Court File No. CV-12-9667-00CL

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 AND ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No. CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE TRUSTEES OF THE LABOURER'S PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC AND MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Bane of America Securities LLC)

Defendants

Proceeding under the Class Proceedings Act, 1992

BOOK OF AUTHORITIES OF THE CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO (THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO)
(Motion Returnable: November 18, 2015)

November 13, 2015

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AND TO: See attached Service List

Tab	Case
1.	*Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] S.C.J. No. 67 (S.C.C.)
2.	*Re Terrace Bay Pulp Inc. (Re)*, [2013] O.J. No. 3703
3.	*Pharmascience Inc.* v. *Binet*, [2006] 2 S.C.R. 513

** Preliminary Version **

Case Name:

Newfoundland and Labrador v. AbitibiBowater Inc.

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, Interveners.

[2012] S.C.J. No. 67

[2012] A.C.S. no 67

2012 SCC 67

[2012] 3 S.C.R. 443

[2012] 3 R.C.S. 443

438 N.R. 134

2012EXP-4268

J.E. 2012-2270

EYB 2012-215017

352 D.L.R. (4th) 399

95 C.B.R. (5th) 200

2012 CarswellQue 12490

221 A.C.W.S. (3d) 264

71 C.E.L.R. (3d) 1

File No.: 33797.

Supreme Court of Canada

Heard: November 16, 2011;
Judgment: December 7, 2012.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

(102 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Appeal by Newfoundland and Labrador from a judgment of the Quebec Court of Appeal dismissing its motion for leave to appeal a decision of the CCAA Court, dismissed -- The Court had to determine whether orders issued by a regulatory body with respect to environmental remediation work could be treated as monetary claims under the CCAA -- Not all orders issued by regulatory bodies were monetary in nature and thus provable claims in an insolvency proceeding, but some could be, even if the amounts involved were not quantified at the outset of the proceeding -- In Abitibi's case, it was sufficiently certain that the Province would perform the remediation work and therefore make a monetary claim -- The orders could be treated as a monetary claim.

Appeal by Newfoundland and Labrador from a judgment of the Quebec Court of Appeal dismissing its motion for leave to appeal a decision of the Companies' Creditors Arrangement Act (CCAA) Court. The Court had to determine whether orders issued against AbitibiBowater Inc. (Abitibi) by a regulatory body with respect to environmental remediation work could be treated as monetary claims under the CCAA. The case at bar concerned contamination that occurred, prior to the CCAA proceedings, on property that was largely no longer under Abitibi's possession and control. The province issued orders under the Environmental Protection Act (EPA Orders) requiring Abitibi to submit remediation action plans to the Newfoundland and Labrador Minister of Environment and Conservation for five industrial sites, three of which had been expropriated, and to complete the approved remediation actions. The Province argued that non-monetary statutory obligations were not "claims" under the CCAA and hence could not be stayed and subjected to a claims procedure order.

It further submitted that Parliament lacked the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that were validly made in the exercise of a provincial power. The CCAA court declared that the filing by the Province of any claim based on the EPA Orders was subject to the claims procedure order. The Court of Appeal denied the Province leave to appeal.

HELD: Appeal dismissed, with dissent. Not all orders issued by regulatory bodies were monetary in nature and thus provable claims in an insolvency proceeding, but some could be, even if the amounts involved were not quantified at the outset of the proceeding. If the Province's actions indicated that, in substance, it was asserting a provable claim within the meaning of federal legislation, then that claim could be subjected to the insolvency process. Environmental claims did not have a higher priority than was provided for in the CCAA. There were three requirements for a provable claim. First, there had to be a debt, a liability or an obligation to a creditor. Second, the debt, liability or obligation had to be incurred before the debtor became bankrupt. Third, it had to be possible to attach a monetary value to the debt, liability or obligation. Subjecting an order to the claims process did not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguished the debtor's obligation to pay its debts. It merely ensured that the creditor's claim would be paid in accordance with insolvency legislation. In the environmental context, the CCAA court had to determine whether there were sufficient facts indicating the existence of an environmental duty that would ripen into a financial liability owed to the regulatory body that issued the order. In Abitibi's case, the CCAA judge's assessment of the facts, particularly his 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 remediation work and therefore fall within the definition of a creditor with a monetary claim. The CCAA court was entitled to take all relevant facts into consideration in making the relevant determination. The orders could be treated as a monetary claim.

Statutes, Regulations and Rules Cited:

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, c. C-A-1.01,

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 9

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36, s. 65

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2, s. 11.1, s. 14, s. 14.06(8), s. 121, s. 121(1), s. 121(2), s. 135(1.1)

Civil Code of Québec, S.Q. 1991, c. 64, art. 1497, art. 1508, art. 1513

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 11, s. 11.1, s. 11.1(2), s. 11.1(3), s. 11.8(5), s. 11.8(6), s. 11.8(7), s. 11.8(8), s. 11.8(9), s. 12, s. 12(1)

Environmental Protection Act, S.N.L. 2002, c. E-14.2, s. 99, s. 102(3)

North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can. T.S. 1994 No. 2, c. 11,

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Bankruptcy and Insolvency -- Provable claims -- Contingent claims -- Corporation filing for insolvency protection -- Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order -- Whether environmental protection orders are monetary claims that can be compromised in corporate restructuring under CCAA -- Whether CCAA is ultra vires or constitutionally inapplicable by permitting court to determine whether environmental order is a monetary claim.

Court Summary:

A was involved in industrial activity in Newfoundland and Labrador (the "Province"). In a period of general financial distress, it ended its last operation there, filed for insolvency protection in the United States and obtained a stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Province subsequently issued five orders under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, requiring A to submit remediation action plans for five industrial sites it had occupied, three of which had been expropriated by the Province, and to complete the remediation actions. The Province also brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to A's proposed reorganization did not bar the Province from enforcing the environmental protection orders. The Province argued that the environmental protection orders were not "claims" under the *CCAA* and therefore could not be stayed and subject to a claims procedure order. It further argued that Parliament lacked the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that were validly made in the exercise of a provincial power. A contested the motion, arguing that the orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order. The *CCAA* court dismissed the Province's motion. The Court of Appeal denied the Province leave to appeal.

Held (McLachlin C.J. and LeBel J. dissenting): The appeal should be dismissed.

Per **Deschamps**, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: Not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceedings. In the environmental context, the *CCAA* court must determine 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. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims or orders on the basis of form alone. If the order is not framed in monetary terms, the *CCAA* court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process in a case such as the one at bar. First, there must be a debt, a liability or an

obligation to a creditor. In this case, the first criterion was met because the Province had identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred as of a specific time. This requirement was also met since the environmental damage had occurred before the time of the *CCAA* proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. The present case turns on this third requirement, and the question is whether orders that are not expressed in monetary terms can be translated into such terms.

A claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred. The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. In the context of an environmental protection order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim. If there is sufficient certainty in this regard, the court will conclude that the order can be subject to the insolvency process.

Certain indicators can guide the *CCAA* court in this assessment, including 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. The court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. The analysis is grounded in the facts of each case. In this case, the *CCAA* court's assessment of the facts, particularly its finding that the orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

Subjecting such orders to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay a debt. It merely ensures that the Province's claim will be paid in accordance with insolvency legislation. Full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third party creditors and replace the polluter-pay principle with a "third-party-pay" principle. Moreover, to subject environmental protection orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities. Reorganization made necessary by insolvency is hardly ever a deliberate choice, and when the risks corporations engage in materialize, the dire costs are borne by almost all stakeholders.

Because the provisions on the assessment of claims in insolvency matters relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. The interjurisdictional immunity doctrine is also inapplicable, because 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 subject to the insolvency process.

Per **McLachlin C.J.** (dissenting): Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They may only be reduced to monetary claims which can be compromised under *CCAA* proceedings in narrow circumstances where a province has done the remediation work, or where it is "sufficiently certain" that it will do the work. This last situation is regulated by the provisions of the *CCAA* for contingent or future claims. The test is whether there is a likelihood approaching certainty, that the province will do the work. "Likelihood approaching certainty" recognizes that the government's decision is discretionary and may be influenced by competing political and social

considerations, which are not normally subject to judicial consideration. Insofar as this determination touches on the division of powers, I am in substantial agreement with Deschamps J.

Apart from the orders related to the work done or tendered for on the Buchans property, the orders for remediation in this case are not claims that can be compromised. The *CCAA* maintains the fundamental distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy. The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. His failure to consider that question requires this Court to answer it in his stead. There is nothing on the record to support the view that the Province will move to remediate the properties. It has not been shown that the contamination poses immediate health risks which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. The Province retained a number of options, including leaving the site contaminated, or calling on Abitibi to remediate following its emergence from restructuring. There is nothing in the record that makes it more probable, much less establishes "sufficient certainty", that the Province will opt to do the work itself.

Per **LeBel J.** (dissenting): The test proposed by the Chief Justice according to which the evidence must show that there is a "likelihood approaching certainty" that the Province would remediate the contamination itself is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J. best reflects how both the common law and the civil law view and deal with contingent claims. Applying that test, the appeal should be allowed on the basis that there is no evidence that the Province intends to perform the remedial work itself.

Cases Cited

By Deschamps J.

Distinguished: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **referred to:** *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624.

By McLachlin C.J. (dissenting)

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4) 534; *Shirley (Re)* (1995), 129 D.L.R. (4) 105; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4) 1; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

Statutes and Regulations Cited

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, c. C-A-1.01.

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27.

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12.

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 "claim provable in bankruptcy", "creditor", 14.06(7), 121(1), (2), 135(1.1).

Civil Code of Québec, S.Q. 1991, c. 64, arts. 1497, 1508, 1513.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(1) "claim", 11, 11.1, 11.8(5), (6), (8), (9), 12(1).

Environmental Protection Act, S.N.L. 2002, c. E-14.2, ss. 99, 102(3).

Treaties and Other International Instruments

North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can. T.S. 1994 No. 2, c. 11.

Authors Cited

Baird, Douglas G., and Thomas H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 Stan. L. Rev. 1199.

Canada. House of Commons. *Evidence of the Standing Committee on Industry*, No. 16, 2 Sess., 35 Parl., June 11, 1996.

Hohfeld, Wesley Newcomb. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, new ed. Burlington, Vt.: Ashgate, 2001.

MacCormick, D.N. "Rights in Legislation", in P.M.S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H.L.A. Hart*. Oxford: Clarendon Press, 1977, 189.

Saxe, Dianne. "Trustees' and Receivers' Environmental Liability Update" (1997), 49 C.B.R. (3d) 138.

History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Chamberland J.A.), 2010 QCCA 965, 68 C.B.R. (5) 57, 52 C.E.L.R. (3d) 1, [2010] Q.J. No. 4579 (QL), 2010 CarswellQue 4782, dismissing the appellant's motion for leave to appeal a decision of Gascon J.S.C., 2010 QCCS 1261, 68 C.B.R. (5) 1, 52 C.E.L.R. (3d) 17, [2010] Q.J. No. 4006 (QL), 2010 CarswellQue 2812. Appeal dismissed, McLachlin C.J. and LeBel J. dissenting.

Counsel:

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

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Josh Hunter, *Robin K. Basu*, *Leonard Marsello* and *Mario Faieta*, for the intervener the Attorney General of Ontario.

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.

The judgment of Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

1 **DESCHAMPS J.**:-- The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

2 Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim.

3 In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the *CCAA* if the order does not require the debtor to make a payment. I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding. In the environmental context, the *CCAA* court must determine 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. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims -- or orders -- on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

4 The case at bar concerns contamination that occurred, prior to the *CCAA* proceedings, on property that is largely no longer under the debtor's possession and control. The *CCAA* court found on the facts of this case that the orders issued by Her Majesty the Queen in right of the Province of Newfoundland and Labrador ("Province") were simply a first step towards remediating the contam-

inated property and asserting a claim for the resulting costs. In the words of the *CCAA* court, "the intended, practical and realistic effect of the *EPA* Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (2010 QCCS 1261, 68 C.B.R. (5th) 1, at para. 211). As a result, the *CCAA* court found that the orders were clearly monetary in nature. I see no error of law and no reason to interfere with this finding of fact. I would dismiss the appeal with costs.

I. Facts and Procedural History

5 For over 100 years, AbitibiBowater Inc. and its affiliated or predecessor companies (together, "Abitibi") were involved in industrial activity in Newfoundland and Labrador. In 2008, Abitibi announced the closure of a mill that was its last operation in that province.

6 Within two weeks of the announcement, the Province passed the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 ("*Abitibi Act*"), which immediately transferred most of Abitibi's property in Newfoundland and Labrador to the Province and denied Abitibi any legal remedy for this expropriation.

7 The closure of its mill in Newfoundland and Labrador was one of many decisions Abitibi made in a period of general financial distress affecting its activities both in the United States and in Canada. It filed for insolvency protection in the United States on April 16, 2009. It also sought a stay of proceedings under the *CCAA* in the Superior Court of Quebec, as its Canadian head office was located in Montreal. The *CCAA* stay was ordered on April 17, 2009.

8 In the same month, Abitibi also filed a notice of intent to submit a claim to arbitration under NAFTA (the *North American Free Trade Agreement Between the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2) for losses resulting from the *Abitibi Act*, which, according to Abitibi, exceeded $300 million.

9 On November 12, 2009, the Province's Minister of Environment and Conservation ("Minister") issued five orders ("*EPA* Orders") under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). The *EPA* Orders required Abitibi to submit remediation action plans to the Minister for five industrial sites, three of which had been expropriated, and to complete the approved remediation actions. The *CCAA* judge estimated the cost of implementing these plans to be from "the mid-to-high eight figures" to "several times higher" (para. 81).

10 On the day it issued the *EPA* Orders, the Province brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to Abitibi's proposed reorganization did not bar the Province from enforcing the *EPA* Orders. The Province argued -- and still argues -- that non-monetary statutory obligations are not "claims" under the *CCAA* and hence cannot be stayed and be subject to a claims procedure order. It further submits that Parliament lacks the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that are validly made in the exercise of a provincial power.

11 Abitibi contested the motion and sought a declaration that the *EPA* Orders were stayed and that they were subject to the claims procedure order. It argued that the *EPA* Orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order.

12 Gascon J. of the Quebec Superior Court, sitting as a *CCAA* court, dismissed the Province's motion. He found that he had the authority to characterize the orders as "claims" if the underlying

regulatory obligations "remain[ed], in a particular fact pattern, truly financial and monetary in nature" (para. 148). He declared that the *EPA* Orders were stayed by the initial stay order and were not subject to the exception found in that order. He also declared that the filing by the Province of any claim based on the *EPA* Orders was subject to the claims procedure order, and reserved to the Province the right to request an extension of time to assert a claim under the claims procedure order and to Abitibi the right to contest such a request.

