COURT OF APPEAL FOR ONTARIO

CITATION: Northstar Aerospace Inc. (Re), 2013 ONCA 600
DATE: 20131003
DOCKET: C56518

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 Northstar Aerospace Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company

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

Steven J. Weisz and Jenna Willis, for the respondent Fifth Third Bank

Paul D. Guy and Scott McGrath, for the Former Directors and Officers Group

Craig J. Hill, for the Monitor Ernst & Young Inc.

Heard: June 19, 2013

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated July 24, 2012, with reasons reported at 2012 ONSC 4423.

Juriansz J.A.:

[1] The appellant, Her Majesty the Queen in right of Ontario as represented by the Ministry of the Environment (the "MOE"), appeals from the order of the CCAA judge dated July 24, 2012, with written reasons released on July 30, 2012.

[2] In his decision, the CCAA judge granted the motion of the insolvent respondents, Northstar Aerospace Inc., Northstar Aerospace (Canada) Inc. ("Northstar Canada"), 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, "Northstar"), for approval of an agreement for the sale of Northstar's assets, and dismissed the MOE's motion for a declaration that a remediation order issued by the MOE under the *Environmental Protection Act*, R.S.O. 1990, c. E-19 ("EPA"), was not subject to the stay of proceedings previously ordered, or, in the alternative, an order lifting the stay in respect of that remediation order.

[3] Leave to appeal the CCAA judge's order was granted only from the dismissal of the MOE's motion.

[4] For the reasons that follow, I would dismiss the appeal.

A. FACTS

[5] Northstar Canada operated a manufacturing and processing facility in Cambridge, Ontario from around 1981 to 2009. The chemical trichloroethylene, a carcinogen, was used in these operations, and the operations produced waste containing heavy metals. Since 2004, Northstar Canada has been actively involved in monitoring the contamination at the site and in the surrounding community, a part of which is residential, and subsequently began remediation activities. In 2012, the MOE, due to a concern that Northstar would be unable to continue its voluntary remediation because of financial problems, issued two

remediation orders against it, dated March 15, 2012 and May 31, 2012 (the "MOE Orders").

[6] On June 14, 2012, Northstar sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The usual initial order staying all rights and remedies against the insolvent company was issued that same date (the "Initial Order"). The Initial Order does not affect regulatory proceedings as contemplated by s.11.1(2) of the CCAA.

[7] On July 24, 2012, the CCAA judge approved the agreement for the sale of substantially all of Northstar's assets. The contaminated site at Cambridge was not included in the sale. The debtor-in-possession lenders advised Northstar that they would not continue to fund its remediation efforts after the agreement for sale of assets closed on August 3, 2012. Northstar advised the MOE that if the sale of assets were approved, its intention was to abandon the site and terminate the remediation work. Also on July 24, 2012, the CCAA judge dismissed the MOE's motion. He found that the remediation orders were subject to the stay of proceedings granted in the Initial Order. Northstar has made no provision to continue its remediation activities after the close of the sale of assets transaction.

B. THE DECISION UNDER APPEAL

[8] In his reasons, the CCAA judge noted that the Initial Order excepted regulatory proceedings as permitted by s. 11.1 of the CCAA. He referred to his

earlier decision in *Re Nortel Networks Corp.*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, quoting his remarks that if the insolvent company was not carrying on operations at the property, "it is necessary to consider the substance of the MOE's actions" (at para. 105). If the MOE orders require the debtor to act in a certain way, it is inevitable that the debtor would incur financial obligations to comply. Where there is no going-forward business, the debtor has no option but to pay money to comply. The clear result would be that "[t]he MOE would be, in reality, enforcing a payment obligation," which the Initial Order prohibited (at para. 105).

[9] The CCAA judge noted that the Cambridge facility had been shut down in 2010 and only remediation activities have been carried on there since that time. In the court-supervised sales process, no bidder was willing to purchase (or expressed any interest in purchasing) the Cambridge facility, either alone or together with the other assets of Northstar.

[10] The CCAA judge therefore adopted his reasoning in *Nortel* and concluded that, in the circumstances of this case, any financial activity the debtor is required to undertake to comply with environmental orders is stayed by the Initial Order. He went on to remark that in this case it was "quite clear that the March 15 [MOE] Order seeks to enforce a payment obligation" (*Northstar*, at para. 61). He concluded that while the MOE was entitled to file a claim for any costs of remedying the environmental conditions at the Cambridge facility, it was not

entitled to use the remediation order "to create a priority that it otherwise does not have access to under the legislation" (at para. 66).

[11] On this reasoning, the CCAA judge dismissed the MOE's motion.

C. ANALYSIS

[12] On August 1, 2012, the MOE brought a motion for a partial stay of the CCAA judge's order permitting distribution of the sale's proceeds. The motion was dismissed and leave to appeal that denial was refused. Thus, this appeal may have some jurisprudential significance but will be of no practical consequence.

[13] While the motion for leave to appeal was pending, the Supreme Court of Canada released its decision in *Newfoundland and Labrador v. AbitibiBowater*, 2012 SCC 67, [2012] 3 S.C.R. 443. That the CCAA judge did not have the benefit of the Supreme Court's decision must be kept in mind in reviewing his reasons. The same situation arose in *Nortel Networks Corp. (Re)*, 2013 ONCA 599, and the two appeals were heard together.

[14] I adopt my review of the *AbitibiBowater* decision as set out in *Nortel*. Briefly stated, the Supreme Court decided that ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings in two circumstances: (1) where the province has performed the remediation work and advances a claim for reimbursement, or (2) 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.

[15] This court, in reviewing a decision of a CCAA judge rendered before the Supreme Court's decision in *AbitibiBowater*, may attempt to glean from the reasons how he or she would have answered the question had the law been available; and it may consider the evidence in the record and answer the question in his or her stead.

[16] It seems to me, the CCAA judge's reasons show that he was of the view the MOE had no realistic alternative but to remediate the property. The property had been contaminated during Northstar's operations while Northstar owned it, and there was no subsequent purchaser whom the MOE could order to undertake the remediation. The CCAA judge said that it seemed quite clear to him that the remediation order sought to enforce a payment obligation.

[17] In my view, the CCAA judge implicitly found it was "sufficiently certain" the MOE would remediate the lands.

[18] A review of the fresh evidence supports his conclusion.

[19] Northstar went bankrupt and the trustee abandoned the Cambridge property. The MOE therefore commenced remediation activities at the site. The Minister's Direction permitting the MOE to perform work at the site provides:

"[u]ntil such time as any other person assumes responsibility for the work required by the [MOE] Order..., it is in the public interest to cause some or all of the work required by the [MOE] Order to be done by the [MOE]".

[20] The affidavit supporting the MOE's fresh evidence motion states that "[t]he MOE has undertaken the Preventive Work without prejudice to its position in this appeal." The MOE also filed a claim with the Monitor for the costs incurred, again on the basis that doing so was "without prejudice to the MOE's position that the two Director's Orders are not pre-filing claims..." The MOE is currently seeking to compel a group of former directors and officers of Northstar to continue remediating the property. The directors and officers appeared on the appeal to submit that they will be able to successfully resist the MOE's efforts.

[21] The issues between the MOE and the directors will be decided elsewhere. As far as this proceeding is concerned, in my view, the fact that the MOE has undertaken remediation activities makes it "sufficiently certain" that it will do so. I am unsure what the MOE hoped to achieve by its unilateral assertion of having undertaken the work on a without prejudice basis.

[22] It is certainly conceivable that the MOE, after commencing remediation work, is able to compel other responsible parties to take over the work and complete it. If the MOE is successful in doing so, the work will be done without the MOE expending funds. As far as the other responsible parties are concerned,

the MOE will be acting in a purely regulatory capacity. However, as far as the MOE Orders against Northstar are concerned, its commencement of the work in the circumstances of this case establishes that the MOE Orders are in substance a claim provable in the insolvency.

D. CONCLUSION

[23] For these reasons, I would dismiss the appeal.

[24] Given the distribution order, the Fifth Third Bank had no stake in the outcome of this appeal and appeared to assist the court by addressing the creditors' perspective. The issues between the directors and officers and the MOE are being dealt with elsewhere. This is not a case for costs.

Released: OCT 0 3 2013

R.G.P. J.A.

I agree. K.M. Weiler J.A.

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