COURT OF APPEAL FOR ONTARIO

CITATION: Nortel Networks Corporation (Re), 2013 ONCA 599
DATE: 20131003
DOCKET: C55682

Goudge, MacPherson and Juriansz JJ.A.

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

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

Leonard F. Marsello and William R. MacLarkey, for the appellant Her Majesty the Queen in right of Ontario as represented by the Ministry of the Environment

David W. DeMille, for the City of Belleville and the Algonquin and Lakeshore Catholic District School Board

Alan B. Merskey and Vasuda Sinha, for the respondents Nortel Networks Corp., Nortel Networks Ltd., Nortel Networks Global Corp., Nortel Networks International Corp. and Nortel Networks Technology Corp.

Joseph Pasquariello, for the Monitor Ernst & Young Inc.

Adam Hirsh, for Former Directors and Officers of Nortel Networks Corp. and Nortel Networks Ltd.

Jane Dietrich, for Unsecured Creditors' Committee of Nortel Networks Inc.

Adam Slavens, for Nortel Networks Inc.

Gavin H. Finlayson, for Informal Committee of Noteholders

Heard: June 19, 2013

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated March 9, 2012, with reasons reported at 2012 ONSC 1213.

Juriansz J.A.:

A. OVERVIEW

[1] The CCAA judge, whose decision is the subject of this appeal, aptly described the issues as arising "from the untidy intersection" of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("CCAA") and the powers of the provincial Minister of the Environment ("MOE") "to make orders with respect to the remediation of real property in Ontario."

[2] After the usual order staying proceedings (the "Initial Order") was granted to the insolvent respondents, Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, "Nortel or the "respondents"), the MOE issued orders pursuant to the *Environmental Protection Act*, R.S.O. 1990, c. E-19, ("EPA") requiring Nortel Networks Limited to remediate environmental contamination remaining on properties it once or currently owned.

[3] In his order dated March 9, 2012, the CCAA judge declared that the MOE's remediation orders were subject to the stay granted by the Initial Order. Ancillary to that declaration, he granted certain other relief. He declared that all proceedings against the respondents or the Former Directors and Officers before the Ontario Environmental Review Tribunal in relation to the EPA orders were subject to the stay of proceedings; he authorized the respondents to cease

performing remediation of property; he declared that any claims in relation to current or future remediation requirements imposed by orders under the EPA against the respondents or the Former Directors and Officers were subject to the insolvency claims process; and he authorized the respondents to repudiate all contractual obligations to carry out remediation at the properties.

[4] The MOE appeals.

[5] For the reasons that follow, I would allow the appeal.

B. FACTS

[6] Nortel is engaged in a liquidating insolvency and has no operations. The sites where Nortel and its predecessors once conducted manufacturing operations were largely disposed of in the late 1990s. At that time Nortel identified environmental impacts that arose from its past operations at Brampton, Brockville, Kingston, Belleville, and London (the "Impacted Sites") and was conducting remediation at those sites on a voluntary or contractual basis.

[7] On January 14, 2009, Nortel filed for protection under the CCAA. At that time, Nortel maintained only a partial interest in the London site. It had disposed of its interests in the other Impacted Sites. As well, the MOE had not issued any remediation orders against Nortel. Nortel says that it spent some $28.5 million on remediation of the sites before filing under the CCAA. After Nortel's CCAA filing,

the MOE issued remediation orders (the "MOE Orders") that Nortel estimates would require further expenditures of approximately $18 million.

[8] Nortel brought a motion before the CCAA judge seeking an order decl ring that the relief the MOE Orders sought was financial and monetary in nature; that the Initial Order stayed the MOE Orders; and an order staying all related proceedings before the Ontario Environmental Review Tribunal. Nortel also sought authorization and direction that it cease performing remediation at the Impacted Sites and a declaration that any claims in relation to current or future remediation by the MOE or any other person against Nortel were stayed and had to be dealt with according to the CCAA claims procedure. In addition, Nortel sought an order repudiating or disclaiming any contractual obligations to carry out remediation at the Impacted Sites; and finally, advice and direction with respect to the London site where Nortel maintained a partial interest in the property.