13 In the Court of Appeal, Chamberland J.A. denied the Province leave to appeal (2010 QCCA 965, 68 C.B.R. (5th) 57). In his view, the appeal had no reasonable chance of success, because Gascon J. had found as a fact that the *EPA* Orders were financial or monetary in nature. Chamberland J.A. also found that no constitutional issue arose, given that the Superior Court judge had merely characterized the orders in the context of the restructuring process; the judgment did not "'immunise' Abitibi from compliance with the EPA Orders" (para. 33). Finally, he noted that Gascon J. had reserved the Province's right to request an extension of time to file a claim in the *CCAA* process.

II. Positions of the Parties

14 The Province argues that the *CCAA* court erred in interpreting the relevant *CCAA* provisions in a way that nullified the *EPA*, and that the interpretation is inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity. The Province further submits that, in any event, the *EPA* Orders are not "claims" within the meaning of the *CCAA*. It takes the position that "any plan of compromise and arrangement that Abitibi might submit for court approval must make provision for compliance with the EPA Orders" (A.F., at para. 32).

15 Abitibi contends that the factual record does not provide a basis for applying the constitutional doctrines. It relies on the *CCAA* court's findings of fact, particularly the finding that the Province's intent was to establish the basis for a monetary claim. Abitibi submits that the true issue is whether a province that has a monetary claim against an insolvent company can obtain a preference against other unsecured creditors by exercising its regulatory power.

III. Constitutional Questions

16 At the Province's request, the Chief Justice stated the following constitutional questions:

1. Is the definition of "claim" in s. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this definition includes statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?
2. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to bar or extinguish statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?
3. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent

this section gives courts jurisdiction to review the exercise of ministerial discretion under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

17 I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However, the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 65) ("2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

18 Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament. Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process. There is no need to perform a detailed analysis of the pith and substance of the provisions on the assessment of claims in insolvency matters to conclude that the federal legislation governing the characterization of an order as a monetary claim is valid. Because the provisions relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. I also find that the interjurisdictional immunity doctrine is not applicable. 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.

19 What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If 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. Environmental claims do not have a higher priority than is provided for in the *CCAA*. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Environmental claims are given a specific, and limited, priority under the *CCAA*. To exempt orders which are in fact monetary claims from the *CCAA* proceedings would amount to conferring upon provinces a priority higher than the one provided for in the *CCAA*.

IV. Claims under the *CCAA*

20 Several provisions of the *CCAA* have been amended since Abitibi filed for insolvency protection. Except where otherwise indicated, the provisions I refer to are those that were in force when the stay was ordered.

21 One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court

can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

22 Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

> [Definition of "claim"]
>
> **12.** (1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.
>
> [Determination of amount of claim]
>
> (2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (*a*) the amount of an unsecured claim shall be the amount
>
> ...
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and ...

23 Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

> "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor.

24 This definition is completed by s. 121 of the *BIA*:

> **121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

25 **Sections** 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

121... .

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

135... .

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

26 These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

27 The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

28 The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

11.8... .

(9) 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.

29 The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases, the damage continues to be sustained after the reorganization has been completed.

30 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. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

31 However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update" (1997), 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

32 Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority (s. 11.8(8) *CCAA*). Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably.

33 If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

34 Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

35 The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

36 The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative: *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75. In the context of an envi-

ronmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

37 The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain that the regulatory body will have to perform the work.

38 Certain indicators can thus be identified from the text and the context of the provisions to guide the *CCAA* court in determining whether an order is a provable claim, including 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. The *CCAA* court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

39 Having highlighted three requirements for finding a claim to be provable in a *CCAA* process that need to be considered in the case at bar, I must now discuss certain policy arguments raised by the Province and some of the interveners.

40 These parties argue that treating a regulatory order as a claim in an insolvency proceeding extinguishes the debtor's environmental obligations, thereby undermining the polluter-pay principle discussed by this Court in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624 (para. 24). This objection demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third party-pay" principle in place of the polluter-pay principle.

41 Nor does subjecting the orders to the insolvency process amount to issuing a licence to pollute, since insolvency proceedings do not concern the debtor's future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any oth-

er person. To quote the colourful analogy of two American scholars, "Debtors in bankruptcy have -- and should have -- no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute" (D. G. Baird and T. H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 Stan. L. Rev. 1199, at p. 1200).

42 Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities.

43 And the power to determine whether an order is a provable claim does not mean that the court will necessarily conclude that the order before it will be subject to the *CCAA* process. In fact, the *CCAA* court in the case at bar recognized that orders relating to the environment may or may not be considered provable claims. It stayed only those orders that were monetary in nature.

44 The Province also argues that courts have in the past held that environmental orders cannot be interpreted as claims when the regulatory body has not yet exercised its power to assert a claim framed in monetary terms. The Province relies in particular on *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), and its progeny. In *Panamericana*, the Alberta Court of Appeal held that a receiver was personally liable for work under a remediation order and that the order was not a claim in insolvency proceedings. The court found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim.

45 The first answer to the Province's argument is that courts have never shied away from putting substance ahead of form. They can determine whether the order is in substance monetary.

46 The second answer is that the provisions relating to the assessment of claims, particularly those governing contingent claims, contemplate instances in which the quantum is not yet established when the claims are filed. Whether, in the regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (new ed. 2001); D. N. MacCormick, "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (1977), 189). However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged. Rather, the question is whether it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim.

47 The third answer to the Province's argument is that insolvency legislation has evolved considerably over the two decades since *Panamericana*. At the time of *Panamericana*, none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in *Panamericana* (*An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9, amending s. 14 of the *BIA*). The 1997 amendments provided additional protection to trustees and monitors

(S.C. 1997, c. 12). The 2007 amendments made it clear that a *CCAA* court has the power to determine that a regulatory order may be a claim and also provided criteria for staying regulatory orders (s. 65, amending the *CCAA* to include the current version of s. 11.1). The purpose of these amendments was to balance the creditor's need for fairness against the debtor's need to make a fresh start.

48 Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings.

V. Application

49 I now turn to the application of the principles discussed above to the case at bar. This case does not turn on whether the Province is the creditor of an obligation or whether damage had occurred as of the relevant date. Those requirements are easily satisfied, since the Province had identified itself as a creditor by resorting to *EPA* enforcement mechanisms and since the damage had occurred before the time of the *CCAA* proceedings. Rather, the issue centres on the third requirement: that the orders meet the criterion for admission as a pecuniary claim. The claim was contingent to the extent that the Province had not yet formally exercised its power to ask for the payment of money. The question is whether it was sufficiently certain that the orders would eventually result in a monetary claim. To the *CCAA* judge, there was no doubt that the answer was yes.

50 The Province's exercise of its legislative powers in enacting the *Abitibi Act* created a unique set of facts that led to the orders being issued. The seizure of Abitibi's assets by the Province, the cancellation of all outstanding water and hydroelectric contracts between Abitibi and the Province, the cancellation of pending legal proceedings by Abitibi in which it sought the reimbursement of several hundreds of thousands of dollars, and the denial of any compensation for the seized assets and of legal redress are inescapable background facts in the judge's review of the *EPA* Orders.

51 The *CCAA* judge did not elaborate on whether it was sufficiently certain that the Minister would perform the remediation work and therefore make a monetary claim. However, most of his findings clearly rest on a positive answer to this question. For example, his finding that "[i]n all likelihood, the pith and substance of the EPA Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAFTA claims for compensation" (para. 178), is necessarily based on the premise that the Province would most likely perform the remediation work. Indeed, since monetary claims must, both at common law and in civil law, be mutual for set-off or compensation to operate, the Province had to have incurred costs in doing the work in order to have a claim that could be set off against Abitibi's claims.

52 That the judge relied on an implicit finding that the Province would most likely perform the work and make a claim to offset its costs is also shown by the confirmation he found in the declaration by the Minister that the Province was attempting to assess the cost of doing remediation work Abitibi had allegedly left undone and that in the Province's assessment, "at this point in time, there would not be a net payment to Abitibi" (para. 181).

53 The *CCAA* judge's reasons not only rest on an implicit finding that the Province would most likely perform the work, but refer explicitly to facts that support this finding. To reach his conclu-

sion that the *EPA* Orders were monetary in nature, the *CCAA* judge relied on the fact that Abitibi's operations were funded through debtor-in-possession financing and its access to funds was limited to ongoing operations. Given that the *EPA* Orders targeted sites that were, for the most part, no longer in Abitibi's possession, this meant that Abitibi had no means to perform the remediation work during the reorganization process.

54 In addition, because Abitibi lacked funds and no longer controlled the properties, the timetable set by the Province in the *EPA* Orders suggested that the Province never truly intended that Abitibi was to perform the remediation work required by the orders. The timetable was also unrealistic. For example, the orders were issued on November 12, 2009 and set a deadline of January 15, 2010 to perform a particular act, but the evidence revealed that compliance with this requirement would have taken close to a year.

55 Furthermore, the judge relied on the fact that Abitibi was not simply designated a "person responsible" under the *EPA*, but was intentionally targeted by the Province. The finding that the Province had targeted Abitibi was drawn not only from the timing of the *EPA* Orders, but also from the fact that Abitibi was the only person designated in them, whereas others also appeared to be responsible -- in some cases, primarily responsible -- for the contamination. For example, Abitibi was ordered to do remediation work on a site it had surrendered more than 50 years before the orders were issued; the expert report upon which the orders were based made no distinction between Abitibi's activities on the property, on which its source of power had been horse power, and subsequent activities by others who had used fuel-powered vehicles there. In the judge's opinion, this finding of fact went to the Province's intent to establish a basis for performing the work itself and asserting a claim against Abitibi.

56 These reasons -- and others -- led the *CCAA* judge to conclude that the Province had not expected Abitibi to perform the remediation work and that the "intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (para. 211). He found that the Province appeared to have in fact taken some steps to liquidate the claims arising out of the *EPA* Orders.

57 In the end, the judge 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" (para. 227). In his words, the situation did not involve a "detached regulator or public enforcer issuing [an] order for the public good" (at para. 175), and it was "the hat of a creditor that best [fit] the Province, not that of a disinterested regulator" (para. 176).

58 In sum, although the analytical framework used by Gascon J. was driven by the facts of the case, he reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. He did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. Earmarking money may be a strong indicator that a province will perform remediation work, and actually commencing the work is the first step towards the creation of a debt, but these are not the only considerations that can lead to a finding that a creditor has a monetary claim. The *CCAA* judge's assessment of the facts, particularly his finding that the *EPA* Orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would

perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

VI. Conclusion

59 In sum, I agree with the Chief Justice that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor. Our difference of views lies mainly in the applicable threshold for including contingent claims and in our understanding of the *CCAA* judge's findings of fact.

60 With respect to the law, the Chief Justice would craft a standard specific to the context of environmental orders by requiring a "likelihood approaching certainty" that the regulatory body will perform the remediation work. She finds that this threshold is justified because "remediation may cost a great deal of money" (para. 22). I acknowledge that remediating pollution is often costly, but I am of the view that Parliament has borne this consideration in mind in enacting provisions specific to environmental claims. Moreover, I recall that in this case, the Premier announced that the remediation work would be performed at no net cost to the Province. It was clear to him that the *Abitibi Act* would make it possible to offset all the related costs.

61 Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under this approach, the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position to assert a monetary claim.

62 Finally, the Chief Justice would review the *CCAA* court's findings of fact. I would instead defer to them. On those findings, applying any legal standard, be it the one proposed by the Chief Justice or the one I propose, the Province's claim is monetary in nature and its motion for a declaration exempting the *EPA* Orders from the claims procedure order was properly dismissed.

63 For these reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

McLACHLIN C.J. (dissenting):--

1. Overview

64 The issue in this case is whether orders made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*") by the Newfoundland and Labrador Minister of Environment and Conservation (the "Minister") requiring a polluter to clean up sites (the "*EPA* Orders") are monetary claims that can be compromised in corporate restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). If they are not claims that can be compromised in restructuring, the Abitibi respondents ("Abitibi") will still have a legal obligation to clean up the sites following their emergence from restructuring. If they are such claims, Abitibi will have emerged from restructuring free of the obligation, able to recommence business without remediating the properties it polluted, the cost of which will fall on the Newfoundland and Labrador public.

65 Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They are not monetary claims. In narrow circumstances, specified by the *CCAA*, these ongoing regulatory obligations may be reduced to monetary claims, which can be compromised under *CCAA* proceedings. This occurs where a province has done the work, or where it is "sufficiently certain" that it will do the work. In these circumstances, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the *CCAA* proceedings. Otherwise, the regulatory obligation survives the restructuring.

66 In my view, the orders for remediation in this case, with a minor exception, are not claims that can be compromised in restructuring. On one of the properties, the Minister did emergency remedial work and put other work out to tender. These costs can be claimed in the *CCAA* proceedings. However, with respect to the other properties, on the evidence before us, the Minister has neither done the clean-up work, nor is it sufficiently certain that he or she will do so. The Province of Newfoundland and Labrador (the "Province") retained a number of options, including requiring Abitibi to perform the remediation if it successfully emerged from the *CCAA* restructuring.

67 I would therefore allow the appeal and grant the Province the declaration it seeks that Abitibi is still subject to its obligations under the *EPA* following its emergence from restructuring, except for work done or tendered for on the Buchans site.

2. The Proceedings Below

68 The *CCAA* judge took the view that the Province issued the *EPA* Orders, not in order to make Abitibi remediate, but as part of a money grab. He therefore concluded that the orders were monetary and financial in nature and should be considered claims that could be compromised under the *CCAA* (2010 QCCS 1261, 68 C.B.R. (5th) 1). The Quebec Court of Appeal denied leave to appeal on the ground that this "factual" conclusion could not be disturbed (2010 QCCA 965, 68 C.B.R. (5th) 57).

69 The *CCAA* judge's stark view that an *EPA* obligation can be considered a monetary claim capable of being compromised simply because (as he saw it) the Province's motive was money, is no longer pressed. Whether an *EPA* order is a claim under the *CCAA* depends on whether it meets the requirements for a claim under that statute. That is the only issue to be resolved. Insofar as this determination touches on the division of powers, I am in substantial agreement with my colleague Deschamps J., at paras. 18-19.

3. The Distinction Between Regulatory Obligations and Claims under the *CCAA*

70 Orders to clean up polluted property under provincial environmental protection legislation are regulatory orders. They remain in effect until the property has been cleaned up or the matter otherwise resolved.

71 It is not unusual for corporations seeking to restructure under the *CCAA* to be subject to a variety of ongoing regulatory orders arising from statutory schemes governing matters like employment, energy conservation and the environment. The corporation remains subject to these obligations as it continues to carry on business during the restructuring period, and remains subject to them when it emerges from restructuring unless they have been compromised or liquidated.

