Her Majesty the Queen in Right of the Province of Newfoundland and Labrador (appellant) v. AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders) (respondents) and Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty the Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada (intervenors)
(33797; 2012 SCC 67; 2012 CSC 67)

Indexed As: Newfoundland and Labrador v. AbitibiBowater Inc. et al.

Supreme Court of Canada
McLachlin, C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis, JJ.
December 7, 2012.

Summary:

At issue was whether orders made by the province under the Environmental Protection Act (N.L.) (EPA) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act (CCAA). On the day it issued the orders, the province moved for a declaration that a claims procedure order issued under the CCAA in relation to the respondent's proposed reorganization did not bar the province from enforcing the EPA orders. The respondent opposed the motion and sought a declaration that the EPA orders were stayed and that they were subject to the claims procedure order.

The Quebec Superior Court, in a decision with neutral citation 2010 QCCS 1261, denied the province's motion and declared that the EPA orders were stayed and were subject to the claims procedure order. The province sought leave to appeal.

The Quebec Court of Appeal, in a decision with neutral citation 2010 QCCA 965, denied leave to appeal. The province appealed.

The Supreme Court of Canada, McLachlin, C.J.C., and Lebel, J., dissenting, dismissed the appeal.

Bankruptcy - Topic 4490

Preferred creditors - Claims by Crown - Environmental programs - [See first, second, third, fourth and fifth **Creditors and Debtors - Topic 8588.1**].

Constitutional Law - Topic 6261

Federal jurisdiction (s. 91) - Bankruptcy and insolvency - General principles - [See first **Creditors and Debtors - Topic 8588.1**].

Creditors and Debtors - Topic 8581.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Priorities -

[See first, second and fourth **Creditors and Debtors - Topic 8588.1**].

Creditors and Debtors - Topic 8581.2

Debtors' relief legislation - Companies' creditors arrangement legislation - Jurisdiction - [See first **Creditors and Debtors - Topic 8588.1**].

Creditors and Debtors - Topic 8587.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Creditor defined - [See sixth **Creditors and Debtors - Topic 8588.1**].

Creditors and Debtors - Topic 8588

Debtors' relief legislation - Companies' creditors arrangement legislation - Stay of proceedings (incl. extension or lifting of) - [See sixth **Creditors and Debtors - Topic 8588.1**].

Creditors and Debtors - Topic 8588.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Unaffected obligations - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) (EPA) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act (CCAA) - The CCAA court found that the orders were clearly monetary in nature and, as such, were stayed by the initial stay order and were subject to a subsequent claims procedure order - The Supreme Court of Canada dismissed the province's appeal - The court rejected the province's argument that the CCAA court erred in interpreting the CCAA provisions in a way that nullified the EPA and that the interpretation was inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity - In 2007, Parliament had given CCAA courts the power to stay regulatory orders that were not monetary claims - The only question here was whether the CCAA court had jurisdiction to determine whether an environmental order that was not framed in monetary terms was, in fact, a monetary claim - Having determined that the federal legislation was valid and that neither the ancillary powers doctrine nor interjurisdictional immunity applied, the court indicated that what the province was really arguing was that the courts should consider the form of an order (i.e., non-monetary), rather than its substance (monetary) - However, the province could not disturb the priority scheme established by the legislation - Environmental claims were given a specific, limited priority under the CCAA - To exempt orders that were in fact monetary claims would amount to conferring a higher priority on the provinces than was provided for in the CCAA - See paragraphs 16 to 19.

Creditors and Debtors - Topic 8588.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Unaffected obligations - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act (CCAA) - The Supreme Court of Canada outlined the basic rules under s. 12 of the CCAA for ascertaining whether an order was a claim that might be subjected

to the insolvency process - There were three requirements that were relevant here: (1) there had to be a debt, liability or obligation to a creditor; (2) that was incurred before the debtor became bankrupt; and (3) it had to be possible to attach a monetary value to the debt, liability or obligation - When considering an order that was not framed in monetary terms, courts had to look at the order's substance and apply the rules for the assessment of claims - The Crown's limited priority under s. 11.8(8) of the CCAA (to contaminated property and certain related property) led the court to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation - As deferential as courts might be to regulatory bodies' actions, they had to apply the general rules - See paragraphs 20 to 33.

