemed not to have taken possession of the property until the PGT registers notice of the taking of possession in the proper land registry office.

> *Escheats* Act, R.S.O. 1990, c. E.20, s. 1(3).

C. Proof of D&O Claim filed by MOE under Claims Procedure Order

19. On October 19, 2012, the MOE delivered to the Monitor a Proof of D&O Claim against seventeen former directors and officers of Northstar Canada and Northstar Inc. claiming: (i) the costs that the MOE had already incurred to carry out the Preventative Work; (ii) the future costs to be incurred by the MOE to carry out the Preventative Work; plus (iii) the future costs to conduct additional environmental remediation work to decontaminate the Site and the Bishop Street Community.

Affidavit of Mike Brown sworn February 28, 2013 ("**Brown Affidavit**") at para. 2, Former D&Os' Motion Record, Vol. 1, Tab 3.
October 31

20. The Former D&Os delivered to the Monitor a Proof of D&O Claim dated October 22, 2012, stating that they sought to preserve the right to commence claims for contribution and indemnity against each other and against any other directors or officers of Northstar Inc. and its predecessor companies in connection with the MOE's Proof of D&O Claim.

21. On December 3, 2012, Mr. Justice Morawetz heard a motion by the CCAA Monitor seeking a determination of whether the MOE's Proof of D&O Claim is a valid post-filing claim for which the Former D&Os are entitled to be indemnified pursuant to paragraph 23 of the Initial Order from the D&O Charge Reserve in the amount of $1.75 million established in accordance with paragraph 24 of the Initial Order and section 11.51 of the CCAA.

Affidavit of Ananthan Sinnadurai sworn March 21, 2012 ("**Sinnadurai Affidavit**") at para. 3, MOE's Motion Record, Tab A.

22. On April 9, 2013, Mr. Justice Morawetz held that the MOE's Proof of D&O Claim was not a claim for which the Former D&Os are entitled to be indemnified under the D&O Charge Reserve as to find otherwise would wrongly and inequitably affect the priority of claims as between the MOE and the secured creditor. Nor was it the type of claim to which the Directors' Charge under s.11.51 of the CCAA responds as the activity that gave rise to the MOE claim occurred prior to the CCAA proceedings.

Northstar Aerospace, Inc. (Re), 2013 ONSC 1780 at paras. 34 and 36, MOE's Book of Authorities, Tab 1.

D. Director's Order against Former D&Os dated November 14, 2012

23. Paragraph 22 of the Initial Order imposed a stay of proceedings (the **"D&O Stay"**) against any of the former, current or future directors or officers of the CCAA Entities. By the order of Mr. Justice Morawetz dated August 2, 2012 the D&O Stay was extended until and including October 31, 2012.

> Glassco Affidavit at paras. 22 - 23, Former D&Os' Motion Record, Vol. 2, Tab 34.
> Initial Order dated June 14, 2012 at para. 22 – Exhibit "D" to Glassco Affidavit, Former D&Os' Motion Record, Vol. 2, Tab 36.
> Order (Re Increase to Monitor's Powers etc.) dated August 2, 2012 at para. 17 – Exhibit "K" to Glassco Affidavit, Former D&Os' Motion Record, Vol. 2, Tab 43.

24. The D&O Stay expired at midnight on October 31, 2012.

> Sinnadurai Affidavit at para. 9, MOE's Motion Record, Tab A.

25. On October 31, 2012, eleven of the Former D&Os brought a motion before Mr. Justice Morawetz seeking an injunction against the Crown to restrain the Director from issuing an Order against them. By an Endorsement dated November 9, 2012, Mr. Justice Morawetz dismissed the motion and declined to grant an injunction.

> Sinnadurai Affidavit at para. 8, MOE's Motion Record, Tab A.
> Endorsement dated November 9, 2012 – Exhibit "3" to Sinnadurai Affidavit, MOE's Motion Record, Tab 4.
> *Northstar Aerospace, Inc. (Re),* 2012 ONSC 6362, MOE's Book of Authorities, Tab 2.

26. On November 14, 2012, the Director issued an order (the **"Director's D&O Order"**) against thirteen of the Former D&Os pursuant to sections 17, 18(1), 18(2) and 196(1) of the EPA on the ground that they had management or control of the contaminated Site. The Former D&Os held directorships and/or offices in Northstar Canada and/or Northstar Inc. during 2003 to 2012. Furthermore, Glenn E. Hess (**"Hess"**) and Craig A. Yuen (**"Yuen"**) were officers of the corporations during the post-

filing period from June 14, 2012 to August 24, 2012. Whether the Former D&Os had the requisite management and control to justify the issuance of the Director's D&O Order under the EPA is an issue for the ERT to determine, based upon a proper evidentiary record. The Director's D&O Order requires the Former D&Os to continue the monitoring, mitigation, containment and remediation work started by Northstar Canada and Northstar Inc.

Sinnadurai Affidavit at paras. 10 - 14, MOE's Motion Record, Tab A.
Director's D&O Order dated November 14, 2012 – Former D&Os' Motion Record, Vol. 4, Tab 83.
Corporation Point in Time Reports for Northstar Canada and Northstar Inc. – Exhibit "5" to Exhibit "43" to Sinnadurai Affidavit, MOE's Motion Record, Tabs 6 to 44.
Chart showing directorships and/or offices held by Former D&Os - Exhibit "4" to Sinnadurai Affidavit, MOE's Motion Record, Tab 4.

E. Former D&Os' Appeal from Director's D&O Order to ERT

27. Twelve of the Former D&Os have appealed the Director's D&O Order to the ERT. The Former D&Os challenged the jurisdiction of the Director to issue the Order and the reasonableness of the Order. The MOE is opposing the appeal.

Sinnadurai Affidavit at para. 15, MOE's Motion Record, Tab A.

28. The thirteenth Former D&O, Thomas E. Connerty ("**Connerty**"), has neither appealed the Director's D&O Order nor taken any steps to comply with the Director's D&O Order.

Sinnadurai Affidavit at para. 16, MOE's Motion Record, Tab A.

29. On February 8, 2013, the Former D&Os, other than Connerty, brought a motion before the ERT seeking an order staying the Director's D&O Order until the final determination of their appeal to the ERT. On February 15, 2013 the ERT dismissed the

Former D&Os' motion. The ERT released its Reasons for Decision on March 22, 2013. The Former D&Os have served Notices of Appeal to the Divisional Court from the ERT's order dismissing their stay motion.

Sinnadurai Affidavit at paras. 17 - 20, MOE's Motion Record, Tab A.
Order of ERT – Former D&Os' Motion Record, Vol. 2, Tab 60.
Baker v. *Director, Ministry of the Environment*, [2013] O.E.R.T.D. No. 21, MOE's Book of Authorities, Tab 3.

30. The Preliminary Hearing before the ERT is scheduled to take place on April 19, 2013. The ERT hearing of the appeal has not yet been scheduled.

Sinnadurai Affidavit at para. 21, MOE's Motion Record, Tab A.

31. Effective March 1, 2013 the Former D&Os put in place arrangements pursuant to which a corporation controlled by the Former D&Os has retained AET to perform the required remediation work in accordance with the Director's D&O Order.

Sinnadurai Affidavit at para. 22, MOE's Motion Record, Tab 1.
Email from Paul Guy dated March 4, 2013 - Exhibit "46" to Sinnadurai Affidavit, MOE's Motion Record, Tab A.

F. Fifth Third Bank has no direct interest in the adjudication of the MOE claim

32. Fifth Third Bank is the agent for itself and two other banks that provided financing to Northstar as pre-filing lenders and DIP lenders (the "**Lender**").

Sinnadurai Affidavit at para. 26, MOE's Motion Record, Tab A.

33. In paragraphs 91 to 94 of their factum, the Former D&Os contend that the Lender has a direct interest in the adjudication of the MOE's claim because any amounts paid under the D&O Charge Reserve in respect of the MOE's claim would reduce the

proceeds that would otherwise flow to the secured creditor group. This argument has been rendered moot by the decision of Mr. Justice Morawetz on April 9, 2013 in which he concluded that the D&O Charge Reserve should be distributed to the Lender.

> Former D&Os' Factum at paras. 91 to 94.
> *Northstar Aerospace, Inc. (Re)*, 2013 ONSC 1780 at para. 39, MOE's Book of Authorities, Tab 1.

PART III – STATEMENT OF ISSUES AND THE LAW

34. The issues to be decided on this motion are:

(a) Does this Honourable Court have any jurisdiction to intervene in the administrative appeal of the Director's D&O Order to the ERT?

(b) Does the issuance of the Director's D&O Order contravene any orders made in the *Northstar* CCAA proceedings?

(c) Is there any constitutional impediment to the ERT proceeding with its review of the Director's D&O Order?

35. The MOE submits that all three questions should be answered in the negative. The Former D&Os have lost both an injunction motion in this Court and a stay motion before the ERT. This Court has also ruled that the Former D&Os are not entitled to the benefit of the D&O Charge Reserve. Despite these decisions, they are attempting to have this Court intervene in an administrative review of the Director's D&O Order, a decision which the legislature has assigned exclusively to the ERT, not this Court. Contrary to the Former D&Os' contention in paragraph 12 of their factum, there are no longer any ongoing parallel administrative and CCAA proceedings. The CCAA

adjudication process is complete and the Court has ordered that the D&O Charge Reserve be disbursed.

36. There is no legal basis for this Honourable Court to interfere in the ongoing administrative proceedings before the ERT that will determine whether the Former D&Os are required to comply with the Director's D&O Order. There is no evidence to suggest that any of the Former D&Os are insolvent, and there is no order made in the *Northstar* insolvency proceedings still in force that precludes the enforcement of the Former D&Os' independent obligations under the EPA against the Former D&Os.

37. As there is no conflict between the Orders issued in the CCAA proceedings and the continuation of the ERT proceedings, there is no basis for finding that the statutory provisions allowing the ERT to review the Director's D&O Order are inapplicable due to interjurisdictional immunity or inoperative due to federal paramountcy.