72 The *CCAA*, like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.

73 This distinction is also recognized in the jurisprudence, which has held that regulatory duties owed to the public are not "claims" under the *BIA*, nor, by extension, under the *CCAA*. In *Panamericana de Bienes y Servicos S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements. Writing for the court, Laycraft C.J.A. said the question was whether the *Bankruptcy Act* "requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety ... as a charge to the public" (para. 29). He answered the question in the negative:

> The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgement for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed. [Emphasis added, para. 33]

74 The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Re Shirley* (1995), 129 D.L.R. (4th) 105 (Ont. Ct. (Gen. Div.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 146, *per* Iacobucci J. (dissenting). As Farley J. succinctly put it in *Air Canada Re [Regulators' motions]*, (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J.), at para. 18: "Once [the company] emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

75 Recent amendments to the *CCAA* confirm this distinction. Section 11.1(2) now explicitly provides that, except to the extent a regulator is enforcing a payment obligation, a general stay does not affect a regulatory body's authority in relation to a corporation going through restructuring. The *CCAA* court may only stay specific actions or suits brought by a regulatory body, and only if such action is necessary for a viable compromise to be reached and it would not be contrary to the public interest to make such an order (s. 11.1(3)).

76 Abitibi argues that another amendment to the *CCAA*, s. 11.8(9), treats ongoing regulatory duties owed to the public as claims, and erases the distinction between the two types of obligation: see *General Chemical Canada Ltd., (Re)*, 2007 ONCA 600, 228 O.A.C. 385, *per* Goudge J.A., relying on s. 14.06(8) of the *BIA* (the equivalent of s. 11.8(9) of the *CCAA*). With respect, this reads too much into the provision. Section 11.8(9) of the *CCAA* refers only to the situation where a government has performed remediation, and provides that the *costs of the remediation* become a claim in the restructuring process even where the environmental damage arose after *CCAA* proceedings have begun. As stated in *Strathcona County v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, *per* Burrows J., the section "does not convert a statutorily imposed obligation

owed to the public at large into a liability owed to the public body charged with enforcing it" (para. 42).

4. When Does a Regulatory Obligation Become a Claim Under the *CCAA?*

77 This brings us to the heart of the question before us: when does a regulatory obligation imposed on a corporation under environmental protection legislation become a "claim" provable and compromisable under the *CCAA*?

78 Regulatory obligations are, as a general proposition, not compromisable claims. Only financial or monetary claims provable by a "creditor" fall within the definition of "claim" under the *CCAA*. "Creditor" is defined as "a person having a claim ..." (*BIA* s. 2). Thus, the identification of a "creditor" hangs on the existence of a "claim". Section 12(1) of the *CCAA* defines "claim" as "any indebtedness, liability or obligation ... that ... would be a debt provable in bankruptcy", which is accepted as confined to obligations of a financial or monetary nature.

79 The *CCAA* does not depart from the proposition that a claim must be financial or monetary. However, it contains a scheme to deal with disputes over whether an obligation is a monetary obligation as opposed to some other kind of obligation.

80 Such a dispute may arise with respect to environmental obligations of the corporation. The *CCAA* recognizes three situations that may arise when a corporation enters restructuring.

81 The first situation is where the remedial work has not been done (and there is no "sufficient certainty" that the work will be done, unlike the third situation described below). In this situation, the government cannot claim the cost of remediation: see s. 102(3) of the *EPA*. The obligation of compliance falls in principle on the monitor who takes over the corporation's assets and operations. If the monitor remediates the property, he can claim the costs as costs of administration. If he does not wish to do so, he may obtain a court order staying the remediation obligation or abandon the property: s. 11.8(5) *CCAA* (in which case costs of remediation shall not rank as costs of administration: s. 11.8(7)). In this situation, the obligation cannot be compromised.

82 The second situation is where the government that has issued the environmental protection order moves to clean up the pollution, as the legislation entitles it to do. In this situation, the government has a claim for the cost of remediation that is compromisable in the *CCAA* proceedings. This is because the government, by moving to clean up the pollution, has changed the outstanding regulatory obligation owed to the public into a financial or monetary obligation owed by the corporation to the government. Section 11.8(9), already discussed, makes it clear that this applies to damage after the *CCAA* proceedings commenced, which might otherwise not be claimable as a matter of timing.

83 A third situation may arise: the government has not yet performed the remediation at the time of restructuring, but there is "sufficient certainty" that it will do so. This situation is regulated by the provisions of the *CCAA* for contingent or future claims. Under the *CCAA*, a debt or liability that is contingent on a future event may be compromised.

84 It is clear that a mere possibility that work will be done does not suffice to make a regulatory obligation a contingent claim under the *CCAA*. Rather, there must be "sufficient certainty" that the obligation will be converted into a financial or monetary claim to permit this. The impact of the obligation on the insolvency process is irrelevant to the analysis of contingency. The future liabilities

must not be "so remote and speculative in nature that they could not properly be considered contingent claims": *Confederation Treasury Services Ltd. (Bankrupt) Re* (1997) 96 O.A.C. 75 (para. 4).

85 Where environmental obligations are concerned, courts to date have relied on a high degree of probability verging on certainty that the government will in fact step in and remediate the property. In *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), Farley J. concluded that a contingent claim was established where the money had already been earmarked in the budget for the remediation project. He observed that "there appears to be every likelihood to a certainty that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent" (para. 15 (emphasis added)). Similarly, in *Shirley (Re)*, Kennedy J. relied on the fact that the Ontario Minister of Environment had already entered the property at issue and commenced remediation activities to conclude that "[a]ny doubt about the resolve of the MOE's intent to realize upon its authority ended when it began to incur expense from operations" (p. 110).

86 There is good reason why "sufficient certainty" should be interpreted as requiring "likelihood approaching certainty" when the issue is whether ongoing environmental obligations owed to the public should be converted to contingent claims that can be expunged or compromised in the restructuring process. Courts should not overlook the obstacles governments may encounter in deciding to remediate environmental damage a corporation has caused. To begin with, the government's decision is discretionary and may be influenced by any number of competing political and social considerations. Furthermore, remediation may cost a great deal of money. For example, in this case, the *CCAA* court found that at a minimum the remediation would cost in the "mid-to-high eight figures" (at para. 81), and could indeed cost several times that. In concrete terms, the remediation at issue in this case may be expected to meet or exceed the entire budget of the Minister ($65 million) for 2009. Not only would this be a massive expenditure, but it would also likely require the specific approval of the Legislature and thereby be subject to political uncertainties. To assess these factors and determine whether all this will occur would embroil the *CCAA* judge in social, economic and political considerations -- matters which are not normally subject to judicial consideration: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 74. It is small wonder, then, that courts assessing whether it is "sufficiently certain" that a government will clean up pollution created by a corporation have insisted on proof of likelihood approaching certainty.

87 In this case, as will be seen, apart from the Buchans property, the record is devoid of any evidence capable of establishing that it is "sufficiently certain" that the Province will itself remediate the properties. Even on a more relaxed standard than the one adopted in similar cases to date, the evidence in this case would fail to establish that remediation is "sufficiently certain".

5. The Result in this Case

88 Five different sites are at issue in this case. The question in each case is whether the Minister has already remediated the property (making it to that extent an actual claim), or if not, whether it is "sufficiently certain" that he or she will remediate the property, permitting it to be considered a contingent claim.

89 The Buchans site posed immediate risks to human health as a consequence of high levels of lead and other contaminants in the soil, groundwater, surface water and sediment. There was a risk that the wind would disperse the contamination, posing a threat to the surrounding population. Lead has been found in residential areas of Buchans and adults tested in the town had elevated levels of

lead in their blood. In addition, a structurally unsound dam at the Buchans site raised the risk of contaminating silt entering the Exploits and Buchans rivers.

90 The Minister quickly moved to address the immediate concern of the unsound dam and put out a request for tenders for other measures that required immediate action at the Buchans site. Money expended is clearly a claim under the *CCAA*. I am also of the view that the work for which the request for tenders was put out meets the "sufficiently certain" standard and constitutes a contingent claim.

91 Beyond this, it has not been shown that it is "sufficiently certain" that the Province will do the remediation work to permit Abitibi's ongoing regulatory obligations under the *EPA* Orders to be considered contingent debts. The same applies to the other properties, on which no work has been done and no requests for tender to do the work initiated.

92 Far from being "sufficiently certain", there is simply nothing on the record to support the view that the Province will move to remediate the remaining properties. It has not been shown that the contamination poses immediate health risks, which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. Abitibi relies on a statement by the then-Premier in discussing the possibility that the Province would be obliged to compensate Abitibi for expropriation of some of the properties, to the effect that "there would not be a net payment to Abitibi" (R.F. at para. 12). Apart from the fact that the Premier was not purporting to state government policy, the statement simply does not say that the Province would do the remediation. The Premier may have simply been suggesting that outstanding environmental liabilities made the properties worth little or nothing, obviating any net payment to Abitibi.

93 My colleague Deschamps J. concludes that the findings of the *CCAA* court establish that it was "sufficiently certain" that the Province would remediate the land, converting Abitibi's regulatory obligations under the *EPA* Orders to contingent claims that can be compromised under the *CCAA*. With respect, I find myself unable to agree.

94 The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. Essentially, he proceeded on the basis that the *EPA* Orders had not been put forward in a sincere effort to obtain remediation, but were simply a money grab. The *CCAA* judge buttressed his view that the Province's regulatory orders were not sincere by opining that the orders were unenforceable (which if true would not prevent new *EPA* orders) and by suggesting that the Province did not want to assert a contingent claim, since this might attract a counterclaim by Abitibi for the expropriation of the properties (something that may be impossible due to Abitibi's decision to take the expropriation issue to NAFTA (the *North American Free Trade Agreement Between the Government of the United Mexican States and the Government of the United States of America*, Can.T.S. 1994 No. 2), excluding Canadian courts.) In any event, it is clear that the *CCAA* judge, on the reasoning he adopted, never considered the question of whether it was "sufficiently certain" that the Province would remediate the properties. It follows that the *CCAA* judge's conclusions cannot support the view that the outstanding obligations are contingent claims under the *CCAA*.

95 My colleague concludes:

> [The *CCAA* judge] did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact would have been same. ... The *CCAA* judge's assessment of the facts ... leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim. [Emphasis added, para. 58].

96 I must respectfully confess to a less sanguine view. First, I find myself unable to decide the case on what I think the *CCAA* judge would have done had he gotten the law right and considered the central question. In my view, his failure to consider that question requires this Court to answer it in his stead on the record before us: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 35. But more to the point, I see no objective facts that support, much less compel, the conclusion that it is "sufficiently certain" that the Province will move to itself remediate any or all of the pollution Abitibi caused. The mood of the regulator in issuing remediation orders, be it disinterested or otherwise, has no bearing on the likelihood that the Province will undertake such a massive project itself. The Province has options. It could, to be sure, opt to do the work. Or it could await the result of Abitibi's restructuring and call on it to remediate once it resumed operations. It could even choose to leave the site contaminated. There is nothing in the record that makes the first option more probable than the others, much less establishes "sufficient certainty" that the Province will itself clean up the pollution, converting it to a debt.

97 I would allow the appeal and issue a declaration that Abitibi's remediation obligations under the *EPA* Orders do not constitute claims compromisable under the *CCAA*, except for work done or tendered for on the Buchans site.

The following are the reasons delivered by

98 LeBEL J. (dissenting):-- I have read the reasons of the Chief Justice and Deschamps J. They agree that a court overseeing a proposed arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), cannot relieve debtors of their regulatory obligations. The only regulatory orders that can be subject to compromise are those which are monetary in nature. My colleagues also accept that contingent environmental claims can be liquidated and compromised if it is established that the regulatory body would remediate the environmental contamination itself, and hence turn the regulatory order into a monetary claim.

99 At this point, my colleagues disagree on the proper evidentiary test with respect to whether the government would remediate the contamination. In the Chief Justice's opinion, the evidence must show that there is a "likelihood approaching certainty" that the province would remediate the contamination itself (para. 22). In my respectful opinion, this is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J., which does not look very different from the general civil standard of probability, better reflects how both the common law and the civil law view and deal with contingent claims. On the basis of the test Deschamps J. proposes, I must agree with the Chief Justice and would allow the appeal.

100 First, no matter how I read the *CCAA* court's judgment (2010 QCCS 1261, 68 C.B.R. (5th) 1), I find no support for a conclusion that it is consistent with the principle that the *CCAA* does not

apply to purely regulatory obligations, or that the court had evidence that would satisfy the test of "sufficient certainty" that the province of Newfoundland and Labrador (the "Province") would perform the remedial work itself.

101 In my view, the *CCAA* court was concerned that the arrangement would fail if the Abitibi respondents ("Abitibi") were not released from their regulatory obligations in respect of pollution. The *CCAA* court wanted to eliminate the uncertainty that would have clouded the reorganized corporations' future. Moreover, its decision appears to have been driven by an opinion that the Province had acted in bad faith in its dealings with Abitibi both during and after the termination of its operations in the Province. I agree with the Chief Justice that there is no evidence that the Province intends to perform the remedial work itself. In the absence of any other evidence, an off-hand comment made in the legislature by a member of the government hardly satisfies the "sufficient certainty" test. Even if the evidentiary test proposed by my colleague Deschamps J. is applied, this Court can legitimately disregard the *CCAA* court's finding as the Chief Justice proposes, since it did not rest on a sufficient factual foundation.

102 For these reasons, I would concur with the disposition proposed by the Chief Justice.

Appeal dismissed with costs, MCLACHLIN C.J. *and* LEBEL J. *dissenting.*

Solicitors:

Solicitors for the appellant: WeirFoulds, Toronto; Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the respondents AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc.: Stikeman Elliott, Toronto.

Solicitors for the respondent the Ad Hoc Committee of Bondholders: Goodmans, Toronto.

Solicitors 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): Borden Ladner Gervais, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the interveners the Attorney General of British Columbia and Her Majesty The Queen in Right of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener Ernst & Young Inc., as Monitor: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Friends of the Earth Canada: Ecojustice, University of Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.

Case Name:

Terrace Bay Pulp Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, as amended
RE: IN THE MATTER OF a Plan of Compromise or Arrangement of Terrace Bay Pulp Inc., Applicant

[2013] O.J. No. 3703

2013 ONSC 5111

Court File No. CV-12-9566-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: May 15 and June 5, 2013.
Judgment: August 9, 2013.