Creditors and Debtors - Topic 8588.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Unaffected obligations - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act - The Supreme Court of Canada noted that a claim could be asserted in insolvency proceedings even if it was contingent on an event that had not yet occurred - In the context of a corporate proposal or reorganization, this broad approach served not only to ensure fairness between creditors, but also allowed the debtor to make as fresh a start as possible after a proposal or arrangement had been approved - The criterion used by courts to determine whether a contingent claim was included in the insolvency process was whether the event that had not yet occurred was "too remote or speculative" - In the context of an environmental order, this meant that there had to be sufficient indications that the regulatory body would ultimately perform remediation work and would assert a monetary claim to have its costs reimbursed - Indicators to guide the court in determining whether an order was a provable claim included "whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order" - See paragraphs 34 to 38.

Creditors and Debtors - Topic 8588.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Unaffected obligations - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act - The Supreme Court of Canada rejected the province's argument that treating a regulatory order as a claim in an insolvency proceeding extinguished the debtor's environmental obligations, thereby undermining the polluter-pay principle - This argument demonstrated a misunderstanding of the nature of insolvency proceedings - Subjecting an order to the claims process merely ensured that the claim would be paid in accordance with insolvency legislation - The province's position would not only result in a super-priority, but also in the acceptance of a "third party pay" principle by shifting the costs of remediation to third party creditors - Nor did subjecting the orders to the insolvency process amount to "issuing a licence to pollute" - See paragraphs 39 to 43.

Creditors and Debtors - Topic 8588.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Unaffected obligations - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act - The Supreme Court of Canada rejected the province's argument that courts had, in the past, held that environmental orders could not be interpreted as claims when the regulatory body had not yet exercised its power to assert a claim framed in monetary terms - Courts had never shied away from putting substance ahead of form - Further, the provisions relating to the assessment of claims contemplated instances in which the quantum was not yet established - Finally, insolvency legislation had evolved - Amendments made in 2007 gave CCAA courts the power to determine whether a regulatory order might be a claim and also provided criteria for staying regulatory orders - Whether the regulatory body had a contingent claim was determined on the facts - Generally, a regulatory body had discretion to decide how best to ensure that regulatory obligations were met - Although the court should take care to avoid interfering with that discretion, the regulatory body's actions were subject to scrutiny in insolvency proceedings - see paragraphs 44 to 48.

Creditors and Debtors - Topic 8588.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Unaffected obligations - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) (EPA) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act (CCAA) - The CCAA court found that the orders were clearly monetary in nature and, as such, were stayed by the initial stay order and were subject to a subsequent claims procedure order - The Supreme Court of Canada dismissed the province's appeal - As the province had not yet formally exercised its power to ask for the payment of money, the issue was whether it was sufficiently certain that the orders would eventually result in a monetary claim - To the CCAA court, that answer was yes - The CCAA court's reasons not only rested on an implicit finding that the province would most likely perform the work, but also referred explicitly to facts that supported this finding - In the end, the CCAA court found that there was definitely a claim that "might" be filed and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" - The CCAA court's assessment of the facts, particularly the finding that the EPA orders were the first step towards performance of the remediation work by the province, led to no conclusion other than that it was sufficiently certain that the province would perform the work and would, therefore, fall within the definition of a creditor with a monetary claim - See paragraphs 49 to 58.

Creditors and Debtors - Topic 8596.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Proof of claim (incl. claims bar process) - [See second, third, fifth and sixth **Creditors and Debtors - Topic 8588.1**].

Cases Noticed:

Husky Oil Operations Ltd. v. Minister of National Revenue et al., [1995] 3 S.C.R. 453;

188 N.R. 1; 137 Sask.R. 81; 107 W.A.C. 81, refd to. [para. 19].

McLarty v. Minister of National Revenue, [2008] 2 S.C.R. 79; 374 N.R. 311; 2008 SCC 26, refd to. [para. 34].