A. There is no Legal Basis upon which to grant the Relief sought by Former D&Os

38. The analytical framework proposed by the Former D&Os is not supported by any statutory authority or case law and is based on misconceptions of (i) the role of the CCAA Court in the adjudication of the claim filed by the MOE against the Former D&Os of the insolvent Northstar Canada and Northstar Inc. under the Claims Procedure Order, and (ii) the role of the ERT in determining the validity and reasonableness of the Director's D&O Order.

39. The Former D&Os erroneously presume that the issues to be determined by the ERT in a statutory appeal of the Director's D&O Order are the same issues to be determined by the CCAA Court in the adjudication of the MOE Claim. By stating that

the "MOE Claim includes the Director's D&O Order", the Former D&Os hope that this Court will interpret its authority to adjudicate the MOE Claim for the purposes of the CCAA, as authority to engage in a review of the validity and reasonableness of the Director's D&O Order for the purposes of the EPA.

40. The Former D&Os have not cited any authority to support the submission in paragraphs 3, 53 and 54 of their factum that there is a presumption that the Director's D&O Order referred to in the claim filed by the MOE against the Former D&Os under the Claims Procedure Order must be adjudicated by the CCAA Court. The statement of Deschamps, J. quoted from *Newfoundland and Labrador* v. *AbitibiBowater Inc.* (***"Abitibi"***) in paragraph 54 of their factum merely underscores that the CCAA is intended to deal with monetary claims against the debtor company which filed for protection under the CCAA. The Former D&Os are not debtors under the protection of the CCAA. In *Abitibi*, the Supreme Court did not consider or purport to articulate a test to be applied to the adjudication of claims made by a regulatory body against the directors and officers of the debtor company.

> *Newfoundland and Labrador* v. *AbitibiBowater Inc.*, 2012 SCC 67 at para. 21, Former D&Os' Book of Authorities.

41. The cases relied upon by the Former D&Os in paragraphs 55 to 58 of their factum do not support the submission underpinning their motion that "The CCAA empowers the CCAA court to adjudicate claims that would otherwise be heard in another forum pursuant to provincial statutory authority ...". None of these three cases (nor the cases cited within those decisions) supports the usurping of the jurisdiction of a provincial administrative tribunal to adjudicate the validity and reasonableness of a statutory order issued by a regulatory authority which is subject to review by the

provincial administrative tribunal. Rather, these cases address whether the CCAA Court has the discretion to interfere with the private contractual rights of parties.

> Former D&Os' Factum at paras. 55 - 58.
> *Hayes Forest Services Ltd. (Re)*, [2009] B.C.J. No. 1725 at para. 25 (S.C.), Former D&Os' Book of Authorities.
> *Pope & Talbot Ltd. (Re)*, [2009] B.C.J. No. 2248 at paras. 129 - 131 (S.C.), Former D&Os' Book of Authorities.
> *Luscar Ltd.* v. *Smoky River Coal Ltd.*, [1999] A.J. No. 676 at para. 1 (C.A.), Former D&Os' Book of Authorities.

42. The Former D&Os acknowledge in paragraph 57 of their factum that there is "no fixed set of factors to be used in making [a] determination" of whether "the venue presumption in favour of the CCAA Court is displaced in favour of another forum". In fact, the list of seven factors set forth in paragraphs 3 and 58 of their factum are not identified in the jurisprudence as factors relevant to the determination of whether this Court has the jurisdiction to intervene in the administrative appeal of the Director's D&O Order to the ERT.

43. The Former D&Os fundamentally misconstrue the "theory of liability that underlies the MOE claim" by asserting that it "flows directly out of the bankruptcy order", and "is rooted in the sale of the assets of Northstar Inc. and its subsidiaries and the subsequent bankruptcy of Northstar Canada, both of which were approved in advance by this court, and which took place after the directors had all resigned".

> Former D&Os' Factum at paras. 72(3) and 82.

44. The Former D&Os place emphasis on the following matters:

(a) The Former D&Os allege that they did not cause or permit the discharge of a contaminant into the natural environment;

(b) The Former D&Os "complied with all of their duties and obligations generally and, specifically, all those prescribed by the EPA with respect to the environment";

(c) When the Director issued the orders against Northstar Canada and Northstar Inc. on March 15, 2012 and May 31, 2012, the MOE did not suggest that any of "... the then current or former directors or officers of Northstar Inc. or Northstar Canada ... had contravened the EPA in any way"; and

(d) The Heligear Transaction and the bankruptcy of Northstar Canada were supported by the Monitor and the Chief Restructuring Officer ("**CRO**") and approved by this Honourable Court.

Former D&Os' Factum at paras. 4, 14, 20, 21, 67, 70 and 115.

45. The Director's D&O Order under which the Former D&Os are personally liable was issued against the Former D&Os pursuant to section 18(1) of the EPA because they "had management or control of an undertaking or property", namely the Site owned by Northstar Canada from which the TCE contamination was discharged into the natural environment. Paragraphs 2.4, 2.5, 2.20 and 2.21 of the Director's D&O Order make it clear that the Former D&Os' liability arises from their "management and control" of Northstar Canada, Northstar Inc. and the Site in their capacities as directors and/or officers of the corporations. That liability is independent of whatever liability the CCAA Entities have.

Corporation Point in Time Reports for Northstar Canada and Northstar Inc. – Exhibit "5" to Exhibit "43" to Sinnadurai Affidavit, MOE's Motion Record, Tabs 6 to 44.
Chart showing directorships and/or offices held by Former D&Os - Exhibit "4" to Sinnadurai Affidavit, MOE's Motion Record, Tab 4.
Director's D&O Order dated November 14, 2012 at paras. 2.4, 2.5, 2.20 and 2.21 – Former D&Os' Motion Record, Vol. 4, Tab 83

46. In paragraphs 73 to 77 of their factum, the Former D&Os confuse the MOE's position on the motion heard on December 3, 2012 regarding the timing of when the MOE's claim arose against the Former D&Os with the foundation of the Director's D&O Order which is based on their management and control of Northstar Canada and Northstar Inc. Contrary to their submissions, the passage excerpted from the MOE's factum in paragraph 76 of the Former D&Os' factum does not state that the Director "had no jurisdiction to issue the Director's D&O Order". Rather, it states that the requirement in section 18(2) of the EPA that the work specified in the Director's D&O Order be "necessary or advisable" to prevent, decrease or eliminate an adverse effect from the contamination was not met until the post-filing period after the bankruptcy of Northstar Canada and the abandonment of the Site.

Former D&Os' Factum at paras. 73 to 77.

47. Another misconception on the part of the Former D&Os is that they assume that the Director's rationale for issuing the Order is determinative of the ultimate validity of the order. To the contrary, the ERT has jurisdiction to make a *de novo* decision. In other words, the ERT stands in the shoes of the Director and may confirm, alter or revoke the order based on different information and considerations than those relied upon by the Director. Thus, the relevancy of the timing of the Director's D&O Order, and whether the Director exercised her discretion in reaction to Northstar Canada's bankruptcy may not be determinative factors as to the validity of such order.

B. This Court has no Jurisdiction stay the ERT Proceeding or oust the ERT's Statutory Jurisdiction to determine the Administrative Appeal of the Director's D&O Order to the ERT

(i) The Legislature has given the ERT the Exclusive Jurisdiction to Review Director's Orders and grant Stays pending Appeal

48. The ERT is the successor to the former Environmental Assessment Board and the Environmental Appeal Board. It hears applications and appeals under several environmental statutes including the EPA.

Environmental Review Tribunal Act, 2000, S.O. 2000, c. 26, Sched. F, s. 1(1).

49. The Legislature has granted the ERT the exclusive jurisdiction to determine whether a Director's order is a valid and reasonable exercise of the Director's powers under the EPA. The question of whether the Director's D&O Order requiring the Former D&Os to conduct remediation work should be upheld is, therefore, a question for the ERT, not this Court. The ERT has the jurisdiction to determine all of the questions relevant to the validity and reasonableness of that Order. It should be allowed to do so. Any concern regarding the scope of the ERT's jurisdiction to review the Director's D&O order is more properly made to the ERT which is tasked with interpreting and applying its enabling legislation.

50. Under s. 140 of the EPA, any "person to whom an order of the Director is directed" may appeal the Director's order to the ERT. The Former D&Os have exercised their right to appeal the Director's D&O Order to the ERT.

EPA, s. 140(1).

51. In *R.* v. *Consolidated Maybrun Mines Ltd.* ("***Maybrun***"), the Supreme Court of Canada held that the EPA appeal provisions are a complete code for the review of Directors' Orders and that the legislature clearly intended to set up a complete procedure, independent of any right to apply to a superior court for review. It concluded that the establishment of a specialized tribunal such as the Environmental Appeal Board "reflects the complex and technical nature of questions that might be raised regarding the nature and extent of contamination, and the appropriate action to take." The Tribunal does not simply review the decision of the Director. It conducts a hearing *de novo* to determine whether the Director's Order is confirmed, altered or revoked.

> *R.* v. *Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paras. 56 - 57, MOE's Book of Authorities, Tab 4.

52. An appeal lies from the ERT on any question of law to the Divisional Court. There is also a right of appeal to the Minister on questions of fact or mixed fact and law. An appeal to either the Court or the Minister does not stay the ERT's decision, unless the Court or the Minister orders otherwise.

> *EPA*, s. 145.6

53. In paragraphs 101 to 105 of their Factum, the Former D&Os contend that having this court adjudicate the validity of the Director's D&O Order offers them a more advantageous appeal route. The MOE submits that the availability of appeal routes ought not to be a valid consideration in the determination of whether this Court has any jurisdiction to intervene in the appeal to the ERT. In any event, the Former D&Os' position on this point is highly questionable given that, pursuant to sections 13 and 14 of the CCAA, the Former D&Os could only appeal to the Court of Appeal from an order

made by this Court with leave, whereas they have an automatic right to appeal to the Divisional Court from a decision of the ERT.