(47 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Of concurrent proceedings -- Motion by Terrace Bay Pulp Inc. to stay the proceedings against the applicant for alleged violations of the Occupational Health and Safety Act dismissed -- Applicant had obtained protection from its creditors under Companies' Creditors Arrangement Act -- It had not yet been determined that Occupational Health proceedings could result in financial penalty being imposed against applicant since no finding of guilt had yet been made -- It was also open to applicant not to incur defence costs by not defending the Occupational Health proceedings.

Motion by Terrace Bay Pulp Inc. to stay the proceedings against the applicant for alleged violations of the Occupational Health and Safety Act. The applicant had obtained protection from its creditors under the Companies' Creditors Arrangement Act in 2012 and previously in 2009. The applicant was insolvent. It commenced the current CCAA Proceeding in order to conduct a marketing and sales process for its business and non-business assets. It sold its operating assets relating to its pulp mill to a third party. The proceedings under the Occupational Health and Safety Act resulted from two incidents that occurred in 2011 in which several employees were injured and one employee was killed. The applicant argued that any fine ordered upon a conviction of Terrace Bay in either of the

Occupational Health proceedings would be a financial obligation of Terrace Bay and the Ministry would be an unsecured creditor in respect of such amounts, and its claim would be subject to the payment of prior claims. The applicant also argued that the costs and expenses, including legal expenses that would be incurred by Terrace Bay in defending the Occupational Health proceedings would be significant and would be borne wholly by the creditors in the form of diminished proceeds available for distribution.

HELD: Motion dismissed. It had not yet been determined that the Occupational Health proceedings could result in a financial penalty being imposed as against Terrace Bay since no finding of guilt had yet been made. At this stage, the Occupational Health proceedings did not force or require the applicant to expend any funds or resources. The applicant could either choose to incur a financial obligation by defending the proceedings or not to incur a financial obligation by not defending.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.02(2), s. 11.1(1), s. 11.1(2), s. 11.1(3), s. 11.1(4)

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 66(2)

Counsel:

Kristina Desimini and Michael McGraw, for Terrace Bay Pulp Inc.

Sheryl Seigel, for Ernst & Young Inc., Monitor.

Ronald Carr, Lisa Brost and Michael Dunn for, Her Majesty The Queen in Right of Ontario as Represented by the Ministry of Labour.

Jonathan Edge (student-at-law), for the Township of Terrace Bay.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- Terrace Bay Pulp Inc. ("Terrace Bay" or the "Applicant") brought this motion for an order declaring that the proceeding known as *R. v. Terrace Bay Pulp Inc. and Gino LeBlanc*, brought by the Ministry of Labour (the "Ministry") against the Applicant, (the "First OHSA Proceeding"), and the proceeding known as *R. v. Terrace Bay Pulp Inc., Venschore Mechanical Ltd., Joseph Mykietyn, Arthur Szczepaniak and Alain Zborowski*, brought by the Ministry against the Applicant, (the "Second OHSA Proceeding", and together with the First OHSA Proceeding, the "OHSA Proceedings"), in connection with alleged violations under the *Occupational Health and Safety Act (Ontario)* (the "OHSA"), are stayed.

2 Terrace Bay obtained protection from its creditors under the *Companies' Creditors Arrangement Act* ("CCAA") on January 25, 2012. On that date, an order (the "Initial Order") was granted and Ernst & Young Inc. was appointed as Monitor.

3 These CCAA proceedings are hereinafter referred to as the "Current CCAA Proceeding".

4 Previously, by order granted March 11, 2009, Terrace Bay filed for and obtained protection under the CCAA, (the "First CCAA Proceeding"), [2009] O.J. No. 1170.

5 On September 15, 2010, Terrace Bay implemented a Plan of Compromise in the First CCAA Proceeding (the "Plan"). The Plan contemplated the issuance of a promissory note (the "Plan Note") for the benefit of holders of proven unsecured claims in the First CCAA Proceeding (collectively, the "Plan Note Beneficiaries").

6 The Plan Note Beneficiaries shared *pari passu* in the Plan Note, which is secured against all assets and property of Terrace Bay (the "Property").

7 On January 10, 2012, the First OHSA Proceeding was commenced, in connection with alleged violations under the OHSA. The First OHSA Proceeding has been discontinued as against all defendants other than Terrace Bay and Gino LeBlanc.

8 On October 15, 2012, the Second OHSA Proceeding was commenced, in connection with further alleged violations of the OHSA.

9 Terrace Bay is insolvent. It commenced the Current CCAA Proceeding in order to conduct a marketing and sales process for its business and non-business assets. In July 2012, Terrace Bay sold its operating assets relating to its pulp mill (the "Mill") to a third party. As a result of the sale, Terrace Bay no longer operates the Mill or any other business and all of its former employees to the extent not assumed by the purchaser, have been terminated.

10 Terrace Bay is currently evaluating Letters of Intent received with respect to its non-business assets. It has obtained a stay of proceedings in the Current CCAA Proceeding until October 31, 2013.

11 The incidents giving rise to the OHSA Proceedings occurred prior to the commencement of the Current CCAA Proceeding.

12 The First OHSA Proceeding was commenced in response to an incident which occurred on January 13, 2011. A Terrace Bay employee was injured while working in the wood-handling department of the Mill. Terrace Bay was charged with various offences under the OHSA, including the offence of failing, as an employer, to ensure that the prescribed measures and procedures were carried out in the Mill.

13 The Second OHSA Proceeding was commenced in response to a blow-tank explosion which blew part of the roof off the Mill on October 31, 2011 (the "October 31 Incident"). The October 31 Incident resulted in the death of a Mill employee. Two other individuals employed by a contractor sustained injuries. Charges were laid against Terrace Bay, Venschore Mechanical Ltd. (a contractor engaged by Terrace Bay) and three supervisors employed by Terrace Bay. Terrace Bay was charged with, among other things, failure to provide adequate instructions to employees.

14 Terrace Bay's limited operating expenses are funded from cash on hand in connection with cash flow projections which have been approved by the court (the "Approved Expenses").

15 Expenses related to the defence of OHSA Proceedings are not included in the Approved Expenses. The balance of Terrace Bay's assets after payment of operating expenses, is held for the benefit of Terrace Bay's creditors and are subject to distribution only upon further order of the court.

16 The issues on this motion are as follows:

(a) Are the OHSA Proceedings stayed by the Initial Order?
(b) In light of the position of the Ministry that the OHSA Proceedings are not stayed pursuant to the Initial Order, should the OHSA Proceedings be stayed pursuant to section 11.1(4) of the CCAA?
(c) Is there a conflict between the CCAA and the statutory requirements to which Terrace Bay is subject pursuant to the OHSA.

17 Pursuant to Section 11.02(2) of the CCAA, a broad stay of proceedings was granted, which is reflected at paragraphs 10 and 11 of the Initial Order.

18 Section 11.1(1) of the CCAA defines a "regulatory body". It is acknowledged that the Ministry, in this case, is a "regulatory body" for the purposes of Section 11.1, as it is responsible for administering the OHSA.

19 Section 11.1(2), (3) and (4) of the CCAA read:

(2) Regulatory bodies - order under section 11.02 - 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.

(3) Exception - On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
(b) it is not contrary to the public interest of the regulatory body be affected by the order made under section 11.02.

(4) Declaration - enforcement of a payment - If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

20 The Applicant takes the position that the only remedy available to the Ministry in the event of a conviction of Terrace Bay in both of the OHSA Proceedings is monetary. Section 66(2) of the OHSA provides that the maximum fine that may be imposed upon a corporation is $500,000 (plus any applicable victim fine surcharge). Terrace Bay takes the position that any fine ordered upon a conviction of Terrace Bay in either of the OHSA Proceedings would be a financial obligation of Terrace Bay and the Ministry would be an unsecured creditor in respect of such amounts, and its claim would be subject to the payment of prior claims.

21 Further, the costs and expenses, including legal expenses, that would be incurred by Terrace Bay in defending the OHSA Proceedings would be significant and would be borne wholly by Terrace Bay's creditors, in the form of diminished proceeds available for distribution by Terrace Bay. Terrace Bay takes the position that in light of its insolvency in the Current CCAA Proceeding, it

must consider the interests of these stakeholders in determining whether to defend the OHSA Proceedings.

22 Terrace Bay further submits that the Ministry has exercised its enforcement power by commencing the OHSA Proceedings, requiring Terrace Bay to incur a financial obligation in order to defend itself in the OHSA Proceedings. The only remedy, counsel submits, available to the Ministry against Terrace Bay, should it be successful in prosecuting Terrace Bay, is a monetary fine. As such, the Ministry is enforcing its right to the creditor Terrace of Bay. Counsel submits that such a claim falls to be administered as a claim against Terrace Bay in the Current CCAA Proceeding and should be stayed.

23 Terrace Bay submits that the stay of proceedings provided for in paragraphs 10 and 11 of the Initial Order should be effective to impose such stay. Alternatively, Terrace Bay seeks a declaration pursuant to Section 11.1(4) of the CCAA that the Ministry is seeking to enforce its rights as a creditor and that the enforcement of such right be stayed.

24 In response, the Ministry submits that Terrace Bay has fundamentally misunderstood the purpose of a regulatory prosecution in that prosecutions are not brought to collect money; they are commenced where there is sufficient evidence of a contravention and where it is in the public interest to proceed.

25 Further, the Ministry points out that Terrace Bay has not moved for an order under Section 11.1(3) of the CCAA, submitting that Terrace Bay could not meet the test. Section 11.1(3) permits a regulatory proceeding to be stayed where the debtor company can prove that a viable compromise or arrangement could not be made and is not contrary to the public interest.

26 Instead, counsel to the Ministry submits that Terrace Bay purports to rely on section 11.1(4) of the CCAA which allows a court to stay regulatory proceedings only where the regulatory body is found to be seeking to enforce its rights as a creditor. In doing so, the Ministry submits that Terrace Bay has improperly applied the Supreme Court's recent decision in *Newfoundland and Labrador v. AbitibiBowater Inc.,* 2012 SCC 67 ("Abitibi").

27 The Ministry takes the position that the OHSA Proceedings do not involve the enforcement of creditor rights, stating that in this case the Ministry is not acting as a creditor with a claim to enforce. Rather, it is acting solely in its capacity as regulator.

28 The Ministry takes the position that the OHSA Proceedings fall directly within the scope of 11.1(2).

29 In Abitibi, the Province of Newfoundland and Labrador (the "Province") issued various orders against a CCAA debtor pursuant to a provincial environmental legislation. The Province then brought a motion for an order that it was not barred from enforcing its orders against the debtor.

30 The Supreme Court of Canada set out the following three requirements for determining when an order of a regulator should be seen as a "claim" within the meaning of the CCAA:

(a) there must be a debt, liability or obligation to a creditor;
(b) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and
(c) it must be possible to attach a monetary value to the debt, liability or obligation.

31 The Applicant takes the position that the three requirements set out in Abitibi are satisfied. With respect to the first requirement, counsel to the Applicant submits that the Supreme Court of Canada in Abitibi held that the only relevant determination is whether the regulatory body has exercised its enforcement power against the debtor.

32 In this case, counsel submits that the Ministry has exercised its enforcement power against Terrace Bay by commencing the OHSA Proceedings, requiring Terrace Bay to incur a financial obligation in order to defend itself in the OHSA Proceedings.

33 In response, the Ministry takes the position that a monetary liability or obligation would arise only if, and when, a court makes a finding of guilt, and enters a conviction and imposes a fine as a sentence in the OHSA Proceeding. Further, counsel submits that it is not possible to attach a monetary value to Terrace Bay's liability. In order to crystallize the obligation, a number of steps must be taken. A court must make a finding of guilt, enter a conviction and impose a fine. Further, in a regulatory prosecution, under the *Provincial Offences Act*, it is open to a court to impose a non-monetary penalty i.e., the court may suspend the passing of sentence and require the defendant to comply with terms of a probation order. Counsel submits that on the record, it is not sufficiently certain that a monetary penalty will ultimately be imposed against Terrace Bay.

34 In support of its position, the Applicant relies upon Nortel Networks Corporation (Re), 2012 ONSC 1213 and Northstar Aerospace (Re), 2012 ONSC 4423. Appeals of both decisions were argued concurrently at the Court of Appeal for Ontario and the decision is currently under reserve.

35 In Nortel, one of the points considered was whether the actions of the Ministry of the Environment ("MOE") required Nortel to respond in a way that caused Nortel to incur a financial obligation. A similar issue arose in Northstar. I held in both cases, that the actions of the MOE would require the debtor to incur a financial obligation.

36 In my view, the issue in this case is different. It seems to me that, the OHSA Proceedings do not, at this stage, require Terrace Bay to respond in a way that causes it to incur a financial obligation.

37 There are two potential financial obligations that have to be considered. The first is whether OHSA Proceedings could result in a financial penalty being imposed as against Terrace Bay. This has not yet been determined. This situation is to be contrasted with Nortel and Northstar, where, in response to actions taken by the MOE, the debtors, both Nortel and Northstar, would be required to expend resources in response to the actions taken by the MOE. In this case, there is another step to be taken, i.e., there would have to be a finding of guilt before any penalty could be imposed.

38 The second type of financial obligation is the expenditure of resources to defend its actions. I do not doubt that if Terrace Bay makes a decision to defend the action, it will incur a financial obligation. However, it does, in this case, have a choice. It can choose to either defend or not to defend the OHSA Proceedings. That is not to suggest that the choice is an enviable one. Clearly it is not. However, the fact remains that Terrace Bay can either choose to incur a financial obligation, by defending, or not to incur a financial obligation, by not defending. In this respect, the Nortel and Northstar decisions are distinguishable.

39 At this stage, the OHSA Proceedings do not force or require Terrace Bay to expend any funds or resources. Terrace Bay is not being asked to respond to any orders issued by the Ministry.

Further, any time and resources that Terrace Bay expends in relation to the OHSA Proceedings, are at its sole discretion.

40 At this stage, it seems to me that the Ministry cannot be considered to be acting as a creditor with respect to the OHSA Proceedings. Its activities, at this stage, are regulatory or prosecutorial in nature.

41 As a result, I have concluded that the first part of the Abitibi test has not been met.

42 Having reached this conclusion, it is unnecessary to address the second and third part of the Abitibi test.

43 Terrace Bay also served a notice of constitutional question, in which it argues that the OHSA Proceedings are barred by virtue of the doctrine of federal paramountcy.

44 The doctrine of paramountcy arises only where there is a conflict between valid federal and provincial legislation, either because compliance of both laws is impossible (impossibility of dual compliance) or because compliance with the provincial law would frustrate the purposes of the federal law.

45 I have concluded that the Crown is not, at this stage, seeking to enforce its rights as a creditor, through the OHSA Proceedings. Thus, it seems to me that there is no conflict between 11.1(4) of the CCAA and the OHSA Proceeding and there is no merit to the submissions put forth by Terrace Bay on this issue.