[9] On March 9, 2012, the CCAA judge determined that, where operations had ceased on a particular property and a company could only comply with the EPA or MOE Orders by expending funds, the environmental liabilities involved amount to financial obligations to pay. Therefore, they were subject to the Initial Order and had to be addressed as claims in the CCAA process.

[10] On June 22, 2012, the MOE was granted leave to appeal the CCAA judge's order.

[11] While the MOE's appeal was pending, the Supreme Court released its decision in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443, on December 7, 2012. On March 28, 2013, the parties were given leave to file "fresh" factums and fresh evidence.

[12] The parties dispute the interpretation of the Supreme Court's decision, and how it should be applied to the case under appeal.

C. SUPREME COURT'S DECISION IN ABITIBIBOWATER

[13] AbitibiBowater Inc. ("Abitibi") had carried on industrial activities in the Province of Newfoundland and Labrador for over 100 years. In 2009, Abitibi sought protection under the CCAA.

[14] Subsequently, the Minister of Environment and Conservation of Newfoundland and Labrador issued five ministerial orders against Abitibi under the province's environmental legislation. These orders required Abitibi to remediate several sites, most of which had been expropriated by the province. The province also brought a motion for a declaration that the CCAA claims process did not bar the province from enforcing the orders. The province argued, among other things, that the remediation orders were regulatory orders, not

"claims" under the CCAA, and therefore they could not be stayed or subjected to compromise in the CCAA restructuring process.

[15] The Supreme Court decided that a CCAA court could determine whether an environmental order that is not framed in monetary terms is in fact a "provable claim". Justice Deschamps, writing for the majority, held that "[a] finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process" (at para. 18). The CCAA court should consider the substance of an order rather than its form: "[i]f the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process" (at para. 19).

[16] The CCAA, informed by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), establishes three requirements for establishing a provable claim. First, there must be a debt, liability or obligation to a creditor. This requirement is satisfied simply by the regulatory body exercising its enforcement power against a debtor: at paras. 26-27.

[17] Second, a claim must be founded on an obligation that falls within the time limit for claims. Section 11.8(9) of the CCAA provides temporal flexibility for environmental claims by providing that

> [a] claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real

> property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

However, statutory environmental obligations relating to polluting activities that continue after the reorganization will not satisfy the time limits: at paras. 28-29.

[18] Both the first and second requirements were easily satisfied in the Abitibi case.

[19] The third requirement is "that it be possible to attach a monetary value to the obligation"; that is, "the question is whether orders that are not expressed in monetary terms can be translated into such terms" (at para. 30). A court must look at the substance of the order not its form and apply its usual approach in dealing with future or contingent claims.

[20] The usual test courts use to decide if a contingent claim will be included in insolvency proceedings is whether it is "too remote or speculative": at para. 36, citing *Confederation Treasury Services Ltd. (Re)* (1997), 96 O.A.C. 75, leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 229. This means that there must be "sufficient indications" that the regulatory body that made the remediation order "will ultimately perform remediation work" itself, thus entitling it to seek reimbursement by means of a monetary claim: *AbitibiBowater*, at para 36.

[21] Accordingly, Deschamps J. concluded that the CCAA court must assess whether "it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim" (at para. 46).

[22] The CCAA judge's discretion will govern the assessment, but several considerations may be relevant, depending on the circumstances of the case. Justice Deschamps identified four potential factors: "whether the [polluting] activities are ongoing, whether the debtor is in control of the property..., whether the debtor has the means to comply with the order," and "the effect that requiring the debtor to comply with the order would have on the insolvency process" (at para. 38).

[23] In the circumstances of *AbitibiBowater*, Deschamps J. acknowledged that the CCAA judge had not addressed whether it was "sufficiently certain" that the Province would remediate the property and seek reimbursement, but she concluded that his reasons rested on the implicit finding that the Province would do so (at para. 51). The CCAA judge explicitly referred to the facts that supported this finding, at paras. 53-55:

- Abitibi was not in a position to carry out the remediation because it was no longer in possession of most of the sites;
- Abitibi's operations were funded through debtor-in-possession financing and its access to funds would limited to ongoing operations;

- the timetable set by the Province in the remediation orders suggested that the Province never truly expected Abitibi to perform the remediation work;
- and the surrounding facts suggested that the Province had intentionally targeted Abitibi.