Canada v. McLarty - see McLarty v. Minister of National Revenue.

Confederation Treasury Services Ltd. (Bankrupt), Re (1997), 96 O.A.C. 75 (C.A.), refd to. [para. 36].

Compagnie pétrolière Impériale ltée v. Québec (Ministre de l'Environnement), [2003] 2 S.C.R. 624; 310 N.R. 343, refd to. [para. 40].

Imperial Oil Ltd. v. Quebec (Minister of the Environment) - see Compagnie pétrolière Impériale ltée v. Québec (Ministre de l'Environnement).

Panamericana De Bienes Y Servicios, S.A. v. Northern Badger Oil & Gas Ltd. (Bankrupt) (1991), 117 A.R. 44; 2 W.A.C. 44; 81 Alta. L.R.(2d) 45 (C.A.), refd to. [paras. 44, 73].

Lamford Forest Products (Bankrupt), Re, [1991] B.C.T.C. Uned. E67; 86 D.L.R.(4th) 534 (S.C.), refd to. [para. 74].

Shirley, Re (1995), 129 D.L.R.(4th) 105 (Ont. Gen. Div.), refd to. [para. 74].

Husky Oil Operations Ltd. v. Minister of National Revenue et al., [1995] 3 S.C.R. 453; 188 N.R. 1; 137 Sask.R. 81; 107 W.A.C. 81, refd to. [para. 74].

Air Canada et al., Re (2003), 28 C.B.R.(5th) 52 (Ont. Sup. Ct.), refd to. [para. 74].

General Chemical Can. Ltd., Re (2007), 228 O.A.C. 385; 2007 ONCA 600, refd to. [para. 76].

Strathcona (County) v. Fantasy Construction Ltd. Estate et al. (2005), 386 A.R. 338; 2005 ABQB 559, refd to. [para. 76].

Confederation Treasury Services Ltd. (Bankrupt), Re (1997), 96 O.A.C. 75 (C.A.), refd to. [para. 84].

Anvil Range Mining Corp., Re, [2004] O.T.C. Uned. 361; 25 C.B.R.(4th) 1 (Sup. Ct.), refd to. [para. 85].

British Columbia v. Imperial Tobacco Canada Ltd. et al., [2011] 3 S.C.R. 45; 419 N.R. 1; 308 B.C.A.C. 1; 521 W.A.C. 1; 2011 SCC 42, refd to. [para. 86].

Housen v. Nikolaisen et al., [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 2002 SCC 33, refd to. [para. 96].

Authors and Works Noticed:

Baird, D.G. and Jackson, T.H., Comment: Kovacs and Toxic Wastes in Bankruptcy (1984), 36 Stan. L. Rev. 1199, p. 1200 [para. 41].

Hohfeld, W.N., Fundamental Legal Conceptions as Applied in Judicial Reasoning (2001), generally [para. 46].

MacCormick, D.N., Rights in Legislation, in Hacker, P.M.S. and Raz, J., eds., Law, Morality and Society: Essays in Honour of H.L.A. Hart (1977), p. 189 [para. 46].

Saxe, D., Trustees' and Receivers' Environmental Liability Update (1997), 49 C.B.R.(3d) 138, p. 141 [para. 31].

Counsel:

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Sean F. Dunphy, Nicholas McHaffie, Joseph Reynaud and Marc B. Barbeau, for the respondents;

Christopher Rupar and Marianne Zoric, for the intervener, the Attorney General of Canada;
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R. Richard M. Butler, for the intervener, the Attorney General of British Columbia;
Roderick Wiltshire, for the intervener, the Attorney General of Alberta;
Elizabeth J. Rowbotham, for the intervener, Her Majesty the Queen in Right of British Columbia;
Robert I. Thornton, John T. Porter and Rachelle F. Moncur, for the intervener, Ernst & Young Inc., as Monitor;
William A. Amos, Anastasia M. Lintner, Hugh S. Wilkins and R. Graham Phoenix, for the intervener, the Friends of the Earth Canada.

Solicitors of Record:

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Stikeman Elliott, Toronto, Ontario, for the respondents, AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc.;
Goodmans, Toronto, Ontario, for the respondent, the Ad Hoc Committee of Bondholders;
Borden Ladner Gervais, Toronto, Ontario, for the respondents, the Ad Hoc Committee of Senior Secured Noteholders and the U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders);
Attorney General of Canada, Ottawa, Ontario, for the intervener, the Attorney General of Canada;
Attorney General of Ontario, Toronto, Ontario, for the intervener, the Attorney General of Ontario;
Attorney General of British Columbia, Victoria, British Columbia, for the interveners, the Attorney General of British Columbia and Her Majesty the Queen in Right of British Columbia;
Attorney General of Alberta, Edmonton, Alberta, for the intervener, the Attorney General of Alberta;
Thornton Grout Finnigan, Toronto, Ontario, for the intervener, Ernst & Young Inc., as Monitor;
Ecojustice, University of Ottawa, Ottawa, Ontario; Fasken Martineau DuMoulin, Toronto, Ontario, for the intervener, the Friends of the Earth Canada.

This appeal was heard on November 16, 2011, by McLachlin, C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis, JJ., of the Supreme Court of Canada. On December 7, 2012, the court's reasons for judgment were delivered in both official languages, including the following opinions:

Deschamps, J. (Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis, JJ., concurring) - see paragraphs 1 to 63;
McLachlin, C.J.C., dissenting - see paragraphs 64 to 97;
LeBel, J., dissenting - see paragraphs 98 to 102.

Appeal dismissed.

Editor: Sharon McCartney

Bankruptcy - Topic 4490

Preferred creditors - Claims by Crown - Environmental programs - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) (EPA) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act (CCAA) - The CCAA court found that the orders were clearly monetary in nature and, as such, were stayed by the initial stay order and were subject to a subsequent claims procedure order - The Supreme Court of Canada dismissed the province's appeal - The court rejected the province's argument that the CCAA court erred in interpreting the CCAA provisions in a way that nullified the EPA and that the interpretation was inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity - In 2007, Parliament had given CCAA courts the power to stay regulatory orders that were not monetary claims - The only question here was whether the CCAA court had jurisdiction to determine whether an environmental order that was not framed in monetary terms was, in fact, a monetary claim - Having determined that the federal legislation was valid and that neither the ancillary powers doctrine nor interjurisdictional immunity applied, the court indicated that what the province was really arguing was that the courts should consider the form of an order (i.e., non-monetary), rather than its substance (monetary) - However, the province could not disturb the priority scheme established by the legislation - Environmental claims were given a specific, limited priority under the CCAA - To exempt orders that were in fact monetary claims would amount to conferring a higher priority on the provinces than was provided for in the CCAA - See paragraphs 16 to 19.

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gave CCAA courts the power to determine whether a regulatory order might be a claim and also provided criteria for staying regulatory orders - Whether the regulatory body had a contingent claim was determined on the facts - Generally, a regulatory body had discretion to decide how best to ensure that regulatory obligations were met - Although the court should take care to avoid interfering with that discretion, the regulatory body's actions were subject to scrutiny in insolvency proceedings - see paragraphs 44 to 48.

Constitutional Law - Topic 6261

Federal jurisdiction (s. 91) - Bankruptcy and insolvency - General principles - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) (EPA) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act (CCAA) - The CCAA court found that the orders were clearly monetary in nature and, as such, were stayed by the initial stay order and were subject to a subsequent claims procedure order - The Supreme Court of Canada dismissed the province's appeal - The court rejected the province's argument that the CCAA court erred in interpreting the CCAA provisions in a way that nullified the EPA and that the interpretation was inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity - In 2007, Parliament had given CCAA courts the power to stay regulatory orders that were not monetary claims - The only question here was whether the CCAA court had jurisdiction to determine whether an environmental order that was not framed in monetary terms was, in fact, a monetary claim - Having determined that the federal legislation was valid and that neither the ancillary powers doctrine nor interjurisdictional immunity applied, the court indicated that what the province was really arguing was that the courts should consider the form of an order (i.e., non-monetary), rather than its substance (monetary) - However, the province could not disturb the priority scheme established by the legislation - Environmental claims were given a specific, limited priority under the CCAA - To exempt orders that were in fact monetary claims would amount to conferring a higher priority on the provinces than was provided for in the CCAA - See paragraphs 16 to 19.

Creditors and Debtors - Topic 8581.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Priorities - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) (EPA) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act (CCAA) - The CCAA court found that the orders were clearly monetary in nature and, as such, were stayed by the initial stay order and were subject to a subsequent claims procedure order - The Supreme Court of Canada dismissed the province's appeal - The court rejected the province's argument that the CCAA court erred in interpreting the CCAA provisions in a way that nullified the EPA and that the interpretation was inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity - In 2007, Parliament had given CCAA courts the power to stay regulatory orders that were not monetary claims - The only question here was whether the CCAA court had jurisdiction to determine whether an environmental order that was not framed in monetary terms was, in fact, a monetary claim - Having determined that the federal

legislation was valid and that neither the ancillary powers doctrine nor interjurisdictional immunity applied, the court indicated that what the province was really arguing was that the courts should consider the form of an order (i.e., non-monetary), rather than its substance (monetary) - However, the province could not disturb the priority scheme established by the legislation - Environmental claims were given a specific, limited priority under the CCAA - To exempt orders that were in fact monetary claims would amount to conferring a higher priority on the provinces than was provided for in the CCAA - See paragraphs 16 to 19.

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Debtors' relief legislation - Companies' creditors arrangement legislation - Priorities - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act - The Supreme Court of Canada rejected the province's argument that treating a regulatory order as a claim in an insolvency proceeding extinguished the debtor's environmental obligations, thereby undermining the polluter-pay principle - This argument demonstrated a misunderstanding of the nature of insolvency proceedings - Subjecting an order to the claims process merely ensured that the claim would be paid in accordance with insolvency legislation - The province's position would not only result in a super-priority, but also in the acceptance of a "third party pay" principle by shifting the costs of remediation to third party creditors - Nor did subjecting the orders to the insolvency process amount to "issuing a licence to pollute" - See paragraphs 39 to 43.

Creditors and Debtors - Topic 8581.2

Debtors' relief legislation - Companies' creditors arrangement legislation - Jurisdiction - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) (EPA) requiring the respondent to clean up sites were monetary claims that

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Creditors and Debtors - Topic 8587.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Creditor defined - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) (EPA) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act (CCAA) - The CCAA court found that the orders were clearly monetary in nature and, as such, were stayed by the initial stay order and were subject to a subsequent claims procedure order - The Supreme Court of Canada dismissed the province's appeal - As the province had not yet formally exercised its power to ask for the payment of money, the issue was whether it was sufficiently certain that the orders would eventually result in a monetary claim - To the CCAA court, that answer was yes - The CCAA court's reasons not only rested on an implicit finding that the province would most likely perform the work, but also referred explicitly to facts that supported this finding - In the end, the CCAA court found that there was definitely a claim that "might" be filed and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" - The CCAA court's assessment of the facts, particularly the finding that the EPA orders were the first step towards performance of the remediation work by the province, led to no conclusion other than that it was sufficiently certain that the province would perform the work and would, therefore, fall within the definition of a creditor with a monetary claim - See paragraphs 49 to 58.

Creditors and Debtors - Topic 8588

Debtors' relief legislation - Companies' creditors arrangement legislation - Stay of proceedings (incl. extension or lifting of) - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) (EPA) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate

restructuring under the Companies' Creditors Arrangement Act (CCAA) - The CCAA court found that the orders were clearly monetary in nature and, as such, were stayed by the initial stay order and were subject to a subsequent claims procedure order - The Supreme Court of Canada dismissed the province's appeal - As the province had not yet formally exercised its power to ask for the payment of money, the issue was whether it was sufficiently certain that the orders would eventually result in a monetary claim - To the CCAA court, that answer was yes - The CCAA court's reasons not only rested on an implicit finding that the province would most likely perform the work, but also referred explicitly to facts that supported this finding - In the end, the CCAA court found that there was definitely a claim that "might" be filed and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" - The CCAA court's assessment of the facts, particularly the finding that the EPA orders were the first step towards performance of the remediation work by the province, led to no conclusion other than that it was sufficiently certain that the province would perform the work and would, therefore, fall within the definition of a creditor with a monetary claim - See paragraphs 49 to 58.

Creditors and Debtors - Topic 8596.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Proof of claim (incl. claims bar process) - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act (CCAA) - The Supreme Court of Canada outlined the basic rules under s. 12 of the CCAA for ascertaining whether an order was a claim that might be subjected to the insolvency process - There were three requirements that were relevant here: (1) there had to be a debt, liability or obligation to a creditor; (2) that was incurred before the debtor became bankrupt; and (3) it had to be possible to attach a monetary value to the debt, liability or obligation - When considering an order that was not framed in monetary terms, courts had to look at the order's substance and apply the rules for the assessment of claims - The Crown's limited priority under s. 11.8(8) of the CCAA (to contaminated property and certain related property) led the court to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation - As deferential as courts might be to regulatory bodies' actions, they had to apply the general rules - See paragraphs 20 to 33.

Creditors and Debtors - Topic 8596.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Proof of claim (incl. claims bar process) - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act - The Supreme Court of Canada noted that a claim could be asserted in insolvency proceedings even if it was contingent on an event that had not yet occurred - In the context of a corporate proposal or reorganization, this broad approach served not only to ensure fairness between creditors, but also allowed the debtor to make as fresh a start as possible after a proposal or arrangement had been approved - The criterion used by courts to determine whether a contingent claim was

included in the insolvency process was whether the event that had not yet occurred was "too remote or speculative" - In the context of an environmental order, this meant that there had to be sufficient indications that the regulatory body would ultimately perform remediation work and would assert a monetary claim to have its costs reimbursed - Indicators to guide the court in determining whether an order was a provable claim included "whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order" - See paragraphs 34 to 38.

Creditors and Debtors - Topic 8596.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Proof of claim (incl. claims bar process) - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act - The Supreme Court of Canada rejected the province's argument that courts had, in the past, held that environmental orders could not be interpreted as claims when the regulatory body had not yet exercised its power to assert a claim framed in monetary terms - Courts had never shied away from putting substance ahead of form - Further, the provisions relating to the assessment of claims contemplated instances in which the quantum was not yet established - Finally, insolvency legislation had evolved - Amendments made in 2007 gave CCAA courts the power to determine whether a regulatory order might be a claim and also provided criteria for staying regulatory orders - Whether the regulatory body had a contingent claim was determined on the facts - Generally, a regulatory body had discretion to decide how best to ensure that regulatory obligations were met - Although the court should take care to avoid interfering with that discretion, the regulatory body's actions were subject to scrutiny in insolvency proceedings - see paragraphs 44 to 48.

Creditors and Debtors - Topic 8596.1

Debtors' relief legislation - Companies' creditors arrangement legislation - Proof of claim (incl. claims bar process) - At issue was whether orders made by the province under the Environmental Protection Act (N.L.) (EPA) requiring the respondent to clean up sites were monetary claims that could be compromised in corporate restructuring under the Companies' Creditors Arrangement Act (CCAA) - The CCAA court found that the orders were clearly monetary in nature and, as such, were stayed by the initial stay order and were subject to a subsequent claims procedure order - The Supreme Court of Canada dismissed the province's appeal - As the province had not yet formally exercised its power to ask for the payment of money, the issue was whether it was sufficiently certain that the orders would eventually result in a monetary claim - To the CCAA court, that answer was yes - The CCAA court's reasons not only rested on an implicit finding that the province would most likely perform the work, but also referred explicitly to facts that supported this finding - In the end, the CCAA court found that there was definitely a claim that "might" be filed and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" - The CCAA court's assessment of the facts, particularly the finding that the EPA orders were the first step towards performance of the remediation work by the province, led to no conclusion other than that it was

sufficiently certain that the province would perform the work and would, therefore, fall within the definition of a creditor with a monetary claim - See paragraphs 49 to 58.