46 In the result, the motion of Terrace Bay for an order declaring that the OHSA Proceedings are stayed is dismissed.

47 The parties are encouraged to resolve the issue of costs, but failing such agreement, brief written submissions to a maximum of 3 pages, may be filed within 30 days.

G.B. MORAWETZ J.

cp/e/qlcct/qlrdp/qlbdp

Indexed as:

Pharmascience Inc. v. Binet

Jocelyn Binet, Appellant;
v.
Pharmascience Inc. and Morris S. Goodman, Respondents.
And between
Attorney General of Quebec, Appellant;
v.
Pharmascience Inc. and Morris S. Goodman, Respondents.

[2006] 2 S.C.R. 513

[2006] 2 R.C.S. 513

[2006] S.C.J. No. 48

2006 SCC 48

File No.: 30995.

Supreme Court of Canada

Heard: May 9, 2006;
Judgment: October 26, 2006.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

(86 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Catchwords:

Law of professions -- Ethics -- Syndic's powers of investigation -- Injunction -- Syndic of Ordre des pharmaciens requiring manufacturer of generic drugs to provide him with any documents indicating that rebates, discounts or other benefits had been granted to pharmacists -- Whether power of inquiry provided for in s. 122 of Professional Code authorizes syndic of professional order to re-

quest information from persons who are not members of that order -- Whether, where third party refuses to provide requested information, syndic may seek injunction pursuant to Code of Civil Procedure -- Professional Code, R.S.Q., c. C-26, ss. 2, 122, 191 -- Code of Civil Procedure, R.S.Q., c. C-25, art. 751.

Summary:

In 2003, the Quebec media reported that a large number of pharmacists had received rebates, discounts and other financial benefits from generic drug manufacturers in exchange for orders for drugs, a practice that is prohibited by the *Code of ethics of pharmacists*. [page514] Based on information from proceedings instituted by the Régie de l'assurance maladie du Québec against the manufacturers in question, the syndic of the Ordre des pharmaciens began an inquiry. To aid in this inquiry, the syndic asked a generic drug manufacturer to provide him with any documents indicating that rebates, discounts or other benefits had been granted to pharmacists. Despite repeated requests from the syndic, the manufacturer refused to forward the documents and filed a motion for a declaratory judgment to have the requests for documents declared null and illegal. In a cross demand, the syndic sought a permanent injunction to compel the manufacturer to deliver the documents to him. The Superior Court issued the injunction provided for in art. 751 of the *Code of Civil Procedure*. The Court of Appeal reversed that decision and ordered the syndic to return the documents he had received.

Held (Fish and Abella JJ. dissenting): The appeal should be allowed and the injunction restored.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Charron and Rothstein JJ.: A grammatical analysis of the statutory provision together with a review of the relevant contextual aspects, such as the purpose of the statute and of the provision in issue, confirms that the legislature intended to subject third parties to the syndic's power of inquiry under s. 122 of the *Professional Code*. The ordinary meaning of the pronoun "*on*" used in the French version of that section favours the argument that the obligation to co-operate applies to everyone. Furthermore, s. 2, which states the general principle that the Code applies to all professions, does not limit the effect of statutes governing professionals to members of the orders concerned. Such a limit would fail to take sufficient account of the public protection objective of the *Professional Code*, which cannot be attained unless certain provisions of the Code apply to or affect third parties. The privilege of professional self-regulation places the individuals responsible for enforcing professional discipline under an onerous obligation. Since the delegation of powers by the state comes with the responsibility for providing adequate protection for the public, it should be expected in this context that individuals with not only the power, but also the duty, to inquire into a professional's conduct will have sufficiently effective means at their disposal to gather all information relevant to determining whether a complaint should be lodged. The offence of which the pharmacists in the case at bar are accused is committed when a benefit is received from a third party. Logically, an inquiry into the commission of the offence in question must therefore extend to third parties. The [page515] fact that a professional order's committee on discipline has powers of investigation does not in any way indicate that the means available to a syndic in conducting his or her own prior inquiry must be interpreted narrowly. These two authorities play different, but complementary, roles. It is in everyone's interest to ensure that a syndic who files a disciplinary complaint has detailed knowledge of the accusations against the professional and that the evidence at the syndic's disposal is complete. [paras. 29-39] [para. 42]

The words used in s. 122 circumscribe the syndic's power. The section expressly provides that the information upon which the syndic relies to require the disclosure of information or documents must raise a suspicion that an offence has been committed. However, at this stage, the syndic need not be in a position to identify exactly which professionals are under suspicion. The individualized process provided for in the *Professional Code* is the lodging of a complaint with the committee on discipline. The syndic's inquiry precedes this process and is aimed at determining whether a complaint should be lodged. In the instant case, the syndic had reliable information from a government authority and from legal proceedings. He was relying on facts that established a reasonable basis for his inquiry. The scope of the inquiry does not make it a random one. The syndic's inquiry concerns allegations of clear breaches of the *Code of ethics of pharmacists*. The syndic has not only the jurisdiction but also the duty to intervene to protect the public. The mere fact that the purpose of the inquiry is to identify the offenders as opposed to determining the specific circumstances of the offence, which would be a more typical situation, is not determinative. [para. 43] [para. 45] [para. 47]

The Superior Court exercised its discretion properly in granting the injunction provided for in art. 751 of the *Code of Civil Procedure*. In Quebec procedural law, the existence of a specific remedy under a special statute does not close the door on the general law injunction, especially where the public interest requires one. It is the Superior Court judge who must consider the impact of the specific remedy provided for in another statute. The existence of that remedy is one element of the set of circumstances the judge will have to weigh in deciding whether the requested order is warranted. Thus, the existence of a specific sanction under a special statute does not preclude a general law injunction where the circumstances require one. In the circumstances that gave rise to the dispute in the case at bar, the injunction provided for in s. 191 of the *Professional Code* to prevent the repeated commission of penal offences would [page516] not have been an appropriate and effective remedy. The case before the syndic was not, strictly speaking, one of repeated violations, and no penal prosecution had been instituted. Moreover, such proceedings could not have been commenced without prior authorization from the Attorney General, as a syndic cannot act alone. A timely and effective remedy to the failure to co-operate with the syndic's inquiry was needed to allow the syndic and the Ordre des pharmaciens to fulfil their obligation of diligence in disciplinary matters. Moreover, in an analysis of serious harm resulting from an offence under the *Professional Code*, the fact that this statute is a law of public order must be taken into account. When the public interest is at stake, a proliferation of court challenges may make a general law injunction necessary. In light of the evidence of the syndic's difficulties in obtaining essential documents for his inquiry and given the manufacturer's refusals and court challenges, the trial judge properly found, in exercising his discretion, that those refusals and that conduct were intended to paralyse the inquiry. The Court of Appeal was not justified in questioning that finding. [para. 57] [para. 60] [paras. 63-67]

Per Fish and Abella JJ. (dissenting): In circumstances where s. 122 of the *Professional Code* applies, the syndic can obtain information and documents from third parties. This section , however, does not confer a general investigatory power, which is reserved to the Inspection Committee of the Bureau. A syndic is confined by s. 122 to requesting information only in relation to allegations that a particular professional or group of professionals have breached the Code. The scope of investigations is clearly limited by the individualized nature of disciplinary hearings. This individual disciplinary investigation is in contrast to the wider powers of the Bureau's Inspection Committee which has responsibility for overseeing the entire profession and for investigating matters affecting it. In this case, the syndic launched an investigation to try to identify members who had committed an infraction. Binet had no information regarding any specific, identifiable pharmacists. What he had

was general information, obtained from as yet unconcluded legal proceedings against generic pharmaceutical companies, that unnamed pharmacists had been receiving kickbacks. The syndic did not have the information necessary to trigger his power of investigation under s. 122. [72-73] [76] [78] [80-81]

An injunction cannot be issued in these circumstances in the absence of the consent of the Attorney General. The enforcement mechanism envisioned in [page517] the *Professional Code* is found in the interplay of ss. 114, 122, 188 and 191. Although art. 751 of the *Code of Civil Procedure* provides the Superior Court with broad powers to order injunctions, these powers yield to the particular procedures in the *Professional Code*, which exhaustively defines the remedies available when it is violated. Even assuming that the request for an injunction was not premature, it is clear from s. 191 that Binet was not permitted to ask the court for an injunction as the Attorney General neither authorized nor requested it. [para. 82] [paras. 84-85]

Cases Cited

By LeBel J.

Distinguished: *Beaulne v. Kavanagh-Lemire*, [1989] R.J.Q. 2343; *James Richardson & Sons Ltd. v. Minister of National Revenue*, [1984] 1 S.C.R. 614; *City of Montreal v. Morgan* (1920), 60 S.C.R. 393; **approved:** *Coutu v. Ordre des pharmaciens du Québec*, [1984] R.D.J. 298; *Ordre des optométristes du Québec v. Vision Directe Inc.*, [1985] C.S. 116; **referred to:** *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, 2004 SCC 36; *Khalil v. Corporation professionnelle des opticiens d'ordonnances*, [1991] D.D.C.P. 316; *Delisle v. Corporation professionnelle des arpenteurs-géomètres*, [1991] D.D.C.P. 190; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *Glykis v. Hydro-Québec*, [2004] 3 S.C.R. 285, 2004 SCC 60; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425, 2005 SCC 70; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62; *Ordre des comptables généraux licenciés du Québec v. Québec (Procureur général)*, [2004] R.J.Q. 1164; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Fortin v. Chrétien*, [2001] 2 S.C.R. 500, 2001 SCC 45; *Parizeau v. Barreau du Québec*, [1997] R.J.Q. 1701; *Atkinson v. Newcastle Waterworks Co.*, [1874-80] All E.R. Rep. 757; *Couch v. Steel* (1854), 3 El. & Bl. 402, 118 E.R. 1193; *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387; *Deveault v. Centre Vu Lebel & Des Roches Inc.*, Sup. Ct. Montreal, No. 500-05-003478-854, May 24, 1985; *Ordre des optométristes du Québec v. United States Shoe Corp.*, SOQUIJ AZ-89021102; *Barreau du Québec v. Descôteaux*, SOQUIJ AZ-95021889; *Ordre des pharmaciens du [page518] Québec v. Meditrust Pharmacy Services Inc.*, [1994] R.J.Q. 2833.

By Abella J. (dissenting)

James Richardson & Sons Ltd. v. Minister of National Revenue, [1984] 1 S.C.R. 614; *Beaulne v. Kavanagh-Lemire*, [1989] R.J.Q. 2343.

Statutes and Regulations Cited

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Act respecting the Barreau du Québec, R.S.Q., c. B-1.

Canadian Charter of Rights and Freedoms, s. 8.

Code of Civil Procedure, R.S.Q., c. C-25, art. 751.

Code of ethics of pharmacists, R.R.Q. 1981, c. P-10, r. 5, s. 3.05.06.

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Optometry Act, R.S.Q., c. O-7 .

Pharmacy Act, R.S.Q., c. P-10, s. 3.

Professional Code, R.S.Q., c. C-26, ss. 2, 23, 26, 27, 112 to 114, 116, 122, 123, 144, 146, 147, 156, 188, 188.1 to 189, 191.

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History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Brossard, Nuss and Morissette JJ.A.), [2005] R.J.Q. 1352, [2005] Q.J. No. 4696 (QL), [page519] 2005 QCCA 427, reversing a decision of Déziel J., [2005] R.J.Q. 90, [2004] Q.J. No. 11246 (QL). Appeal allowed, Fish and Abella JJ. dissenting.

Counsel:

Philippe Frère, Odette Jobin-Laberge and *Josiane L'Heureux*, for the appellant Jocelyn Binet.

Benoît Belleau and *Pierre Arguin*, for the appellant the Attorney General of Quebec.

Guy Du Pont, Marc-André Boutin, Mathieu Bouchard and *Jean-Philippe Groleau*, for the respondents Pharmascience Inc. and Morris S. Goodman.

English version of the judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Charron and Rothstein JJ. delivered by

LeBEL J.:--

I. Introduction

1 This appeal concerns the validity of an order of injunction issued by the Quebec Superior Court. The order directed the respondent Pharmascience Inc. ("Pharmascience"), a generic drug manufacturer, to provide the appellant Binet, syndic of the Ordre des pharmaciens du Québec ("Order"), with information regarding allegations of unlawful rebates and benefits provided to pharmacy owners. In my respectful view, the appeal must be allowed. The Superior Court was correct to grant the injunction, and the appellant is entitled to the information requested pursuant to s. 122 of the *Professional Code*, R.S.Q., c. C-26 ("*Prof. C.*" or "Code").

II. Origin of the Case

2 The case at bar arose in 2003, when a scandal involving a large number of Quebec pharmacy owners received extensive coverage in the Quebec media. It was alleged that the owners had unlawfully received rebates, discounts and other financial benefits from generic drug manufacturers in exchange for orders for drugs. The case concerns an inquiry process that could lead to disciplinary [page520] complaints against pharmacists for having accepted such discounts. In parallel, the Régie de l'assurance maladie du Québec ("RAMQ") has instituted civil proceedings against certain manufacturers.

3 In order to better understand the stratagem that was used, according to the RAMQ, it is important to briefly review the drug insurance plan in effect in Quebec. Under the plan, registered individuals pay only part of the cost of certain prescription medications. The remainder of the sale price is covered by the RAMQ, which pays the pharmacists directly. The medications the cost of which is covered in part by the RAMQ are found on a list drawn up by the Minister (s. 60 of the *Act respecting prescription drug insurance*, R.S.Q., c. A-29.01). Each medication on the list must be provided at a "guaranteed" selling price established by the manufacturer in accordance with certain conditions.

4 According to the allegations made in the proceedings instituted by the RAMQ, the manufacturers recovered the cost of kickbacks given to pharmacy owners by inflating the guaranteed selling price of their generic drugs. The same medication could thus cost 40 percent more on average in Quebec than elsewhere in Canada. However, according to the undertaking manufacturers are required to give the RAMQ, the guaranteed selling price "must not be higher than any selling price granted by the manufacturer for the same drug under other provincial drug insurance programs" (*Regulation respecting the conditions on which manufacturers and wholesalers of medications shall be recognized*, (1992) 124 G.O. II, 3264, Sch. I, s. 1(4)). In its undertaking, the manufacturer also agrees to comply with the requirement that "no property given without consideration and no reduction given in the form of a rebate, discount or premium may be granted to a buyer" (Sch. I, s. 2(5)).

The kickbacks allegedly represented between 28 and 50 percent of the cost of certain generic drugs purchased by the pharmacy owners. In other words, for every $100 purchase of generic drugs, [page521] a pharmacy owner could receive between $28 and $50 in discounts and benefits in various forms.