CCAA, ss. 13 and 14.

54. The Legislature has expressly provided that an appeal to the ERT "does not stay the operation of a decision or order made under" the EPA. With regard to the costs of remediation before an appeal to the ERT is heard, the ERT held in its decision dismissing the Former D&Os' motion seeking a stay that "[w]ith the 1990 amendments to the *EPA*, the Legislature deliberately chose to impose responsibility on an orderee during the interim period pending the resolution of an appeal unless and until the Tribunal stays the order."

EPA, s. 143(1).
Baker v. *Director, Ministry of the Environment*, [2013] O.E.R.T.D. No. 21 at para. 59, MOE's Book of Authorities, Tab 3.

55. The ERT does have the discretionary authority to order a stay. The Former D&Os applied for a stay but their request was denied. The ERT held that most of the Director's D&O Order was an order merely to "monitor, record and report" which the ERT cannot stay pending appeal. It refused to stay the remainder of the order, on the basis that "the Appellants have not met their obligations under the *EPA*, despite a clear statutory direction that requires compliance with an order pending appeal unless the Tribunal orders otherwise." In light of the Former D&Os' decision to "simply ignore their statutory obligations," the ERT found that even if the Former D&Os had suffered irreparable harm, the balance of convenience favoured denying a stay.

EPA, ss. 143(2) and 143(3).
Rules of Practice of the Environmental Review Tribunal, Rules 108 – 110, MOE's Book of Authorities, Tab 33.

Baker v. Director, Ministry of the Environment, [2013] O.E.R.T.D. No. 21 at paras. 28 - 43 and 92 - 95, MOE's Book of Authorities, Tab 3.

56. The Former D&Os and Neil Baker have brought separate appeals to the Divisional Court from the ERT's interlocutory decision not to grant a stay pending appeal. It is the position of the MOE that these two appeals should be dismissed.

Sinnadurai Affidavit at paras. 18 - 19, MOE's Motion Record, Tab A.
Notice of Appeal by Former D&Os other than Neil W. Baker - Exhibit "44" to Sinnadurai Affidavit, MOE's Motion Record, Tab 44.
Notice of Appeal by Neil W. Baker - Exhibit "45" to Sinnadurai Affidavit, MOE's Motion Record, Tab 45.

57. This motion is essentially another attempt by the Former D&Os to appeal the ERT's decision not to grant a stay pending appeal. Even if it were proper to bring an appeal at this early stage of the ERT proceedings, the appeal would lie to the Divisional Court, not this Court.

EPA, s. 145.6(1).

58. Similarly, even if it were proper to seek judicial review before the ERT proceedings conclude and without taking advantage of the statutory appeal rights provided by the EPA, any application for judicial review would lie to the Divisional Court, not this Court. This Court, therefore, has no jurisdiction to intervene in the ERT proceedings.

Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 6.

59. In paragraphs 95 to 100 of their factum, the Former D&Os contend that it is open to the CCAA Court to oust the ERT's jurisdiction over their appeal from the Director's D&O order because the EPA does not contain a privative clause. However, the provisions of the EPA prescribing their right of appeal to the ERT with a further right of

appeal to the Divisional Court on questions of law and to the Minister on questions of fact or mixed fact and law are a complete code for the review of Director's Orders. The mere absence of a privative clause does not warrant intervention by this court.

Former D&Os' factum at paras. 95 - 100.

(ii) The Former D&Os have not exhausted their Administrative Remedies under the EPA

60. Even if this Court does have jurisdiction to intervene in the administrative appeal of the Director's D&O Order to the ERT, it would be inappropriate for it to do so until that administrative procedure has run its course. There are no "exceptional circumstances" that would justify a Court intervening in the administrative proceedings before they conclude.

61. It is well established that parties should only proceed to the court system after all adequate remedial recourses in the administrative process have been exhausted. In *C.B. Powell Ltd.* v. *Canada (Border Services Agency)* ("***Powell***"), the Federal Court of Appeal recently affirmed that "absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted."

C.B. Powell Ltd. v. *Canada (Border Services Agency)*, [2010] F.C.J. No. 274 at para. 31 (C.A.), MOE's Book of Authorities, Tab 5.

62. In *Powell*, the court articulated the following rationale for this principle requiring courts not to interfere with ongoing administrative processes:

(a) It prevents the fragmentation of the administrative process and piecemeal court proceedings;

(b) It eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process in any event;

(c) Only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings. Expert administrative tribunals are uniquely able to apply their expertise, legitimate policy judgments and valuable regulatory experience to make their findings; and

(d) This approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge.

> *C.B. Powell Ltd.* v. *Canada (Border Services Agency)*, [2010] F.C.J. No. 274 at para. 32 (C.A.), MOE's Book of Authorities, Tab 5.

63. Canadian courts have vigorously enforced the principle of non-interference with ongoing administrative processes and narrowly applied the "exceptional circumstances" exception. Very few circumstances qualify as "exceptional" and the threshold for exceptionality is high.

> *C.B. Powell Ltd.* v. *Canada (Border Services Agency)*, [2010] F.C.J. No. 274 at para. 33 (C.A.), MOE's Book of Authorities, Tab 5.

64. In *Powell*, the Federal Court of Appeal decisively held that the presence of a "jurisdictional" issue, by itself, is not an exceptional circumstance that allows a party to launch a judicial review before the administrative process has been completed. The use of the label "jurisdiction" to justify judicial interference with ongoing administrative

decision-making was discarded by the courts over thirty years ago and is no longer appropriate.

> *C.B. Powell Ltd.* v. *Canada (Border Services Agency)*, [2010] F.C.J. No. 274 at paras. 39 - 42 (C.A.), MOE's Book of Authorities, Tab 5.

65. The principle of judicial non-interference with ongoing administrative processes was recently applied by the Court of Appeal for Ontario in *Volochay* v. *College of Massage Therapists of Ontario*. The Court of Appeal:

(a) held that a true question of jurisdiction refers to whether the tribunal had authority to make the inquiry in the first place; and

(b) expressly approved of the conclusions reached in *Powell* being of the view that the principle of judicial non-interference "has particular force where adequate alternative remedies are available under the administrative scheme."

> *Volochay* v. *College of Massage Therapists of Ontario*, [2012] O.J. No. 3871 at paras. 54 - 56 and 66 - 71 (C.A.), MOE's Book of Authorities, Tab 6.
> *Toth Equity Ltd.* v. *Ottawa*, 2011 ONCA 372 at paras. 34 – 35, MOE's Book of Authorities, Tab 7.
> *Halifax (Regional Municipality)* v. *Nova Scotia (Human Rights Commission)*, [2012] 1 S.C.R. 364 at paras. 35 - 37, MOE's Book of Authorities, Tab 8.

66. In *563386 B.C. Ltd. (c.o.b. Mountain View Manufactured Home Park)* v. *Barrett*, the British Columbia Court of Appeal recognized the importance of the legislative dispute resolution scheme that excluded the Supreme Court's involvement in the merits of such disputes, while leaving to the court its proper supervisory function through judicial review.

> *563386 B.C. Ltd. (c.o.b. Mountain View Manufactured Home Park)* v. *Barrett*, [2009] B.C.J. No. 512 at paras. 29 – 30 (C.A.), MOE's Book of Authorities, Tab 9.

67. In *Ontario College of Art* v. *Ontario (Human Rights Commission)*, the Ontario Divisional Court held that there is a long line of authority which established that judicial review applications should be dismissed as premature where the applicant has failed to commence, or complete, proceedings before administrative bodies or tribunals that have jurisdiction to determine the issues raised by the applicant. This decision has been followed in numerous cases.

> *Ontario College of Art* v. *Ontario (Human Rights Commission)*, [1993] O.J. No. 61 at p. 3, (Div. Ct.), MOE's Book of Authorities, Tab 10.

68. In *Ontario (Liquor Control Board)* v. *Lifford Wine Agencies*, the Court of Appeal for Ontario endorsed the principle that "Neither the interests of justice nor meaningful judicial review are facilitated by the untimely challenge of administrative action during the course of a pending hearing before an administrative tribunal".

> *Ontario (Liquor Control Board)* v. *Lifford Wine Agencies*, [2005] O.J. No. 3042 at paras. 41 – 42 (C.A.), MOE's Book of Authorities, Tab 11.

69. The principle of non-interference in administrative proceedings has been consistently applied in environmental law proceedings. In some cases, the party had not even embarked on administrative proceedings, but ought to have done so.

> *C.B. Powell Ltd.* v. *Canada (Border Services Agency)*, [2010] F.C.J. No. 274 at para. 31 (C.A.), MOE's Book of Authorities, Tab 5.

70. The Supreme Court of Canada considered this issue in *Maybrun* where the question before the Court was whether a person who has not challenged an order through the ERT's appeal process may, once charged, raise the validity of the order by way of defence. The Ontario Court (General Division) held that by reviewing the validity of the order, the trial judge had exceeded his jurisdiction under the EPA and

encroached upon the ERT's functions. The Court of Appeal affirmed the judgment and the Supreme Court of Canada upheld the decision of the Court of Appeal.

> *R.* v. *Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paras. 8 – 11, 14 – 15 and 62, MOE's Book of Authorities, Tab 4.

71. The Supreme Court concluded that persons failing to comply with an environmental order may not collaterally attack the validity of that order after failing to avail themselves of the appeal mechanisms provided by the EPA. Whether a challenge to an order constitutes an impermissible collateral attack requires a determination as to upon whom the Legislature intended to confer jurisdiction to hear and determine the question raised. The Supreme Court viewed the Environmental Appeal Board as a specialized tribunal established precisely to hear questions relating to the environment and to take the appropriate action necessary to prevent it from being contaminated.

> *R.* v. *Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paras. 53 – 59 and 60 - 62, MOE's Book of Authorities, Tab 4.