[24] On this reasoning, Deschamps J., writing for the majority, deferred to the CCAA judge's implicit conclusion it was sufficiently certain that the Province would perform the remediation work. Therefore, the Province fell within the definition of a creditor with a monetary claim.

[25] McLachlin C.J. and LeBel J. dissented.

D. THE RESPONDENTS' EFFORT TO DISTINGUISH ABITIBIBOWATER

[26] The respondents submit that it is an oversimplification of the *AbitibiBowater* decision to read it as requiring all future courts to examine environmental remediation orders "through the exclusive and binary test" of determining whether it is sufficiently certain that the province would perform the remediation and claim reimbursement. The respondents suggest that in *AbitibiBowater* the court used this language because it was particularly apt for the circumstances in the case. They claim that a careful reading of the reasons makes evident that the test the court established is less specific.

[27] The respondents point to the more general language in Deschamps J.'s reasons. They highlight the various factors that Deschamps J. indicated could be

relevant depending on the circumstances of each case to determine whether remediation orders will be subject to a CCAA stay: at para. 38. They argue that as long as the order requires an expenditure of funds its nature is monetary. In setting out the three basic requirements to determine whether an environmental order is a "claim", Deschamps J. said with respect to the third requirement, "that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms" (at para. 30).

[28] Instead, the respondents posit that in *AbitibiBowater*, the Supreme Court set out the policy approach to be followed in determining whether nonmonetary orders can be translated into monetary terms. This approach, as Deschamps J. emphasized, concerns: the importance of the single proceeding model of insolvency in Canada; the necessity of examining the substance, not only the form, of an environmental remediation order; the balance struck by Parliament between enforcement of environmental regulation and the interests of insolvency stakeholders; and the need to have regard to the interests of third-party creditors.

[29] Turning to this case, the respondents submit that it was sufficiently certain that compliance with the orders would require the expenditure of a minimum of $18 million. Whether the money is paid to the MOE as reimbursement for the costs of performing the remediation, or paid to third parties retained to perform the remediation should make no difference. The environmental problems at the

impacted sites were long-standing; the soil had been contaminated decades earlier. In fact, the Brockville site was already contaminated when Nortel bought it. Historical environmental problems, the respondents argue, should be distinguished from current ones, where the debtor is polluting at the time.

[30] Finally, the respondents stress that the CCAA court should be mindful of the impact on the debtor and the stakeholders and avoid giving the MOE a super-priority it would not have under the BIA. Under the BIA there is no debtor-in-possession, only a trustee, and the trustee could abandon the contaminated property. In a liquidating reorganization there was no good reason why the MOE should do better under the CCAA than under the BIA.

E. ANALYSIS

[31] I cannot accept the respondents' proposed interpretation of *AbitibiBowater*. In determining whether a regulatory order is a provable claim, a CCAA court must apply the general rules that apply to future or contingent claims. As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.

[32] The respondents' approach is not only inconsistent with *AbitibiBowater*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risks materialize, the costs are borne by those who hold a stake in the company. A risk that results in an environmental obligation becomes subject to the insolvency process only when it is in substance monetary and is in substance a provable claim.

[33] Parliament has struck a balance between the interests of the stakeholders and that of the public in designing the CCAA process. Parliament, in s. 11.8(8) of the CCAA, granted the MOE's claims with respect to remediation costs the security of a charge on the contaminated property. And Parliament, in s. 11.1(3), made it clear that a CCAA court has the discretion to stay regulatory orders on specified criteria.

F. IS IT IMPLICIT THAT THE CCAA JUDGE APPLIED THE CORRECT TEST?

[34] The CCAA judge in this case, without the benefit of the *AbitibiBowater* decision, did not explicitly consider the question whether it was sufficiently certain that the MOE would perform the remediation work ordered. In these circumstances there are two legal approaches available to this court. This court could attempt to glean from the CCAA judge's reasons how he would have

answered the question had the law been available to him; and it can consider the evidence in the record and answer the question in his stead, as the dissenting judges did in *AbitibiBowater*.

[35] I am unable to read the CCAA judge's reasons as implicitly addressing the question whether it was sufficiently certain that the MOE would perform the remediation work. The CCAA judge's analysis focused on whether Nortel would be required to incur a financial obligation to comply with the remediation orders, without regard to whom the financial obligations would be owed. He rejected the MOE's contention "that financial obligations incurred by Nortel for the purpose of complying with the MOE Orders are different from obligations incurred directly to the Crown." He focused instead on the fact that undertaking remedial work would result in Nortel expending money that would be "directed away from creditors participating in the insolvency proceedings". He held that "the same insolvency considerations ought to apply regardless of who receives the money" (at para. 107).

[36] This analysis stands in contrast to that of Deschamps J. She made it clear, at para. 3, that the question was "whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order" (emphasis added).

[37] The CCAA judge was well aware that in this case, unlike *AbitibiBowater*, it could not be said that the regulatory body had no realistic alternative but to perform the remediation work itself. Nortel no longer owns most of the properties, and the MOE Orders are directed to Nortel and the subsequent owners. In fact, the CCAA judge specifically discussed Nortel's contractual arrangements with some of the subsequent purchasers and in his order permitted Nortel to repudiate some of those arrangements.

[38] In my view, this court lacks the basis to conclude, as did the majority in *AbitibiBowater*, that the CCAA judge's decision rests on an implicit finding that the MOE will most likely perform the work.

G. IS IT SUFFICIENTLY CERTAIN THE MOE WILL UNDERTAKE THE REMEDIATION?

[39] Considering the matter afresh, I would conclude that it is not sufficiently certain that the MOE will perform the remediations ordered. The MOE orders respecting in the Belleville, Brockville and Kingston sites are directed to Nortel together with other current and former owners of the properties. In fact with respect to the Kingston site, the other current and former owners named in the orders are jointly and severally liable with Nortel to carry out the activities required by the orders. Under s. 18 of the EPA, the MOE clearly has the power to

make orders against subsequent (or past) owners for anything it ordered Nortel to do.

[40] In *AbitibiBowater*, the province had expropriated most of the properties and remained the owner. It would seem reasonable to expect that the MOE would enforce the orders against other parties instead of undertaking the remediation itself. Indeed, the CCAA judge observed that subsequent purchasers of the properties may have unsecured contractual claims against Nortel.

[41] Matters at the London site are not so clear. Evidently, in 1997 and 1998 Nortel subdivided and sold three parts of the London site to others, but retained the fourth part. The MOE order respecting the London site is directed to Nortel and the three entities who own the other parts and imposes joint responsibilities as well as some individual responsibilities on them. After the insolvency there will be no going-forward entity. Evidently Nortel's retained portion of the land is worth less than the cost of remediating it and it seems probable that the retained portion will eventually be abandoned. There is no one to carry out Nortel's responsibilities under the MOE Order. As a result, I consider it "sufficiently certain" that MOE will ultimately undertake Nortel's obligations under the order, and may seek to claim the security provided by s. 11.8(8).

H. CONCLUSION

[42] I would conclude that the MOE Orders in relation to the Impacted Sites other than the retained portion of the London property have not been established to be provable claims that must be included in the insolvency process.

[43] In paragraph 2 of his order, the CCAA judge declared that the MOE's remediation orders "are subject to the stay of proceedings granted in the initial order… and stayed thereunder". This declaration cannot stand. Paragraph 15 of the initial order contains the caveat that "nothing in this Order shall…(ii) exempt the [respondents] from compliance with statutory or regulatory provisions relating to health, safety or the environment". The conclusion that the remediation orders are regulatory rather than provable claims brings them within the ambit of this caveat.

[44] The CCAA judge himself acknowledged, at para. 104 that "if the Minister is solely acting in its regulatory capacity, it can do so unimpeded by the Stay. This is the effect of s. 11.1(2) of the CCAA." Section 11.1(2) provides:

> (2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

[45] I would therefore allow the appeal and modify the CCAA judge's declaration that the MOE Orders are stayed by the Initial Order so that it applies

only to the retained London lands. I would also modify paragraphs 3, 4, 5, and 6 of his order, which are premised on the finding that MOE Orders are claims and are not regulatory, so that they apply only to the retained London lands.

[46] If the MOE is seeking costs, it may make written submissions through the court's senior legal counsel, John Kromkamp.

Released: OCT 0 3 2013

J.A.

I agree Eb Rouleau J.A.

I agree. J.C. MacPherson J.A.