5 The RAMQ therefore brought actions in damages against certain manufacturers to recover the kickbacks that had allegedly been given to the pharmacists. It alleged that it had paid for these kickbacks indirectly by reimbursing pharmacy owners for generic drugs sold at inflated prices.

6 The *Code of ethics of pharmacists*, R.R.Q. 1981, c. P-10, r. 5 ("*Code of ethics*"), prohibits accepting "any benefit, allowance or commission" (s. 3.05.06). Upon reviewing the RAMQ's legal proceedings against certain manufacturers, the syndic of the Ordre des pharmaciens, Jocelyn Binet, noted that the Quebec pharmacy owners in question, who represented approximately one quarter of the Order's six thousand (6,000) registered pharmacists, may have received approximately $200,000,000 in rebates or other benefits between 2000 and 2003. The allegations in the RAMQ's lawsuit referred not only to payments for training given to pharmacists' employees and the delivery of pharmacy equipment, such as weekly pill organizers, but also to the provision of prepaid purchase cards, offers of free travel, payment of the cost of construction materials and renovation work, the leasing and purchase of vehicles, and the purchase and installation of swimming pools. The manufacturers were even alleged to have paid for houses either in part or in whole, and to have provided cash, gasoline vouchers, and interest-free loans. According to the allegations in the RAMQ's proceedings, Pharmascience's share of these illegal payments was in excess of $39,000,000.

7 On June 11, 2003, to aid in his investigation, Syndic Binet asked Pharmascience to provide him with any documents indicating that rebates, discounts or other benefits had been granted to pharmacists. His request was based on his powers under s. 122 *Prof. C.*:

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> **122.** The syndic and assistant syndics may, following an [*sic*] information to the effect that a professional is guilty of an offence contemplated in section 116 [offences against the *Professional Code*, the regulations made under it or the Act constituting the Order], inquire into the matter and require that they be provided with any information or document relating to such inquiry... .

8 Despite repeated requests from the syndic, Pharmascience refused to forward the documents. A few weeks later, the syndic contacted the respondent Goodman, a director of Pharmascience and a pharmacist entered on the roll of the Order, to obtain the information. Mr. Goodman, too, refused to disclose any documents whatsoever. A complaint against him was lodged with the Order's committee on discipline. In October 2003, Pharmascience and Mr. Goodman took the initiative of bringing a motion for a declaratory judgment to have the disclosure requests declared null and illegal. In a cross demand, the syndic sought a permanent injunction compelling Pharmascience to deliver the documents to him.

III. Judicial History

A. *Superior Court*, [2005] R.J.Q. 90

9 Déziel J. found that pharmacist Goodman was subject to the syndic's power of inquiry, even though he had not been a practising pharmacist for several years. On the issue of whether Mr. Goodman had violated his *Code of ethics*, the judge deferred to the committee on discipline, which would have to rule on the complaint lodged against him.

10 In Déziel J.'s view, the use of the pronoun "*on*" in the French version of s. 122 suggests that the legislature did not intend that only professionals should be obliged to provide the syndic with information. The objective of monitoring professions adequately is another factor in favour of a large and liberal interpretation. For Déziel J., the syndic's request was valid and in compliance with the power granted by the legislature under s. 122. The syndic had sufficiently specific information to make the request. Since he saw no ambiguity in s. 122 [page523] *Prof. C.*, Déziel J. did not think it necessary to refer to the values protected by the *Canadian Charter of Rights and Freedoms* to assess the validity of the syndic's information request. In any event, he considered that, because of the highly regulated nature of the sale of drugs, Pharmascience's expectation of privacy with regard to the documents requested by the syndic was significantly lower. Given the importance of the syndic's role in protecting the public, the alleged acts, which -- if the allegations were true -- were very costly to Quebec's public purse, the potential delay inherent in the disciplinary proceedings against Mr. Goodman, and the evidence demonstrating the existence of the requested documents and information, the judge concluded that the application for a permanent injunction met the criteria of art. 751 of the *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*").

B. *Quebec Court of Appeal (Brossard, Nuss and Morissette JJ.A.)*, [2005] R.J.Q. 1352, 2005 QCCA 427

11 The Quebec Court of Appeal allowed the appeal and ordered the syndic to return the documents he had received. It granted the application for a declaratory judgment and ruled that s. 122 *Prof. C.* could not be set up against Pharmascience or against Mr. Goodman in his capacity as an officer of that corporation. Accordingly, the court quashed the injunction order against Pharmascience.

12 Brossard J.A., writing for a unanimous Court of Appeal, stated that the use of the word "*on*" in the French version of s. 122 makes the provision ambiguous and that the provision must therefore be interpreted in accordance with s. 8 of the *Charter*. The court considered the syndic's power to be specific and limited: his investigation had to target *a* professional and had to be based on *information* that an offence had been committed. In the court's view, this interpretation was supported by Baudouin J.A.'s conclusion in *Beaulne v. Kavanagh-Lemire*, [1989] R.J.Q. 2343 (C.A.), that s. 122 *Prof. C.* did not authorize sending a questionnaire to a group of professionals for the purpose of discovering which of them had committed a specific act. According [page524] to the court, the rationale for applying the reasoning in *Beaulne* is even stronger when third parties are involved. Section 122 must be read in conjunction with s. 2 *Prof. C.*, which limits the scope of the syndic's powers to "professional orders and to their members".

13 Although he confirmed that the Superior Court had jurisdiction to issue the injunction, Brossard J.A. nevertheless found that the grounds on which the order was granted had not been established. For instance, according to the Court of Appeal, the fact that the syndic had not obtained the requested information had in no way affected the RAMQ's lawsuit and had accordingly had no impact on the public purse. Nor, since the injunction did not apply to Mr. Goodman, was there any

relevance in the fact that the disciplinary proceedings brought against him might be lengthy. The syndic thus had not shown that he would suffer real and permanent harm if the injunction were refused. According to the court, he could have waited for the information to be provided in the course of the legal proceedings or the disciplinary process already in progress.

C. *Appeal to This Court*

14 This Court granted leave to appeal in the case at bar for the purpose of determining whether s. 122 *Prof. C.* imposes on third parties an obligation to disclose information required by a syndic for an inquiry and, if so, whether the syndic can obtain an injunction under the general law to compel the disclosure of documents. The issue of the respondent Goodman's ethical responsibility in his capacity as a pharmacist is not before this Court and will ultimately, as the courts below have mentioned, be decided by the committee on discipline that hears the complaint against him. Nor is the constitutionality of s. 122 *Prof. C.* in issue.

IV. Analysis

A. *Issues*

15 The main issue raised by this appeal is thus whether s. 122 *Prof. C.* authorizes a syndic to [page525] request information from third parties and, if so, whether the circumstances of the case at bar meet the conditions for making such a request. It will then have to be determined whether, should a third party refuse, a syndic may seek an injunction pursuant to the Quebec *Code of Civil Procedure* to compel the third party to provide the requested information.

B. *Positions of the Parties*

1. Syndic and Attorney General

16 The appellants argue that the grammatical and ordinary sense of the French version of s. 122 *Prof. C.*, which states that "*[l]e syndic et les syndics adjoints peuvent ... exiger qu'on leur fournisse tout renseignement et tout document*" (the English version reads "[t]he syndic and assistant syndics may ... require that they be provided with any information or document"), clearly demonstrates the legislature's intention to have this provision apply to everyone, not just a defined group of individuals. Section 122 must also be interpreted in the context of the mechanisms established in the *Professional Code* to protect the public by monitoring the practice of the profession. In the appellants' view, *Beaulne* does not support a narrow interpretation of s. 122 *Prof. C.* In that case, the syndic of the Ordre des optométristes had no prior information that an offence had been committed. In the case at bar, on the other hand, Syndic Binet had extensive reliable information suggesting that pharmacists who owned pharmacies and were customers of Pharmascience had violated their *Code of ethics*. The appellants add that the Court of Appeal erred in invoking the values protected by s. 8 of the *Charter*. They see no ambiguity in the text that would justify resorting to the *Charter* and its values. The ordinary principles of interpretation are quite sufficient to decide the case. The appellants thus argue that the Superior Court was justified in granting the injunction requested by the syndic and add that the Court of Appeal should have deferred to the trial judge's findings of fact.

[page526]

2. Pharmascience

17 Pharmascience replies that s. 122 *Prof. C.* grants syndics a circumscribed and well-defined investigative role and that syndics must have personalized information before they may take action. In the case at bar, the syndic was not in a position to identify the pharmacists about whom he wanted to obtain information. He could not use s. 122 to identify members who may have violated the *Code of ethics*. That approach would amount to a fishing expedition, which is prohibited by s. 122 and the case law of this Court: *James Richardson & Sons Ltd. v. Minister of National Revenue*, [1984] 1 S.C.R. 614.

18 Pharmascience argues that the interpretation proposed by the appellants is overly literal in that it focuses unduly on the meaning of the French word "*on*". A contextual interpretation of the *Professional Code* leads to the conclusion that s. 122 applies only to members of professional orders. Moreover, s. 2 *Prof. C.* makes it clear that only professional orders and their members are subject to the Code. The scheme of the legislation also confirms the specific and limited nature of the power of inquiry of syndics. For example, should a professional refuse to respond to a syndic's order, a complaint may be lodged with the committee on discipline for hindering the syndic's inquiry. However, the *Professional Code* does not provide for any similar penalty for third parties who refuse to comply.

19 Even if it were assumed that third parties are obliged to disclose information under s. 122, Pharmascience submits that the only sanction contemplated by the *Professional Code* is the institution of penal proceedings for contravening the Code (s. 188). In this context, the Attorney General must act as prosecutor or, at the very least, authorize a prosecution (s. 191). Pharmascience contends that, when the legislature passes legislation to establish a framework for a public authority's powers, the public authority cannot ignore that legislative framework and rely instead on the general law.

[page527]

C. *Legislative Framework*

1. *Professional Code* as a General Framework for the Organization and Activities of Professional Orders in Quebec

20 In 1973, the Quebec legislature carried out a sweeping reform of the law of professions as it stood at that time in the province. The *Professional Code* was the cornerstone of the reform. It established a set of common rules applicable to professional orders that had up to then been governed only by their constituting legislation. The reform resulted from the work of a commission of inquiry, which found it astonishing

> that laws relating to professional bodies do not constitute a system but a disparate nomenclature of legislative documents which do not correspond to one another, relate to one another nor complement one another.

> (*Report of the Commission of Inquiry on Health and Social Welfare*, vol. VII, t. 1, *The Professions and Society* (1970), at para. 70)

As is clear from s. 2, the Code thus became the law of general application with regard to professions in Quebec. This general scheme is complemented or varied by special legislation governing each individual profession:

> **2.** Subject to the inconsistent provisions of a special Act, of the letters patent issued under section 27 or of an integration or amalgamation order made under section 27.2, this Code applies to all professional orders and to their members.

21 The Code creates two main classes of professions. On the one hand, it recognizes exclusive professions, in which the members of the relevant professional orders have the exclusive privilege to carry out certain acts: for example, only physicians may perform surgery. On the other hand, the Code also provides for professions with reserved titles, in which, although the use of certain titles, abbreviations or initials is restricted to members of the relevant orders, members are not given a monopoly over the practice of the profession (s. 27 *Prof. C.*). For example, people may offer translation [page528] services without being members of the Ordre des traducteurs, terminologues et interprètes agréés du Québec, but may not represent themselves to be professionals entered on the roll of that order or give third parties the impression that they are.

22 There are currently 45 professional orders in Quebec: 25 in exclusive professions and 20 in professions with reserved titles. Each exclusive profession is established by a statute (s. 26 *Prof. C.*): the *Pharmacy Act*, R.S.Q., c. P-10, is one such statute, and the *Act respecting the Barreau du Québec*, R.S.Q., c. B-1, and the *Optometry Act*, R.S.Q., c. O-7, are two other examples. Each of these statutes sets out the nature of the practice of the profession but also refers to the interrelationship between the scheme it establishes and the *Professional Code*. The *Pharmacy Act* is no exception:

> **3.** Subject to this act, the Order and its members shall be governed by the Professional Code.

23 At the time of the 1973 reform, every exclusive professional order then in existence thus had its constituting legislation amended or, in certain cases, adapted to take into account the general law represented by the *Professional Code*. The implementation of the Code as a framework law governing the organization and practice of all professions in Quebec was the product of a long process of consultations and discussions with stakeholders. As Claude Castonguay, the minister responsible for this legislative reform, noted at that time, the new legislation [TRANSLATION] "will provide ... the public with better protection by creating new [disciplinary] mechanisms" for professions (Assemblée nationale du Québec, *Journal des débats*, 4th Sess., 29th Leg., July 6, 1973, at p. 2270).

2. Organization of Discipline Under the *Professional Code*: Its Mechanisms and Stages, and the Distinction Between It and Professional Inspection

24 The *Professional Code* establishes a number of mechanisms to protect the public through the supervision of professional practice. As I recently noted [page529] for this Court in *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, 2004 SCC 36, to fully understand the nature of this system for supervising and monitoring professional practice, it is important to recall the distinction between

professional inspection, which is preventive in nature, and the disciplinary system, which plays a curative and punitive role (para. 18).

25 Each order must establish a professional inspection committee, which must in particular inspect the records, books and registers kept by professionals, and the equipment they use in practising the profession in question (s. 112). The committee or one of its members may also inquire into the competence of a professional. The *Professional Code* includes a prohibition against hindering a committee's inquiry:

> **114.** It is forbidden to hinder in any way a member of the committee, the person responsible for professional inspection appointed pursuant to section 90, an inspector, an investigator or an expert, in the performance of the duties conferred upon him by this Code, to mislead him by concealment or false declarations, [to] refuse to furnish him with any information or document relating to an inspection or inquiry carried out by him under this Code or to refuse to let him take copy of such a document.

26 On completing its inquiry, a committee may recommend to the Bureau of the order that it suspend a member's right to practise until he or she has completed a refresher course (s. 113). Where the committee has reasonable grounds to believe that a professional has committed an offence under s. 116 *Prof. C.*, that is, an offence against the Code, the order's constituting legislation or the regulations made under one of those statutes, it must inform the syndic (s. 112, para. 5).

27 The syndic plays a crucial role in the disciplinary system under the *Professional Code*. The syndic inquires into the conduct of a professional before a formal complaint is lodged with the committee on discipline. The syndic launches an inquiry on the basis of information that a professional is guilty of an offence contemplated in s. 116. This information may come from any of a variety of sources. As [page530] mentioned above, it may be provided to the syndic by the professional inspection committee. Another professional, a member of the public, or the Bureau of the order may also ask the syndic to hold an inquiry. Finally, syndics may act on their own initiative if, for example, they themselves observe situations that could give rise to disciplinary complaints; for instance, a syndic might see an advertisement made by a professional in violation of the rules relating to advertising (*Khalil v. Corporation professionnelle des opticiens d'ordonnances*, [1991] D.D.C.P. 316 (Prof. Trib.); *Delisle v. Corporation professionnelle des arpenteurs-géomètres*, [1991] D.D.C.P. 190 (Prof. Trib.), noted in S. Poirier, *La discipline professionnelle au Québec: principes législatifs, jurisprudentiels, et aspects pratiques* (1998), at p. 81). As in the case of an inquiry by a professional inspection committee, the legislature has imposed an obligation to co-operate with a syndic's inquiry in s. 122 *Prof. C.*, the interpretation of which is central to the instant case:

> **122.** The syndic and assistant syndics may, following an [*sic*] information to the effect that a professional is guilty of an offence contemplated in section 116, inquire into the matter and require that they be provided with any information or document relating to such inquiry... .
>
> Section 114 shall apply to every inquiry held under this section.

At the end of his or her inquiry, the syndic decides whether a complaint should be lodged with the committee on discipline (s. 123).

28 Section 116 *Prof. C.* gives each order's committee on discipline jurisdiction to sanction offences committed by professionals. These committees are quasi-judicial adjudicative bodies responsible for ruling on the merits of complaints in adversarial proceedings (s. 144). Like most bodies of this nature, they have the power to summon witnesses and to compel them to appear and answer (ss. 146 and 147). Section 156 of the Code sets out the penalties that may be imposed against a professional.

[page531]

D. *Interpretation of Section 122*

29 In my view, a grammatical analysis of the statutory provision together with a review of the relevant contextual aspects, such as the purpose of the statute and of the provision in issue, confirms that the legislature intended to subject third parties to the syndic's power of inquiry under s. 122 *Prof. C.* This contextual analysis resolves any ambiguity flowing from s. 122 without it being necessary to refer to *Charter* principles or values. This Court has consistently held that the courts may turn to *Charter* values to interpret the meaning of a statutory provision only if an ambiguity persists following a contextual analysis (*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74). In the case at bar, the Court of Appeal did not adhere to this interpretive approach when it referred to *Charter* values without trying to determine the meaning of the text in question by situating it in its context.

1. Effect of a Textual Interpretation

30 Although the weight to be given to the ordinary meaning of words varies enormously depending on their context, in the instant case, a textual interpretation supports a comprehensive analysis based on the purpose of the Act. Most often, "ordinary meaning" refers "to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context" (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 59). In *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735, Gonthier J. spoke of the "natural meaning which appears when the provision is simply read through".

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31 The ordinary and grammatical sense of the French version of s. 122, which provides that "*[l]e syndic et les syndics adjoints peuvent ... exiger qu'on leur fournisse tout renseignement et tout document*" favours the argument that the obligation to co-operate applies to everyone, not just to a defined and limited group of individuals, such as professionals belonging to a given order. Moreo-

ver, this is the meaning usually given to the French indefinite pronoun "*on*", which is defined as follows:

> [TRANSLATION] ***on*** Indef. pron. (lat. *homo*, man). [Always subject.] **1.** Designates an indeterminate person, group of persons; someone, people.
>
> (*Petit Larousse illustré* (2004) at p. 715; trial judgment, at paras. 82-83)

If there were any concern that the significance given to this common meaning might give disproportionate weight to the French version, contrary to the principles of interpretation of bilingual statutes, it should be noted that the ordinary sense of the English version of s. 122, which provides that "[t]he syndic and assistant syndics may ... require that they be provided with any information or document", is equally supportive of the appellants' position. In my view, the primary meaning of s. 122 leans more toward an interpretation according to which the obligation applies to third parties. As this Court recently noted, when the legislature intends to limit the scope of a statutory provision, it usually says so clearly: *Glykis v. Hydro-Québec*, [2004] 3 S.C.R. 285, 2004 SCC 60, at para. 13; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425, 2005 SCC 70, at para. 3. The legislature could have drafted s. 122 so as to restrict the obligation to provide information to the professional under investigation. It did not do so.

32 Nevertheless, it has to be admitted that textual interpretation has its limits. Before this Court, the parties submitted numerous definitions of the French word "*on*" taken from dictionaries, grammar books and other encyclopedic sources, and countless examples drawn from statutes in which the legislature used similar or different wordings [page533] to indicate the inclusion of all persons or of a specific group of individuals. That is why this Court now considers it important, even when a provision seems clear and conclusive, to nevertheless review the overall context of the provision: *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62, at para. 10.

2. Contextual Interpretation: Structure of the Act and Judicial Policy

33 As I noted above, the *Professional Code* is the statutory solution chosen by the Quebec legislature to protect the public by means of an appropriate framework for all professionals. Section 2 states this general principle by asserting that the "Code applies to all professional orders and to their members". Still, this provision cannot be transformed into a rule limiting the effect of statutes governing professionals to members of orders subject to the *Professional Code*. That is one of the errors the Court of Appeal committed in agreeing with one of Pharmascience's arguments and consequently concluding that s. 2 establishes the scope of application of the *Professional Code* and limits it to members of professional orders (para. 49). In the Court of Appeal's view, the presence of this section confirms that s. 122 does not apply to third parties.

34 That conclusion fails to take sufficient account of the public protection objective of the *Professional Code*, which cannot be attained unless certain provisions of the *Professional Code* apply to or affect third parties. For example, ss. 188.1 to 189 prohibit the unlawful practice of a profession by non-member third parties. And s. 188 provides for the imposition of a fine on *every person* who commits an offence. As its wording indicates, s. 2 is intended to establish the general nature of the Code, its status as a framework law for the practice of professions in Quebec, and the precedence of a professional order's special statute in the event of inconsistency. This is confirmed by the context

in which the Code was enacted, which I discussed above. Section 2 does not provide that the Code applies *only to* members of professional orders; [page534] rather, it confirms that the Code applies to *all* members of *every* professional order and establishes common rules governing operations and action in this area. This interpretation was accepted by the Quebec Court of Appeal in a recent decision: *Ordre des comptables généraux licenciés du Québec v. Québec (Procureur général)*, [2004] R.J.Q. 1164, at paras. 18-19.

35 According to the principles of interpretation, in the event of ambiguity, the interpretation most favourable to the purpose of the statute must prevail. Professor P.-A. Côté sums up this rule as follows:

> Undoubtedly the aim of an enactment is relevant in selecting the most suitable of a number of possible meanings, where the written expression is ambiguous.
>
> (*The Interpretation of Legislation in Canada* (3rd ed., 2000), at p. 392; see also Sullivan, at pp. 219-21.)

This principle is consistent with the *Interpretation Act*, R.S.Q., c. I-16, s. 41 of which states that a "provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit". That section's second paragraph adds that a "statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit". Section 122 must therefore be interpreted from the perspective of the protection of the public, which is recognized in s. 23 as the main objective of the *Professional Code*: "The principal function of each order shall be to ensure the protection of the public."

(a) *Importance of the Function of Professional Orders, Their Role in Protecting the Public Interest, and a Review of the Case Law*

36 This Court has on many occasions noted the crucial role that professional orders play in protecting [page535] the public interest. As McLachlin J. stated in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, "[i]t is difficult to overstate the importance in our society of the proper regulation of our learned professions" (p. 249). The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them. Also, it should not be forgotten that in the client-professional relationship, the client is often in a vulnerable position. The Court has already had occasion to address this point in respect of litigants who entrust their rights to lawyers (*Fortin v. Chrétien*, [2001] 2 S.C.R. 500, 2001 SCC 45, at para. 17). The general public's lack of knowledge of the pharmaceutical field and high level of dependence on the advice of competent professionals means that pharmacists are another profession in which the public places great trust. I have no hesitation in applying the comments I wrote for this Court in *Finney*, at para. 16, generally to the health field to emphasize the importance of the obligations imposed by the state on the professional orders that are responsible for overseeing the competence and honesty of their members:

> The primary objective of those orders is not to provide services to their members or represent their collective interests. They are created to protect the public, as s. 23 of the *Professional Code* makes clear... .

The privilege of professional self-regulation therefore places the individuals responsible for enforcing professional discipline under an onerous obligation. The delegation of powers by the state comes with the responsibility for providing adequate protection for the public. *Finney* confirms the importance of properly discharging this obligation and the seriousness of the consequences of failing to do so.

(b) *Need for a Flexible Interpretation of Their Supervisory Powers to Enable Them to Discharge Their Duties*

37 In this context, it should be expected that individuals with not only the power, but also the duty, to [page536] inquire into a professional's conduct will have sufficiently effective means at their disposal to gather all information relevant to determining whether a complaint should be lodged. As we have seen, the *Professional Code* confers the responsibility for conducting an inquiry and deciding whether to lodge a complaint with the committee on discipline on an independent official, the syndic. In *Parizeau v. Barreau du Québec*, [1997] R.J.Q. 1701 (Sup. Ct.), at p. 1708, Dalphond J., as he then was, gave a clear description of the essential role delegated by the legislature to the syndic:

> [TRANSLATION] The keystone of the monitoring of the profession is the syndic, who plays a dual role: that of an investigator with significant powers (s. 122 of the Code) and that of an informant or complainant before the committee on discipline (s. 128 of the Code).

38 The importance of this "dual role" must necessarily guide the interpretation of s. 122. The lodging of a complaint with the committee on discipline is a possible outcome of the syndic's inquiry. For the professional concerned, the mere fact that a complaint has been lodged can sometimes have a serious impact on his or her reputation and ability to practise. In order to conduct an effective investigation while bearing in mind and upholding the rights of everyone with an interest in the outcome, the syndic must be able to require relevant documents and information from anyone, not just from professionals as the Court of Appeal concluded. Obtaining information in the possession of third parties appears often to be essential to the effective conduct of a syndic's inquiry. Although only the professional accused of a violation of the *Code of ethics* might eventually be summoned before the committee on discipline, situations likely to give rise to disciplinary complaints will often involve third parties in one way or another.

39 The offence for which certain pharmacists are being investigated in the case at bar, that is, "receiv[ing] ... [a] benefit, allowance or commission" (s. 3.05.06 of the *Code of ethics*), is no exception. The benefit is received from another person. Logically, an inquiry into the commission of an offence would therefore have to extend to third [page537] parties. Other examples can be used to illustrate this. For instance, a syndic might need to obtain information from a nurse or orderly who witnessed certain events in order to determine whether a sexual harassment complaint should be lodged against a doctor. Also, a syndic's investigation might require access to information held by a bank or an accountant on a lawyer's improper use of a trust account.

(c) *Problems With Pharmascience's Interpretation*

40 Pharmascience submits that a broad interpretation of s. 122 and of the syndic's powers of investigation would make certain functions of the committee on discipline pointless. Its reasoning can be summed up as follows. Under ss. 146 and 147 *Prof. C.*, a committee on discipline can summon witnesses and compel them to appear and testify. It can also require the production of documents. According to Pharmascience, if the syndic is recognized as having the power to require documents from third persons in the course of an inquiry, [TRANSLATION] "the investigative role of the committee on discipline would duplicate the functions of a syndic".

41 In my view, this argument disregards the position of members of a professional order in the context of the application of s. 122 and in the course of a disciplinary proceeding, from the opening of the file by the syndic to the decision by the committee on discipline. These are a series of actions that the syndic and the committee on discipline may perform in discharging their duties relating to professionals. First, the syndic exercises powers of investigation in order to determine whether there is a basis for a complaint. If a complaint is lodged, the committee on discipline then holds hearings to consider the merits of the complaint. At each stage, an inquiry takes place, but within a different legal framework and for a different purpose.

42 From the standpoint of the fairness of the entire disciplinary proceeding and the protection of the rights and reputations of all concerned, it is [page538] difficult to see any advantage in Pharmascience's position that it should be possible to obtain documents or information from third parties only after a disciplinary complaint has been lodged with the committee on discipline. It seems far preferable, especially for the professional in question, to allow the syndic conducting the inquiry to have access to all the necessary information before an adversarial proceeding is set in motion before an administrative tribunal. In this regard, the fact that the committee on discipline has powers of investigation does not in any way indicate that the means available to a syndic in conducting his or her own inquiry must be interpreted narrowly. These two authorities play different, but complementary, roles: the quality of the evidence presented to the committee on discipline is largely dependent on the effectiveness of the syndic's inquiry. In this sense, the interpretation advocated by Pharmascience would encourage the lodging of hasty and even groundless complaints with the committee on discipline. It is in everyone's interest to ensure that a syndic who files a disciplinary complaint has detailed knowledge of the accusations against the professional and that the evidence at the syndic's disposal is complete. What is more, the requirements of procedural fairness set out in the statute include the obligation to disclose this evidence to the professional.

3. Conditions for Exercising the Power Under Section 122

43 The words used in s. 122 *Prof. C.* circumscribe the syndic's power: the syndic may require the disclosure of information or documents only "following an [*sic*] information to the effect that a professional is guilty of an offence". These words require sufficient cause for making the request and do not permit "fishing expeditions".

44 The Code does not specify the nature or the source of the information that may justify holding an inquiry. As a general rule, a member of the public will contact a professional order to complain about a professional. In making the receipt of "information" a precondition, however, the legislature contemplated the possibility of the likely commission of an offence being brought to a syndic's attention [page539] by other means. It would have been surprising if this were not the case, given the fact that the syndic may act on his or her own initiative. Thus, there is nothing to prevent a

syndic from personally taking cognizance, by reading newspapers or court pleadings, for example, of information that might give rise to an inquiry.

45 The information upon which a syndic relies must raise a suspicion that an offence has been committed. However, at this stage, the syndic need not be in a position to identify exactly which professionals are under suspicion. The individualized process provided for in the *Professional Code* is the lodging of a disciplinary complaint with the committee on discipline. The syndic's inquiry precedes this process and is aimed at determining whether a complaint should be lodged. Pharmascience contends that the syndic's inquiry in the case at bar is, because of its scope, similar to a commission of inquiry. Pharmascience submits that the professional inspection committee is responsible for monitoring the practice of the profession, while each order's Bureau is responsible for general oversight of compliance with legal, regulatory, and ethical standards. Pharmascience relies on *Beaulne*, a decision of the Quebec Court of Appeal, in support of the argument that the actions of Syndic Binet are incompatible with the role conferred on him by the Code. The Court of Appeal erred in finding that *Beaulne* applies to the instant case.

46 The legal situations and facts in the two cases can be clearly distinguished. In *Beaulne*, the syndic of the Ordre des optométristes, relying on s. 122, had indiscriminately sent a questionnaire to all members of that order to find out whether they were associated with dispensing opticians. The optometrists had to respond to the questionnaire or face penalties. The Court of Appeal found that the syndic had exceeded his powers in sending out this questionnaire, noting that it was not an offence for an optometrist to be associated with an optician:

> [TRANSLATION] These proceedings relate to a dispute within the optometry profession regarding two [page540] competing conceptions of the practice of the profession. There are those who feel that optometrists should remain independent, while others think, on the contrary, that it could be in an optometrist's interest to practise his or her profession jointly or in close collaboration with a dispensing optician. [p. 2344]

It was in this context that the Court of Appeal in *Beaulne* noted that the syndic's power of inquiry was not unlimited and that his actions in that case fell instead within the jurisdiction of the professional inspection committee responsible for monitoring the practice of the profession. On this point, the Court of Appeal wrote the following:

> [TRANSLATION] Section 122 of the *Professional Code, supra*, allows syndics to conduct inquiries only in specific circumstances and under certain conditions. The power the statute confers on them is not general and discretionary but, on the contrary, specific and limited. There must be *information* that a professional has committed an offence. In the case at bar, the syndic, through this questionnaire, is thus investigating all optometrists, without any prior information. Furthermore, nothing in the statute or the regulations prohibits optometrists from practising optometry in the same establishment or jointly with a dispensing optician. I am therefore of the view that the syndic did not have the power to conduct an inquiry as general as this while, in addition, ordering recipients to respond on pain of disciplinary penalties. I cannot (since this is a disciplinary matter in which the fundamental rights of a possible offender must there-

> fore be upheld) accept the argument that the legislature, despite the specific guidance regarding the syndic's mandate set out in section 122, also intended to give syndics unlimited powers to conduct inquiries on their own initiative, without any information, simply because their role generally consists in monitoring the practice of the profession and defending the public interest. [Emphasis added; p. 2346.]

47 In *Beaulne*, the syndic thus had no information on which to base a rational suspicion that an offence had been committed. The decision tells us nothing that is not already clear from s. 122, but merely confirms that prior information is necessary in order to initiate an inquiry. As for Syndic Binet, he had reliable information from a government authority and from legal proceedings. But there are two particular features of the case at bar that may have led the Court of Appeal to find that it could [page541] not be distinguished from *Beaulne*: (1) the syndic's inquiry concerns an exceptionally large number of professionals; and (2) the syndic does not know their names. However, these characteristics are not determinative. Although Syndic Binet is not yet able to name names, he does have information leading him to suspect that some pharmacists have committed offences; he even knows approximately how many are involved. He is relying on facts that establish a reasonable basis for his inquiry. The scope of the inquiry does not make it a random one. Far from relating to an ethical debate within the profession that would fall more within the jurisdiction of a professional inspection committee (as was the case in *Beaulne*), the syndic's inquiry concerns allegations of clear breaches of the *Code of ethics*. The syndic has not only the jurisdiction but also the duty to intervene to protect the public. The mere fact that the purpose of the inquiry is to identify the offenders as opposed to determining the specific circumstances of the offence, which would be a more typical situation, is not determinative. In fact, the very reason why the syndic has required that Pharmascience disclose certain documents is to be able to commence disciplinary proceedings.

48 For similar reasons, the principle stated by this Court in *Richardson* does not apply to the circumstances of the case at bar. In that case, the Court concluded, in interpreting a ministerial power under the *Income Tax Act*, S.C. 1970-71-72, c. 63, to require "any ... additional information" from any person, that the power could be used only in a serious inquiry into the tax liability of one or more specific persons. The power could not be used to conduct a "fishing expedition" (p. 625) with regard to a broker's customers who were not the subject of a genuine inquiry:

> If the tax liability of its customers or one or more of them were the subject of a genuine inquiry, then the Minister would clearly be entitled under s. 231(3) to single out the appellant even although innocent taxpayers' trading [page542] activities were disclosed in the process. But it cannot, in my opinion, be singled out otherwise. It cannot be compelled ... to provide [a] random sample ... . [pp. 625-26]

In the instant case, unlike in the process criticized in *Richardson*, Syndic Binet is not seeking information randomly. He is conducting a genuine and serious inquiry concerning pharmacists whom he has reasonable grounds to suspect of receiving discounts and other benefits. The inquiry concerns a group of specific persons, and Pharmascience was not selected at random.

4. Justification for Resorting to Section 122

49 Like Déziel J., I believe that the inquiry in the case at bar is not a fishing expedition and that Syndic Binet had a reasonable factual basis for opening it. In addition to the information drawn from figures advanced by the media and the Order, according to which 85 percent of Quebec pharmacy owners had received benefits or discounts, the syndic received personal correspondence from the director general of the RAMQ that provided him with reasonable grounds to believe that some pharmacists had breached their ethical obligations (affidavit of the syndic dated November 14, 2003, A.R., at pp. 253 *et seq.*).

50 In June 2003, the syndic therefore acted under s. 122, contacting Pharmascience, one of the generic drug manufacturers being sued by the RAMQ, to obtain accurate information about the goods or benefits each of its pharmacist customers had allegedly received or profited from. Pharmascience refused to disclose the information he was seeking. A few weeks later, the syndic sent pharmacist Morris Goodman, a director of Pharmascience, a request for the same information. He was acting on information that Mr. Goodman had been personally involved in setting up the rebate scheme. Mr. Goodman also refused to disclose any information. The syndic also contacted a sampling of 175 pharmacy owners, who tried to block his inquiry by applying for an injunction, which the Superior [page543] Court subsequently dismissed. He therefore had to investigate, but it was impossible for him to complete his inquiry without first obtaining information about the identities of the pharmacists concerned. After a motion for a declaratory judgment was filed to contest the scope of his powers, he himself applied for an injunction to compel the respondents to co-operate with his inquiry.

E. *Recourse to an Injunction*

51 Although recognizing that the Superior Court had jurisdiction to issue an injunction in the case at bar, the Court of Appeal found that it had been inappropriate to do so (para. 62). This conclusion was unwarranted in the circumstances. In reviewing the Court of Appeal's judgment, it is important to consider the penalties, rights, obligations and powers established by the *Professional Code*.

1. Penal Injunctions Under the *Professional Code*

52 The procedure for penalizing a third party for refusing to disclose documents to a syndic brings into play several provisions of the *Professional Code*, including ss. 114, 122, 188 and 191. Section 114 establishes a general prohibition against refusing to disclose a document needed for a disciplinary inquiry. The last paragraph of s. 122 makes it clear that this prohibition applies to requests by a syndic. Section 188 provides that anyone who contravenes a provision of the *Professional Code* is guilty of an offence. The combined effect of ss. 122 and 188 is therefore that a third party who refuses to disclose documents requested by a syndic is guilty of an offence punishable by a fine of not less than $600 and no more than $6,000. Section 191 adds that, if any penal offence provided for in the *Professional Code* is repeated, the Attorney General or, with the Attorney General's authorization, a professional order may, after penal proceedings have been instituted, obtain an interlocutory injunction, and then a final injunction, to ensure that the person committing the offence ceases to do so.

[page544]

2. Availability of the General Remedy of an Injunction in Support of the Exercise of the Order's Powers

53 Pharmascience submits, citing *City of Montreal v. Morgan* (1920), 60 S.C.R. 393, that since the legislation does not expressly authorize a syndic to apply to the Superior Court for an injunction and since it even provides for other forms of sanctions, syndics are not entitled to do so. The Court of Appeal also considered that *Morgan* made the issuance of an injunction under the *Code of Civil Procedure* inappropriate. However, *Morgan* does not have the restrictive effect attributed to it by Pharmascience and the Court of Appeal. In fact, I feel that it actually supports the opposite position, namely that the syndic was entitled to apply for a general law injunction.

54 *Morgan* created an exception to the general principle that the general law is inapplicable where a specific statute provides for an obligation and related penalties. In that case, a person who had constructed a building in violation of municipal by-laws claimed that, absent other procedures provided for by statute, a fine was the only sanction available to the City of Montréal. It is important to consider the remarks of Anglin J., which are central to this part of the debate in the case at bar:

> To what consequences has the defendant's contravention of by-law No. 570 subjected him? He argues that he is merely liable to the penalty which the by-law provides and that the plaintiffs have no other means of enforcing it. But a person prepared to do so cannot thus purchase the right to disobey the law. The public interest forbids that the enforcement of the penalty should be the sole remedy for the breach of such a by-law and requires that the regulation itself should be made effective. The general rule of construction that where a law creates a new obligation and enforces its performance in a specific manner, that performance cannot be enforced in any other manner (*Doe d. Murray* v. *Bridges* [1 B. & Ad. 847, at p. 849]) is of course well established. But that rule is more uniformly applicable to statutes creating private rights than to those imposing public obligations. *Atkinson* v. *Newcastle Waterworks Co.* [2 Ex. D. 441, at p. 448]. Moreover whether the general rule is to [page545] prevail or an exception to it should be admitted must depend on the scope and language of the act which creates the obligation.*Pasmore* v. *Oswaldtwistle Urban District Council* [[1898] A.C. 387, at pp. 397-98] per Lord Macnaghten. The provisions and object of the Act must be looked at. *Vallance* v. *Falle* [13 Q.B.D. 109, at p. 110]; *Brain* v. *Thomas* [50 L.J.Q.B. 662, at p. 663].
>
> Here the object and scope of by-law No. 570 make it clear, in my opinion, that the recovery of the penalties prescribed was not meant to be the sole remedy available for its enforcement. A breach of the obligation which it imposes falls within the purview of Art. 1066 [of the *Civil Code*], as my brother Mignault points out. [Emphasis added; pp. 406-7.]

55 *Morgan* thus places a limit on the general principle that the penalties provided for in a special statute are exhaustive: one cannot be given the opportunity to buy the right to break the law repeatedly with no further consequences. To avoid applying this exception, the Court of Appeal held

that Pharmascience had not repeatedly broken the law and was merely contesting the applicability of s. 122 *Prof. C.* to third parties. Moreover, there was nothing to indicate that Pharmascience would have refused to provide the documents following an adverse final decision on a penal complaint. Finally, according to the Court of Appeal, the *Professional Code*, unlike the statute in question in *Morgan*, does not provide that the payment of a fine is the only sanction for third parties who refuse to disclose documents: s. 191 contemplates an injunction to stop the commission of repeat offences.

56 In my view, the principle in *Morgan* cannot be limited to situations in which a monetary penalty is the only sanction contemplated by a statute. Some authors attribute a broader scope to *Morgan*:

> [TRANSLATION] This decision and this comment by Anglin J. were on many occasions cited and interpreted to mean that public authorities may apply to the Superior Court for an order to do or not to do something when the public interest requires this, whether to [page546] safeguard public order or public safety or to put an end to repeated violations of the law. [Emphasis added.]
>
> (P.-A. Gendreau et al., *L'injonction* (1998), at pp. 182-83)

57 In Quebec procedural law, the existence of a specific remedy does not close the door on the ordinary general law injunction provided for in art. 751 *C.C.P.*, especially where the public interest requires that one be issued. It is the Superior Court judge who will have to consider the impact of the specific remedy provided for in another statute. The existence of that remedy is one element of the set of circumstances the judge will have to weigh in deciding whether the requested order is warranted. This conclusion is shared by the authors cited above:

> [TRANSLATION] The "exhaustion doctrine" is not in itself an additional test. It is part of the Court's exercise of its discretion in applying the usual tests for injunctions ... . [p. 183]

In the case at bar, therefore, Déziel J. could properly conclude that, given the situation in which the syndic found himself, the existence of a specific remedy under the *Professional Code* did not in any way preclude the issuance of a permanent injunction. No applicable legal rule prevented him from issuing the order.

58 The words used by Anglin J. in *Morgan* to qualify the strict application of the principle of the exclusivity of specific sanctions support this result. Anglin J. mentions first of all that this principle applies more to statutes that create private rights than to those that impose public obligations. He cites *Atkinson v. Newcastle Waterworks Co.*, [1874-80] All E.R. Rep. 757, in which the English Court of Appeal distinguished *Couch v. Steel* (1854), 3 E1. & B1. 402, 118 E.R. 1193 (Q.B.), a case dealing with the duty of a shipowner to provide sailors with sufficient medical supplies ("it differs from the case where a general public duty is imposed": *Atkinson*, at p. 761). Anglin J. adds that the creation of an exception depends on the scope and language of the statute creating the obligation (citing *Pasmore v. Oswaldtwistle Urban [page547] District Council*, [1898] A.C. 387 (H.L.), in which Lord Macnaghten stated that "[w]hether the general rule is to prevail, or an exception to the general rule is to be admitted [in any particular case], must depend on the scope and language of the

Act ... and on considerations of policy and convenience" (pp. 397-98 (emphasis added)). Finally, Anglin J. states that the provisions and purpose of the statute must be taken into consideration.

59 The role of the syndic of a professional order is clearly a public duty. The syndic's principal function is to inquire into the conduct of professionals in order to protect those who receive their services. The scope of the *Professional Code* and the language used in it reflect this objective of protection, which is provided for in s. 23. As we have seen, judicial policy considerations also favour recognizing the syndic's right to obtain all the information needed to carry out an effective inquiry and reach a final decision to lodge or not to lodge disciplinary complaints.

60 Moreover, the Quebec courts have recognized that the existence of a specific sanction under a special statute does not preclude a general law injunction where the circumstances require one. For example, in *Coutu v. Ordre des pharmaciens du Québec*, [1984] R.D.J. 298, the Court of Appeal issued an order for an injunction to end a [TRANSLATION] "flagrant, persistent, systematic and deliberate" breach of the Order's regulations on advertising, which continued even after complaints had been lodged. Although that decision falls within the exception developed in *Morgan* concerning the ability to buy the right to break the law, Jacques J.A. made some more general comments on the circumstances in which the Superior Court would be justified in granting an injunction despite the existence of a specific penal remedy:

> [TRANSLATION] All the facts submitted to the Court must therefore point to an exceptional situation in which [page548] the public interest is impaired, such as where repeated convictions have had no effect on the offender, where violations of a zoning by-law are affecting the rights of the residents of a zone, or where public safety is put at risk, even before the other remedies provided for by the legislature have been exhausted.
>
> ...
>
> If there is one constant that emerges from these decisions, it is the need for an impairment of public rights or of public order. The severity of the penalties for contempt of court, which is the consequence of disobeying an injunction, is such that the conduct sought to be prohibited must be disproportionate to the penalties specifically provided for by the legislature, thereby making it necessary to consider the harm caused in relation to the nature of the right invoked and its certainty. [Emphasis added; p. 313.]

61 Faced with similar facts in *Ordre des optométristes du Québec v. Vision Directe Inc.*, [1985] C.S. 116, