

ENVIRONMENTAL & ENERGY LAW

ONTARIO COURT OF APPEAL CONFIRMS THAT MOE ORDERS MAY BE SUBJECT TO THE INSOLVENCY PROCESS

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On October 3, 2013, the Ontario Court of Appeal ("OCA") released decisions in *Nortel Networks Corporation (Re)*, 2013 ONCA 599 ("Nortel") and *Northstar Aerospace Inc. (Re)*, 2013 ONCA 600 ("Northstar") and applied the Supreme Court of Canada's ("SCC") decision in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 ("Abitibi") to remedial orders issued by Ontario's Ministry of the Environment ("MOE").

In *Abitibi*, the SCC found that remediation orders issued by a regulator, in that case, the Minister of Environment and Conservation of Newfoundland and Labrador, could be subject to the stay provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The SCC set out a three part test for determining when an order of a regulator qualifies as a "provable claim" subject to the CCAA. First, the order must create a debt, liability or obligation. Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt, and third, it must be possible to attach a monetary value to the debt, liability or obligation.

In *Northstar* and *Nortel*, the focus was on the third part of the test, namely whether it was possible to attach a monetary value to the MOE orders. The OCA applied *Abitibi* to MOE orders and held that a monetary value may be attached to an MOE order if the MOE has performed the ordered 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 MOE will do the work and then seek reimbursement.

In *Northstar*, the OCA upheld a CCAA judge's finding that the MOE order in question was subject to CCAA because the MOE had in fact done the work required by the order and filed a claim for the costs incurred.

In *Nortel*, the OCA overturned the CCAA judge's holding with respect to 4 out of 5 MOE orders issued to Nortel Networks Corporation ("Nortel Networks") together with other current and former owners of certain Nortel Networks' properties because it found that it was not sufficiently certain that the MOE would perform the work required under those orders. In so finding, the OCA commented that it would seem reasonable to expect the MOE to enforce the orders against the other parties to the orders before undertaking the work itself. Thus it was not "sufficiently certain" that the MOE would do the work itself and seek reimbursement. The court was satisfied that there was sufficient certainty that the MOE would do the work with respect to the 5th order.

Note that to date, CCAA protections have only been applied to regulatory orders as opposed to regulatory prosecutions. In *Terrace Bay Pulp Inc. (Re)*, [2013] O.J. No. 3703, the CCAA judge dismissed a motion to stay a prosecution by the Ministry of Labour on the basis of *Abitibi*, holding that a regulatory prosecution does not meet the first part of the *Abitibi* test.



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