72. In *Michaud* v. *Manitoba*, the plaintiff sued for a declaration that an environmental clean-up order, a remedial order and a costs order were made without jurisdiction by a director under the *Dangerous Goods Handling and Transportation Act*, C.C.S.M. c. D12. The Act contained a specific appeal process for challenging the director's decisions. The Court found that the plaintiff's action was an impermissible collateral attack and an abuse of process on the basis that the plaintiff sought to attack the validity of these orders in a civil proceeding when he chose not to use the direct attack procedures that were open to him.

> *Michaud* v. *Manitoba*, [2012] M.J. No. 85 at para. 27 (Q.B.); affirmed on other grounds, [2011] M.J. No. 60 (C.A.), MOE's Book of Authorities, Tab 12.

73. In *Gemex Developments Corp.* v. *Coquitlam (City)*, the court found that the doctrine of collateral attack precluded a civil proceeding challenging an order to remove a concrete wall that extended into a river. The order was issued under the *Water Act*, R.S.B.C. 1996, c. 483, which contained a statutory right of appeal to the Environmental Appeal Board ("**EAB**"). The Act did not provide a right of appeal to the courts from a decision of the EAB. The Court held that the establishment of the EAB, a specialized independent body, was "a strong indication that the legislature intended these statutory appeal tribunals to resolve disputes arising under the Water Act."

> *Gemex Developments Corp.* v. *Coquitlam (City)*, [2002] B.C.J. No. 2938 at paras. 2, 8, 9 and 32 - 35 (S.C.), MOE's Book of Authorities, Tab 13.

74. In *Wood Producers' Assn. of Ontario* v. *Ontario*, the MOE Director issued work orders against several sawmills that required the hiring of a consultant to conduct environmental assessments. The sawmills did not exercise their statutory right of appeal to the ERT and the Wood Producers Association sought declarations that the wood by-products at issue were exempt from the EPA.

> *Wood Producers' Assn. of Ontario* v. *Ontario*, [2005] O.J. No. 475 at paras. 1 - 4 (S.C.J.), MOE's Book of Authorities, Tab 14.

75. The Court concluded that the EPA sets out a complete statutory code and any issues with respect to an Order issued by the MOE Director are to be appealed to the ERT which is an expert tribunal established for the purpose of adjudicating precisely the types of issues that the applicants sought to refer to the court for determination. The application constituted a collateral attack on the administrative process set out in the EPA; therefore, it was an abuse of process to disregard the statutory right of appeal

conferred under the EPA and thereafter refer the issues directly to the court for determination.

> *Wood Producers' Assn. of Ontario* v. *Ontario*, [2005] O.J. No. 475 at paras. 7, 9 – 12, 24 (S.C.J.), MOE's Book of Authorities, Tab 14.

76. In an Endorsement dated November 9, 2012, Mr. Justice Morawetz dismissed a motion by the Former D&Os seeking an injunction restraining the Director from issuing the Director's D&O Order. This Court held:

> On the first point of whether there is a serious issue to be tried, I am in agreement with counsel for the MOE that the Former D&O Group has sought relief to which they are not entitled. The EPA sets out a complete statutory scheme for the issuance of environmental orders including provisions for the issuance, stay and appeal of those orders. Counsel to the MOE has provided sufficient authority to establish the position that there is no serious issue to be tried because the Former D&O Group's motion constitutes a collateral attack on the administrative process set out in the EPA. It has been established that the validity of the Director's Order to be issued under the EPA against the directors/officers is to be determined by the Tribunal. (See *Wood Producers Association of Ontario v. Ontario* [2005] O.J. No. 475 at para. 7, which relies upon the decision of the Supreme Court of Canada in *R. v. Consolidated Maybrun Mines Limited* [1998] 1 S.C.R. No. 706.) [emphasis added].
>
> *Northstar Aerospace, Inc. (Re)*, 2012 ONSC 6362 at para. 29, MOE's Book of Authorities, Tab 2.

77. As discussed above, in this case the ERT has complete jurisdiction to determine the validity and reasonableness of the Director's D&O Order. It can also determine the constitutional issues raised by the Former D&Os. There is no reason for this Court to intervene, even if it does have the jurisdiction to do so.

78. The Courts, therefore, should not hear any challenge by the Former D&Os to the Director's D&O Order until the ERT proceedings are concluded. This motion is both premature and an improper collateral attack on the ERT proceedings. The proper way to bring to court any concerns the Former D&Os may have with the Director's D&O Order is to appeal the ERT's final decision to the Divisional Court.

(iii) There are no exceptional circumstances that justify circumventing the ERT Proceedings

79. None of the seven factors listed in paragraphs 3 and 58 of the Former D&O's factum qualify as an "exceptional circumstances" that would justify this Court intervening in the administrative proceedings. In particular, the issue of the inability to recover costs for interim compliance with the Director's D&O Order does not warrant this Court taking such an exceptional action. The statutory scheme of the EPA which does not allow an orderee to recover their legal costs in an appeal before the ERT. This is a limitation of the legislation that applies equally to all orderees under the EPA, and there is nothing unique about the Director's D&O Order in this regard.

80. In paragraphs 42, 45 and 106 to 114 of their factum, the Former D&Os contend that if the ERT determines their appeal in their favour, they will lose the juridical advantage of being able to seek reimbursement from the MOE of their legal costs and the costs they will have incurred in performing the work specified in the Director's D&O Order. Section 150(1) of the EPA authorizes the Director to issue an order against the Former D&Os requiring them to pay the costs that the MOE has incurred in causing AET to perform the remediation work between August 27, 2012 and March 1, 2013. The EPA does not provide the Former D&Os with any corresponding statutory right to

obtain reimbursement of the remediation costs from the MOE, and the Former D&Os have not cited any authority to support their position on this point.

> Former D&Os' Factum at paras. 42, 45 and 106 to 114.
> EPA, s. 150(1).

81. In their factum the Former D&Os disregard the following factors which further undermine their position:

(a) There is no case law to support the suggestion that the scope of the ERT's jurisdiction to award costs should be a consideration in the determination of whether this Court has jurisdiction to intervene in the administrative appeal of the Director's D&O Order to the ERT. In any event, section 17.1 of the *Statutory Powers Procedure Act* empowers the ERT to award costs to a party (i) where the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith, and (ii) the ERT has made rules with respect to the ordering of such costs, the circumstances in which costs may be ordered and the amount or manner in which the amount of costs is to be determined. Rules 225 and 226 of the ERT Rules provide that the ERT may only order costs in the rare case where a party's conduct warrants such an award;

(b) the Former D&Os may seek contribution and indemnification for the costs incurred in legal fees and to perform the remediation work by bringing a proceeding against other former directors and officers of Northstar Canada and Northstar Inc. and/or other persons who were responsible for the discharge of the contamination. They have already delivered a Proof of D&O Claim dated October 22, 2012, preserving their right to commence claims for contribution and

indemnity against each other and against any other directors or officers of the CCAA Entities; and

(c) it is open to them to seek to minimize their legal costs by requesting an expedited hearing before the ERT and, if their appeals are dismissed, by seeking to expedite an appeal to the Divisional Court from the ERT's decision.

> *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 17.1.
> *Rules of Practice of the Environmental Review Tribunal*, Rules 225 - 226, MOE's Book of Authorities, Tab 33.

82. In *Okwuobi* v. *Lester B. Pearson School Board*, the Supreme Court of Canada expressly rejected the inability of a tribunal to grant a particular remedy sought by a party as a ground for circumventing the administrative process.

> *Okwuobi* v. *Lester B. Pearson School Board*, [2005] 1 S.C.R. 257 at paras. 44 – 46, MOE's Book of Authorities, Tab 15.

83. As set out above, the fact that orderees are required to perform work ordered by a Director's Order until a stay is ordered by the ERT or the ERT proceeding is concluded without any possibility of reimbursement from the MOE was a deliberate choice of the Legislature. This Court has no more power to order reimbursement of the costs of work performed by the Former D&Os than the ERT does. In any event, the Former D&Os put their concerns about not being able to obtain reimbursement of remediation costs to the ERT in support of their motion for a stay. In denying the stay, the ERT expressly considered and rejected that argument.

> Affidavit of Craig Yuen sworn February 26, 2013 at para. 9, Former D&Os' Motion Record, Vol. 4, Tab 81.
> Sinnadurai Affidavit at para. 17, MOE's Motion Record, Tab A.
> Order of ERT dated February 15, 2013, Former D&Os' Motion Record, Vol. 2, Tab 60.
> *Baker* v. *Director, Ministry of the Environment*, [2013] O.E.R.T.D. No. 21 at paras. 72 - 79, MOE's Book of Authorities, Tab 3.

C. The Issuance of the Director's D&O Order does not contravene any order in the *Northstar* CCAA Proceedings

84. In paragraphs 79, 84 and 92 of their factum, the Former D&Os contend that the ERT proceedings are a collateral attack on this Court's prior orders in the *Northstar* CCAA proceedings. In doing so, the Former D&Os conflate their personal liability to comply with the EPA with the potential liability of the CCAA Entities to indemnify them. The former matter is not subject to oversight by this Court; the latter matter is.

Former D&Os' Factum at paras. 79, 84 and 92.

85. The Former D&Os' liability under the EPA is not derivative of the CCAA Entities' obligation to comply with the EPA; rather, it is an independent obligation owed by the Former D&Os personally.

86. The ERT proceedings are concerned with the Former D&Os' liability, not the liability of the CCAA Entities; therefore, they cannot be considered a collateral attack on this Court's CCAA orders. To the contrary, none of the Orders that this Court has made and that are still in force preclude the ERT proceedings from continuing.

(i) The Former D&Os' Liability is independent of the CCAA Entities' Liability and is not dependent on Fault

87. Under the EPA, the MOE Director is empowered to issue orders against past owners, occupants and persons who were in charge, management or control of an undertaking, property or source of a contaminant.

88. The EPA specifically permits the Director to make various orders that impose obligations and personal liabilities upon persons who (i) cause or permit the discharge

of a contaminant into the natural environment and/or (ii) had management or control of an undertaking or property from which a contaminant was discharged.

EPA, ss. 17, 18(1), 18(2) and 196(1).

89. It is the MOE's position that the Former D&Os had management and control of Northstar Canada and Northstar Inc. during the period from 2003 to 2012 such that they must have been informed and aware of the environmental issues arising from the TCE contamination. Hess and Yuen had management and control of the two corporations during the Post-Filing Period.

Corporation Point in Time Reports for Northstar Canada and Northstar Inc. – Exhibit "5" to Exhibit "43" to Sinnadurai Affidavit, MOE's Motion Record, Tabs 5 to 43.

90. Section 18 of the EPA applies not only to persons who currently own, manage, or control undertakings or property but also to those who previously held such a status. The EPA provisions capturing past owners, managers and controllers are retrospective and apply to persons holding that status before 1990 when the provisions were passed.

Sheridan v. *Ontario (Ministry of Environment and Energy)*, [1994] O.E.A.B. No. 56 at 12, MOE's Book of Authorities, Tab 16.

91. In *Currie* v. *Ontario (Ministry of the Environment)* ("**Currie**"), the ERT quoted with approval from the decision of the Divisional Court in *Ontario (Ministry of the Environment and Energy, Southern Region)* v. *724597 Ontario Inc. (c.o.b. Appletex)* which confirmed the Ontario Environmental Appeal Board's interpretation of "management and control". "Control" includes de facto control and control of the purse strings through means other than direct or daily participation in the corporation or its business. "Management" is not restricted to how the business was conducted as an

operating entity, but includes how the property was decommissioned when the business was abandoned.

> *Currie* v. *Ontario (Ministry of the Environment)*, [2011] O.E.R.T.D. No. 26 at para. 76, MOE's Book of Authorities, Tab 17.

92. The ERT in *Currie* also confirmed that directors who have been named in a Director's order under section 18(1) of the EPA bear the onus of proving that they did not have management or control of the corporation whose operations caused the environmental contamination. The registered documents of the corporation create presumptions regarding management and control that can only be rebutted by very convincing cases.

> *Currie* v. *Ontario (Ministry of the Environment)*, [2011] O.E.R.T.D. No. 26 at para. 77, MOE's Book of Authorities, Tab 17.

93. In their Request for Hearing filed with the ERT, the grounds of appeal advanced by the Former D&Os include that they "exercised sound and reasonable business judgment, including a proper consideration of all environmental issues", "acted honestly and in good faith with a view to the best interests of Northstar and Northstar Canada", "exercised the care, diligence and skill that a reasonably prudent person would exercise in supervising and managing Northstar's and Northstar Canada's affairs", and they "did everything they reasonably could to ensure that Northstar respected the environment by, among other things, operating the remedial systems that were in place for years prior to Northstar Canada's bankruptcy". These are grounds that relate to the reasonableness of the Director's D&O Order.

> Request for Hearing dated November 30, 2013 at pp. 6 - 7 -- Exhibit "G" to Brown Affidavit, Former D&Os' Motion Record, Vol. 2, Tab 54.

94. In paragraphs 87 - 90 of their factum, the Former D&Os contend that the ERT does not have the expertise to determine issues relating to their conduct while they were directors and officers of Northstar Canada and/or Northstar Inc. because they filed for protection under the CCAA. The Legislature, however, did not place any such restriction on the ERT's authority to decide whether a Director's order against former directors and officers of an insolvent company is valid and reasonable. As noted in paragraph 91 above, in *Currie* the ERT made findings regarding the aspects of management and control relating to the decision of the directors to abandon the business and the premises.

> Former D&Os' Factum at paras. 87 - 90.
> *Currie* v. *Ontario (Ministry of the Environment)*, [2011] O.E.R.T.D. No. 26 at para. 76, MOE's Book of Authorities, Tab 17.

95. Furthermore, in certain cases the ERT has given no weight to whether an orderee is at fault in determining whether a Director's Order should be upheld. For example, in *Kawartha Lakes (City)* v. *Ontario (Ministry of the Environment)*, on a preliminary motion to restrict the scope of the appeal, the ERT refused to hear evidence and argument regarding fault for causing a spill of furnace oil. In its decision on the appeal, the ERT reiterated this evidentiary ruling and upheld the Director's order against the City.

> *Kawartha Lakes (City)* v. *Ontario (Ministry of the Environment)*, [2009] O.E.R.T.D. No. 59 at paras. 1 - 2, 94 and 97; [2010] O.E.R.T.D. No. 32 at paras. 18, 37 – 41, MOE's Book of Authorities, Tabs 18 and 19.

96. The Divisional Court dismissed the City's appeal from the ERT's decision and held:

> It is not the role of the decision-maker to allocate liability or make findings of fault or degrees of fault. People who are named in an order are held to be jointly and severally liable for the clean-up. If determining fault or degrees of fault as between one or more potential orderees is irrelevant to the exercise of a statutory decision-maker under s. 157.1, such a determination of fault becomes much more irrelevant when the parties against whom the findings of fault are sought are not even potential orderees under s. 157.1 [emphasis added]..
>
> *Kawartha Lakes (City)* v. *Ontario (Ministry of the Environment)*, [2012] O.J. No. 2378 at paras. 72 and 74 (Div. Ct.); leave to appeal to the Court of Appeal granted, MOE's Book of Authorities, Tab 20.

97. In paragraphs 64 and 78 of their factum, the Former D&Os incorrectly characterize their personal liability under section 18 of the EPA as "vicarious liability" for the failure of Northstar Canada and Northstar Inc. to continue to pay for the required environmental remediation. To the contrary, their liability is direct and dependent upon their management or control of one or both of the corporations.

> Former D&Os' Factum at paras. 64 and 78.

98. The fact that Northstar Canada and Northstar Inc. ceased performing the remediation work on August 23, 2012, in their words "on this court's watch", does not absolve the Former D&Os of liability under section 18 of the EPA. The legislative scheme enacted in the EPA imposes the obligation on persons having management or control of a corporate polluter to perform remediation work irrespective of whether the company is bankrupt or insolvent. The key consideration for the Director under section 18(2) of the EPA in issuing an order against such persons is whether, on reasonable and probable grounds, such an order is necessary or advisable to prevent, decrease or eliminate the adverse effects of the discharge of a contaminant.

> Former D&Os' Factum at para. 65.

EPA, s. 18(2).

99. The Former D&Os contend that the claim filed by the MOE under the Claims Procedure Order is a collateral attack on both the orders made by this Court and the conduct of the Monitor and the CRO in connection with the Heligear Transaction. They incorrectly assert that the MOE's position is that the Former D&Os' "liability flows directly out of the Bankruptcy Order" and that "the MOE anchors the MOE Claim in the Bankruptcy Order". These submissions seriously misconstrue the MOE's position and fail to comprehend that the Former D&Os have personal liability under section 18 of the EPA arising from their management or control of the corporations which is separate and distinct from the corporations' liability under sections 17 and 18 of the EPA arising from their discharge of the TCE into the natural environment and their ownership of the Site.

Former D&Os' Factum at paras. 79 - 86, 92.

100. In paragraph 85 of their factum, the Former D&Os again misrepresent the position taken by the MOE on the motion heard on December 3, 2012 by quoting in a misleading manner from the MOE's factum filed on that motion. The MOE's factum clearly states that the "post-filing timing of the MOE's D&O Claim arising in the form of the Reimbursement Claim", not the claim itself, was dictated by the actions of the Monitor, Hess, Yuen, the Pre-Filing Agent and likely the CRO in orchestrating the abandonment of the Site which, in turn, caused the MOE to incur actual loss and damages through its expenditures on the services of AET to continue the remediation activities. The MOE does not impugn the conduct of the Monitor and the CRO; rather, the court-approved bankruptcy of Northstar Canada and subsequent abandonment of

the site are merely the events that compelled the MOE to perform the remediation work from August 27, 2012 to March 1, 2013.

Former D&Os' Factum at para. 85.
MOE's Factum at para. 60, D&Os' Motion Record, Vol. 3, Tab 78.

101. The Former D&Os inaccurately state in paragraph 81 of their factum that the MOE's claim against Northstar Canada and Northstar Inc. has been "denied" by this Court. In fact, the order of Mr. Justice Morawetz dated July 24, 2012, declined to lift the stay in the Initial Order of the Director's Order dated March 15, 2012. That Director's Order remains stayed pending the MOE's appeal to the Court of Appeal; it has not been "denied" or dismissed by this Court.

Former D&Os' Factum at para. 81.

(ii) No In-Force CCAA Order bars the ERT Proceedings from continuing

102. Section 11.03(1) of the CCAA allows a CCAA Court to stay a proceeding against the directors of an insolvent company that "relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations." Such a stay, however, can only last "until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court."

CCAA, s. 11.03(1).

103. A D&O Stay under s. 11.03 was included in paragraph 22 of the Initial Order. That Stay, however, expired on October 31, 2012. It, therefore, did not apply to the Director's D&O Order which was not issued until November 14, 2012.

Sinnadurai Affidavit at paras. 9 – 10, MOE's Motion Record, Tab A.

104. Furthermore, the Former D&Os brought a motion to this Court seeking an injunction to restrain the Director from issuing the Director's D&O Order. That motion was dismissed by Mr. Justice Morawetz on November 9, 2012. There was, therefore, no CCAA Order precluding the Director from making the Director's D&O Order in force at the time the Order was made, much less a CCAA Order prohibiting the ERT from considering the Former D&Os' appeal of that Order.

Sinnadurai Affidavit at para. 8, MOE's Motion Record, Tab A.

105. The CCAA also permits a compromise or arrangement to be made, with the approval of a two-thirds majority of the creditors and the sanction of this Court, which "includes in its terms provision for the compromise of claims against directors of the company that ... relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."

CCAA, ss. 5.1 and 6.

106. In this case, however, no compromise or arrangement between the debtor companies and their creditors was submitted to the court for approval. Instead, substantially all of the assets of the CCAA Entities were sold to Heligear, Northstar Canada was adjudged bankrupt, and the Site was abandoned by BDO, the trustee in bankruptcy. The Former D&Os have not had their personal obligations under the EPA compromised by a court and a creditor-approved plan of arrangement. The CCAA, therefore, does not preclude the MOE from seeking to enforce the Director's D&O Order against the Former D&Os and this Court has no jurisdiction.

(iii) The CCAA has no further application to the Former D&Os

107. The Former D&Os sought indemnification from the $1.75 million D&O Charge Reserve established from the proceeds of the sale of the CCAA Entities' assets to Heligear for the costs which they have been incurring since on or about March 1, 2013 to comply with the Director's D&O Order. The Monitor brought a motion asking this Court to determine whether the Proofs of D&O Claims filed by the MOE and the Former D&Os under the Claims Procedure Order were valid post-filing claims for which the Former D&Os were entitled to be indemnified from the D&O Charge Reserve. Mr. Justice Morawetz concluded that although the MOE may have a remedy against the Former D&Os, it did not have recourse against the D&O Charge Reserve which he ordered be distributed to the Lender. Accordingly, there are no further CCAA claims issues to be determined by this Court that relate to the Former D&Os.

> Sinnadurai Affidavit at para. 3, MOE's Motion Record, Tab A.
> Initial Order at paras. 23-25, Former D&Os' Motion Record, Vol. 2, Tab 36, p. 838.
> Distribution Order at para. 4(b), Former D&Os' Motion Record, Vol. 2, Tab 39, p. 926.
> Claims Procedure Order at paras. 2(p)-(t), (ii), and (II), 16, 18 and 22, Former D&Os' Motion Record, Vol. 2, Tab 48, pp. 1046-47, 1049 and 1052.
> *Northstar Aerospace, Inc. (Re)*, 2013 ONSC 1780 at paras. 34, 36 and 38, MOE's Book of Authorities, Tab 1.

D. There is no Constitutional Impediment to the ERT Proceedings continuing

(i) The ERT, not this Court, should decide the Constitutional Issues in the First Instance

108. As a tribunal entitled to consider questions of law, the ERT has the jurisdiction to consider constitutional issues, including federalism challenges to its own jurisdiction. The Supreme Court of Canada has held that "expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional

questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*." Such tribunals should be allowed to decide constitutional questions "linked to matters properly before them" to avoid "the need for bifurcated proceedings between superior courts and administrative tribunals" as:

> a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction

Rules of Practice of the Environmental Review Tribunal, Rules 73 – 83, MOE's Book of Authorities, Tab 33.
R. v. *Conway*, [2010] 1 S.C.R. 765 at paras. 78 - 80, MOE's Book of Authorities, Tab 21.

109. The Former D&Os did not, however, serve a notice of constitutional question in the ERT proceedings or otherwise raise their alleged constitutional concerns before the ERT. They should not be permitted to bifurcate their challenge to the ERT proceedings by bringing a constitutional challenge in this Court while those proceedings are still ongoing. The proper way to raise their constitutional challenge is to bring it before the ERT and, if unsuccessful, raise it on appeal to the Divisional Court. As discussed above, the existence of a constitutional issue is not an "exceptional circumstance" that justifies bypassing the normal administrative process.

(ii) The ERT Proceedings do not impair the Core of the Federal Power over Bankruptcy and Insolvency

110. In any event, neither the Former D&Os' interjurisdictional immunity (**"IJI"**) nor their paramountcy arguments should succeed.

111. The Former D&Os contend that the ERT adjudicating their appeal of the Director's D&O Order is constitutionally barred by the doctrine of IJI, because it will

have an impact on the adjudication of the claims the MOE and the Former D&Os have filed in the *Northstar* CCAA proceedings and the Former D&Os' claim seeking indemnification from the D&O Charge Reserve.

112. IJI is a doctrine of limited application that protects core federal competencies from impairment by provincial legislation. Where a provincial law impairs, rather than merely affects, the "basic, minimum, and unassailable content" of a federal head of legislative power or a "vital or essential" part of a federal undertaking, the provincial law is inapplicable to the extent of the impairment. Only that which is "absolutely indispensable or necessary" to the federal power or undertaking is protected by IJI.

> *Canadian Western Bank* v. *Alberta*, [2007] 2 S.C.R. 3 at paras. 33 - 53, MOE's Book of Authorities, Tab 22.
> *Québec (A.G.)* v. *Canadian Owners and Pilots Assn.*, [2010] 2 S.C.R. 536 at para. 35, MOE's Book of Authorities, Tab 23.

113. Although IJI is in principle applicable to all federal and provincial heads of legislative authority, the Supreme Court of Canada has held that IJI should "in general be reserved for situations already covered by precedent", and that "in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy."

> *Canadian Western Bank*, [2007] 2 S.C.R. 3 at paras. 77 - 78, MOE's Book of Authorities, Tab 22.
> *Québec (A.G.)* v. *Canadian Owners and Pilots Assn.*, [2010] 2 S.C.R. 536 at paras. 36 and 42 - 45, MOE's Book of Authorities, Tab 23.

114. The bankruptcy and insolvency power is not one to which IJI has historically been held to apply. That makes sense given that IJI cannot practically apply to bankruptcy and insolvency in light of the "broad array of provincial legislation

underpinning the *Bankruptcy Act*." As "the proprietary and contractual rights that are regulated by the bankruptcy process are usually created by virtue of provincial law," it is difficult to see how there could be an inviolable core of bankruptcy and insolvency where no provincial law could ever apply even in the absence of federal legislation. To the contrary, the Supreme Court has held that "so long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights."

> *Husky Oil Operations Ltd.* v. *Canada (M.N.R.)*, [1995] 3 S.C.R. 453 at paras. 29 - 30 (Gonthier, J.) and 138 - 149 (Iacobucci, J. dissenting), MOE's Book of Authorities, Tab 24.
> *Crystalline Investments Ltd.* v. *Domgroup Ltd.*, [2004] 1 S.C.R. 60 at para. 43, MOE's Book of Authorities, Tab 25.
> *Canadian Western Bank*, *supra* at para. 24, MOE's Book of Authorities, Tab 22.

115. There is, therefore, no need to consider whether IJI precludes provincial environmental law from applying to the Former D&Os. Even if IJI could apply to the bankruptcy and insolvency power, the determination of whether directors and officers of a formerly insolvent and now bankrupt company are personally liable as a result of actions they did or did not take while they were in management and control of the company is not part of the "basic, minimum, and unassailable content" of the federal bankruptcy and insolvency power.

116. The Supreme Court of Canada and Privy Council cases which have considered the meaning of the words "Bankruptcy and Insolvency" in subsection 91(21) of the *Constitution Act, 1867* have consistently interpreted the term "insolvency" as involving relations between an insolvent debtor and its creditors. Those creditors include directors and officers who have claims for indemnification against an insolvent company. But Parliament's power to stay or compromise claims brought against non-insolvent

directors _ is merely ancillary to its power to regulate the debts of the insolvent company.

> *Constitution Act, 1867* (U.K.), 29 & 30 Vict., c. 3, s. 91(21).
>
> *Ontario (A.G.)* v. *Canada (A.G.),* [1894] A.C. 189, [1894] J.C.J. No. 1 (P.C.), MOE's Book of Authorities, Tab 26.
>
> *Reference re Companies' Creditors Arrangement Act,* [1934] S.C.R. 659, MOE's Book of Authorities, Tab 27.
>
> *British Columbia (A.G.)* v. *Canada (A.G.),* [1937] A.C. 391, [1937] J.C.J. No. 9 (P.C.), MOE's Book of Authorities, Tab 28.
>
> *Ladore* v. *Bennett,* [1939], J.C.J. No. 1, [1939] A.C. 468 (P.C.), MOE's Book of Authorities, Tab 29.
>
> *Alberta (A.G.)* v. *Canada (A.G.),* [1943] J.C.J. No. 2, [1943] A.C. 356 (P.C.) MOE's Book of Authorities, Tab 30.
>
> *Canadian Bankers Assn.* v. *Saskatchewan (A.G.),* [1956] S.C.R. 31, MOE's Book of Authorities, Tab 31.
>
> *Century Services Inc.* v. *Canada (A.G.),* [2010] SCC 60, MOE's Book of Authorities, Tab 32.

117. In any event, determining whether the Former D&Os are personally liable under the EPA is not a matter that "seriously or significantly trammels the federal power" over bankruptcy and insolvency, particularly given that the D&O Stay has expired and there is no plan of arrangement compromising claims against the Former D&Os.

> *Québec (A.G.)* v. *Canadian Owners and Pilots Assn.*, [2010] 2 S.C.R. 536 at para. 45, MOE's Book of Authorities, Tab 23.

118. Imposing liability on the Former D&Os personally cannot affect the outcome of the insolvency or the conduct of the CCAA proceedings. The CCAA Entities have already sold substantially all of their assets, and Northstar Canada has been adjudged bankrupt. Nor can it impact the likelihood of a plan of arrangement being approved – there was a court-approved asset sale, not a plan of arrangement. The claims adjudication process under the CCAA is now complete as it relates to the Former D&Os as Mr. Justice Morawetz has ruled that the former D&Os cannot be indemnified from the

D&O Charge Reserve. There is no evidence that any of the Former D&Os are currently insolvent or bankrupt. If they become so in the future, any attempts to enforce the Director's D&O Order against them at that time will be subject to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

119. The Former D&Os' personal liability can have no impact on the insolvent (and, in the case of Northstar Canada, bankrupt) companies. As discussed above, this Court, not the ERT, has concluded that the Former D&Os are not entitled to indemnification from the D&O Charge Reserve. That is a decision that falls within the federal bankruptcy and insolvency power. The Former D&Os' personal environmental liability, however, falls solely within provincial jurisdiction. Thus, there is no impairment of the federal power over bankruptcy and insolvency in this circumstance. Accordingly, IJI does not preclude the ERT from continuing to review the validity of the Director's D&O Order.

(iii) As there is no Conflict with any CCAA Order, the Doctrine of Federal Paramountcy does not apply

120. For the same reason, there is no issue of paramountcy. A provincial law can be inoperative due to paramountcy either because it is in operational conflict with a federal law, or because it frustrates the purpose of a federal law. In either case, the party asserting paramountcy has the burden of meeting the high standard required to invoke the doctrine of paramountcy. The Former D&Os have failed to do so here.

> *Canadian Western Bank* v. *Alberta*, [2007] 2 S.C.R. 3 at paras. 69 - 75, MOE's Book of Authorities, Tab 22.
> *Québec (A.G.)* v. *Canadian Owners and Pilots Assn.*, [2010] 2 S.C.R. 536 at paras. 62 - 66, MOE's Book of Authorities, Tab 23.

121. There is no in-force CCAA order which precludes the ERT proceedings from continuing against the Former D&Os. If the Director's D&O Order is upheld by the ERT, there is no in-force CCAA order precluding the MOE from enforcing it against the Former D&Os personally.

122. As the Legislature intended, the validity of the Director's D&O Order will be adjudicated by the ERT. As Parliament intended, the validity of the Claim against the D&O Charge Reserve has been adjudicated by this Court. There is no conflict between the CCAA proceedings and the ERT proceedings which could give rise to a question of paramountcy. Each proceeding is addressing a different issue. The federal and provincial laws harmoniously coexist. Both can and are being complied with.

123. Nor does seeking to enforce the Director's D&O Order against the Former D&Os personally frustrate the purposes of the CCAA. As discussed above, the Former D&Os' personal liability under the EPA is independent of any potential liability of the CCAA Entities. The purpose of the CCAA is not to automatically immunize the directors and officers of an insolvent company from liability for their own actions and omissions. To avoid distractions while attempts at restructuring are made, the CCAA allows the Court to temporarily stay claims against directors. But here, the CCAA Entities' assets were sold and the D&O Stay was lifted by this Court. The CCAA also allows directors to be permanently immunized from claims as part of a creditor- and court-approved plan of arrangement. But, unlike in *Abitibi*, no such arrangement was entered into here. Allowing the ERT proceedings to proceed, therefore, would not frustrate the purposes of the CCAA.

124. As it is possible to comply with both the EPA and the CCAA, and because the ERT proceedings do not frustrate the purposes of the CCAA, there is no paramount federal legislation that precludes the ERT proceedings from continuing.

PART IV – ORDER REQUESTED

125. For the reasons set out above, the MOE requests that this Honourable Court make:

(a) an order dismissing the Former D&Os' motion in its entirety; and

(b) an order that the Former D&Os' pay the MOE's costs of this motion on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: April 15, 2013

Jacqueline Wall

Jacqueline L. Wall
Josh Hunter

Counsel to Her Majesty the Queen in right of Ontario, as represented by the Ministry of the Environment

SCHEDULE "A"

Authorities

1. *Northstar Aerospace, Inc. (Re)*, 2013 ONSC 1780.
2. *Northstar Aerospace, Inc. (Re)*, 2012 ONSC 6362.
3. *Baker* v. *Director, Ministry of the Environment*, [2013] O.E.R.T.D. No. 21.
4. *R.* v. *Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706.
5. *C.B. Powell Ltd.* v. *Canada (Border Services Agency)*, [2010] F.C.J. No. 274 (C.A.).
6. *Volochay* v. *College of Massage Therapists of Ontario*, [2012] O.J. No. 3871 (C.A.).
7. *Toth Equity Ltd.* v. *Ottawa*, 2011 ONCA 372.
8. *Halifax (Regional Municipality)* v. *Nova Scotia (Human Rights Commission)*, [2012] 1 S.C.R. 364.
9. *563386 B.C. Ltd. (c.o.b. Mountain View Manufactured Home Park)* v. *Barrett*, [2009] B.C.J. No. 512 (C.A.).
10. *Ontario College of Art* v. *Ontario (Human Rights Commission)*, [1993] O.J. No. 61 (Div. Ct.).
11. *Ontario (Liquor Control Board)* v. *Lifford Wine Agencies*, [2005] O.J. No. 3042 (C.A.).
12. *Michaud* v. *Manitoba*, [2012] M.J. No. 85 (Q.B.); affirmed on other grounds, [2011] M.J. No. 60 (C.A.).
13. *Gemex Developments Corp.* v. *Coquitlam (City)*, [2002] B.C.J. No. 2938 (S.C.).
14. *Wood Producers' Assn. of Ontario* v. *Ontario*, [2005] O.J. No. 475 (S.C.J.).
15. *Okwuobi* v. *Lester B. Pearson School Board*, [2005] 1 S.C.R. 257.
16. *Sheridan* v. *Ontario (Ministry of Environment and Energy)*, [1994] O.E.A.B. No. 56.
17. *Currie* v. *Ontario (Ministry of the Environment)*, [2011] O.E.R.T.D. No. 26.
18. *Kawartha Lakes (City)* v. *Ontario (Ministry of the Environment)*, [2009] O.E.R.T.D. No. 59.

19. *Kawartha Lakes (City)* v. *Ontario (Ministry of the Environment)*, [2010] O.E.R.T.D. No. 32.

20. *Kawartha Lakes (City)* v. *Ontario (Ministry of the Environment)*, [2012] O.J. No. 2378 (Div. Ct.); leave to appeal to the Court of Appeal granted.

21. *R.* v. *Conway*, [2010] 1 S.C.R. 765.

22. *Canadian Western Bank* v. *Alberta*, [2007] 2 S.C.R. 3.

23. *Québec (A.G.)* v. *Canadian Owners and Pilots Assn.*, [2010] 2 S.C.R. 536.

24. *Husky Oil Operations Ltd.* v. *Canada (M.N.R.)*, [1995] 3 S.C.R. 453.

25. *Crystalline Investments Ltd.* v. *Domgroup Ltd.*, [2004] 1 S.C.R. 60.

26. *Ontario (A.G.)* v. *Canada (A.G.)*, [1894] A.C. 189, [1894] J.C.J. No. 1 (P.C.).

27. *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659.

28. *British Columbia (A.G.)* v. *Canada (A.G.)*, [1937] A.C. 391, [1937] J.C.J. No. 9 (P.C.).

29. *Ladore* v. *Bennett*, [1939], J.C.J. No. 1, [1939] A.C. 468 (P.C.).

30. *Alberta (A.G.)* v. *Canada (A.G.)*, [1943] J.C.J. No. 2, [1943] A.C. 356 (P.C.).

31. *Canadian Bankers Assn.* v. *Saskatchewan (A.G.)*, [1956] S.C.R. 31.

32. *Century Services Inc.* v. *Canada (A.G.)*, [2010] SCC 60.

33. *Rules of Practice and Practice Directions of The Environmental Review Tribunal.*

SCHEDULE "B"

Relevant Statutes

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

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(*a*) relate to contractual rights of one or more creditors; or

(*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(*a*) subsection 224(1.2) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(*a*) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(*d*) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement,

together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(*b*) the court is satisfied that the company can and will make the payments as required under paragraph (*a*).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(*a*) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(*b*) the court is satisfied that the company can and will make the payments as required under paragraph (*a*).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

Leave to appeal

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

Court of appeal

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal

***Environmental Protection Act*, R.S.O. 1990 c. E-19, as amended**

Purpose of Act

3. (1) The purpose of this Act is to provide for the protection and conservation of the natural environment.

Remedial orders

17. Where any person causes or permits the discharge of a contaminant into the natural environment, so that land, water, property, animal life, plant life, or human health or safety is injured, damaged or endangered, or is likely to be injured, damaged or endangered, the Director may order the person to,

(a) repair the injury or damage;

(b) prevent the injury or damage; or

(c) where the discharge has damaged or endangered or is likely to damage or endanger existing water supplies, provide temporary or permanent alternate water supplies.

Order by Director re preventive measures

18. (1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property to do any one or more of the following:

1. To have available at all times, or during such periods of time as are specified in the order, the equipment, material and personnel specified in the order at the locations specified in the order.

2. To obtain, construct and install or modify the devices, equipment and facilities specified in the order at the locations and in the manner specified in the order.

3. To implement procedures specified in the order.

4. To take all steps necessary so that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property.

5. To monitor and record the presence or discharge of a contaminant specified in the order and to report thereon to the Director.

6. To study and to report to the Director on,

   i. the presence or discharge of a contaminant specified in the order,

   ii. the effects of the presence or discharge of a contaminant specified in the order,

   iii. measures to control the presence or discharge of a contaminant specified in the order,

   iv. the natural environment into which a contaminant specified in the order may be discharged.

7. To develop and implement plans to,

i. reduce the amount of a contaminant that is discharged into the natural environment,

ii. prevent or reduce the risk of a spill of a pollutant within the meaning of Part X, or

iii. prevent, decrease or eliminate any adverse effects that result or may result from a spill of a pollutant within the meaning of Part X or from any other discharge of a contaminant into the natural environment, including,

A. plans to notify the Ministry, other public authorities and members of the public who may be affected by a discharge, and

B. plans to ensure that appropriate equipment, material and personnel are available to respond to a discharge.

8. To amend a plan developed under paragraph 7 or section 91.1 in the manner specified in the order.

Grounds for order

(2) The Director may make an order under this section if the Director is of the opinion, on reasonable and probable grounds, that the requirements specified in the order are necessary or advisable so as,

(a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or

(b) to prevent, decrease or eliminate an adverse effect that may result from,

(i) the discharge of a contaminant from the undertaking, or

(ii) the presence or discharge of a contaminant in, on or under the property.

Appeal of order

140. (1) A person to whom an order of the Director is directed may, by written notice served upon the Director and the Tribunal within fifteen days after service upon the person of a copy of the order, require a hearing by the Tribunal.

Failure or refusal to issue, etc., order

(2) No failure or refusal to issue, amend, vary or revoke an order is an order.

No automatic stay on appeal

143. (1) The commencement of a proceeding before the Tribunal under this Part does not stay the operation of a decision or order made under this Act, other than,

(a) an order to pay costs and expenses under section 99.1;

(b) an order to pay the costs of work made under section 150;

(c) an order to pay an environmental penalty; or

(d) an order to pay an administrative penalty.

Tribunal may grant stay

(2) The Tribunal may, on the application of a party to a proceeding before it, stay the operation of a decision or order, other than,

(a) an order to monitor, record and report; or

(b) an order issued under section 168.8, 168.14 or 168.20.

When stay may not be granted

(3) The Tribunal shall not stay the operation of a decision or order if doing so would result in,

(a) danger to the health or safety of any person;

(b) impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or

(c) injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

Right to apply to remove stay: new circumstances

(4) A party to a proceeding may apply for the removal of a stay if relevant circumstances have changed or have become known to the party since the stay was granted, and the Tribunal may grant the application.

Right to apply to remove stay: new party

(5) A person who is made a party to a proceeding after a stay is granted may, at the time the person is made a party, apply for the removal of the stay, and the Tribunal may grant the application.

Removal of stay by Tribunal

(6) The Tribunal, on the application of a party under subsection (4) or (5), shall remove a stay if failure to do so would have one or more of the results mentioned in clauses (3) (a) to (c).

Powers of Tribunal

145.2 (1) Subject to sections 145.3 and 145.4, a hearing by the Tribunal under this Part shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

Non-application of subs. (1)

(2) Subsection (1) does not apply in respect of a hearing required under section 142.1.

Appeals from Tribunal

145.6 (1) Any party to a hearing before the Tribunal under this Part may appeal from its decision or order on a question of law to the Divisional Court in accordance with the rules of court.

Appeal to Minister

(2) A party to a hearing before the Tribunal under this Part may, within 30 days after receipt of the decision of the Tribunal or within 30 days after final disposition of an appeal, if any, under subsection (1), appeal in writing to the Minister on any matter other than a question of law and the Minister shall confirm, alter or revoke the decision of the Tribunal as to the matter in appeal as the Minister considers in the public interest.

Decision of Tribunal not automatically stayed on appeal

(3) An appeal of a decision of the Tribunal to the Divisional Court or to the Minister under this section does not stay the operation of the decision, unless the Tribunal orders otherwise.

Divisional Court or Minister may grant or set aside stay

(4) If a decision of the Tribunal is appealed to the Divisional Court or to the Minister under this section, the Divisional Court or the Minister may,

(a) stay the operation of the decision; or

(b) set aside a stay ordered by the Tribunal under subsection (3).

Minister may cause things to be done

146. Where an order or decision made under this Act is stayed, the Minister may cause to be done any thing required by the order or decision.

Order to pay

150. (1) The Director may issue an order to pay the costs of doing any thing caused to be done by the Minister or Director under this Act to any person required by an order or decision made under this Act to do the thing.

Idem

(2) If, after the Minister or Director causes any thing to be done under this Act, the Director ascertains the identity of a person to whom a decision or order requiring the thing to be done could have been issued under this Act, the Director may issue an order to pay the costs of doing the thing to that person.

Same

(2.1) If the Minister or Director has caused any thing to be done under this Act in circumstances where, pursuant to subsection 19 (5) or 168.20 (7) or a stay granted under Part I of the *Bankruptcy and Insolvency Act* (Canada), a receiver or trustee in bankruptcy was not required to do the thing, the Director may issue an order to the receiver or trustee in bankruptcy to pay the costs of doing the thing.

Same

(2.2) If an order to pay the costs of doing a thing is issued under subsection (1), (2) or (2.1) to a receiver or trustee in bankruptcy, the receiver or trustee in bankruptcy is not personally liable for those costs unless the order or decision that required the thing to be done arose from the gross negligence or wilful misconduct of the receiver or trustee in bankruptcy or of a receiver representative or trustee in bankruptcy representative.

Order to pay: contents

(3) An order under subsection (1), (2) or (2.1) to pay costs shall include,

(a) a description of things that the Minister or Director caused to be done under this Act;

(b) a detailed account of the costs incurred in doing the things; and

(c) a direction that the person to whom the order is issued pay the costs to the Minister of Finance.

Idem

(4) An order under subsection (2) to pay costs shall also include a brief statement of the circumstances giving rise to the decision to cause the things to be done.

Joint and several liability

(5) Where two or more persons are liable to pay costs pursuant to an order under subsection (1), (2) or (2.1), they are jointly and severally liable to Her Majesty in right of Ontario.

Contribution and indemnity

(6) Where the Director is entitled to issue an order to two or more persons under subsection (1), (2) or (2.1) in respect of costs, as between themselves, in the absence of an express or implied contract, each of those persons is liable to make contribution to and indemnify the other in accordance with the following principles:

1. Where the Director is entitled to issue an order to two or more persons under subsection (1), (2) or (2.1) in respect of costs and one or more of them caused or contributed to the costs by fault or negligence, such one or more of them shall make contribution to and indemnify,

    i. where one person is found at fault or negligent, any other person to whom the Director is entitled to issue an order under subsection (1), (2) or (2.1), and

    ii. where two or more persons are found at fault or negligent, each other and any other person to whom the Director is entitled to issue an order under subsection (1), (2) or (2.1) in the degree in which each of such two or more persons caused or contributed to the costs by fault or negligence.

2. For the purpose of subparagraph 1 ii, if it is not practicable to determine the respective degrees in which the fault or negligence of two or more persons to whom the Director is entitled to issue an order under subsection (1), (2) or (2.1) caused or contributed to the costs, such two or more persons shall be deemed to be equally at fault or negligent.

3. Where no person to whom the Director is entitled to issue an order under subsection (1), (2) or (2.1) caused or contributed to the costs by fault or negligence, each of the persons to whom the Director is entitled to issue an order under subsection (1), (2) or (2.1) is liable to make contribution to and indemnify each other in such degree as is determined to be just and equitable in the circumstances..

Enforcement of contribution

(7) The right to contribution or indemnification under subsection (6) may be enforced by action in a court of competent jurisdiction.

Adding parties

(8) Wherever it appears that a person not already a party to an action under subsection (7) may be a person to whom the Director is entitled to issue an order under subsection (1), (2) or (2.1) in respect of the costs, the person may be added as a party defendant to the action on such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties..

Orders, consequential authority

196. (1) The authority to make an order under this Act includes the authority to require the person or body to whom the order is directed to take such intermediate action or such procedural steps or both as are related to the action required or prohibited by the order and as are specified in the order.

Same, authority to order access

(2) A person who has authority under this Act to order that a thing be done on or in any place also has authority to order any person who owns, occupies or has the charge, management or control of the place to permit access to the place for the purpose of doing the thing.

Application

(3) Subsection (1) applies in respect of every order made under this Act whether or not the order was made before the 1st day of January, 1984.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

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, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(*a*) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (*b*), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(*b*) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (*a*), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

Escheats Act, R.S.O. 1990, c. E.20

1. (1) Where any property has become the property of the Crown by reason of the person last seised thereof or entitled thereto having died intestate and without lawful heirs, or has become forfeited for any cause to the Crown, the Public Guardian and Trustee may cause possession thereof to be taken in the name of the Crown, or, if possession is withheld, may cause an action to be brought for the recovery thereof, without an inquisition being first made.

(2) The proceedings in the action shall be in all respects similar to those in other actions for the recovery of property.

(3) If land described in subsection (1) has escheated or become forfeit because of the dissolution of a corporation, the Public Guardian and Trustee shall be deemed not to have taken possession of the property until the Public Guardian and Trustee registers notice of taking possession in the proper land registry office.

Environmental Review Tribunal Act, 2000, S.O. 2000, c. 26, Sched. F

1. (1) The Environmental Assessment Board and the Environmental Appeal Board are amalgamated and continued as a tribunal known in English as the Environmental Review Tribunal and in French as Tribunal de l'environnement.

Judicial Review Procedure Act, R.S.O. 1990. c. J.1

Application to Divisional Court

6. (1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court.

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

Decision

17.(1)A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing therefor if requested by a party.

Interest

(2) A tribunal that makes an order for the payment of money shall set out in the order the principal sum, and if interest is payable, the rate of interest and the date from which it is to be calculated.

Costs

17.1(1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party's costs in a proceeding.

Exception

(2) A tribunal shall not make an order to pay costs under this section unless,

(a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and

(b) the tribunal has made rules under subsection (4).

Amount of costs

(3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under subsection (4).

Rules

(4) A tribunal may make rules with respect to,

(a) the ordering of costs;

(b) the circumstances in which costs may be ordered; and

(c) the amount of costs or the manner in which the amount of costs is to be determined.

Same

(5) Subsections 25.1 (3), (4), (5) and (6) apply with respect to rules made under subsection (4).

Continuance of provisions in other statutes

(6) Despite section 32, nothing in this section shall prevent a tribunal from ordering a party to pay all or part of another party's costs in a proceeding in circumstances other than those set out in, and without complying with, subsections (1) to (3) if the tribunal makes the order in accordance with the provisions of an Act that are in force on February 14, 2000.

Transition

(7) This section, as it read on the day before the effective date, continues to apply to proceedings commenced before the effective date. .

Same

(8) Rules that are made under section 25.1 before the effective date and comply with subsection (4) are deemed to be rules made under subsection (4) until the earlier of the following days:

1. The first anniversary of the effective date.

2. The day on which the tribunal makes rules under subsection (4).

Definition

(9) In subsections (7) and (8),

"effective date" means the day on which section 21 of Schedule B to the *Good Government Act, 2006* comes into force.

***Constitution Act, 1867* (U.K.), 29 & 30 Vict., c. 3**

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTHSTAR AEROSPACE, INC. et al.

Court File No: CV-12-9761-00CL

Applicants

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

Proceeding commenced in Toronto

RESPONDING FACTUM OF HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF THE ENVIRONMENT

(Returnable April 18, 2013)

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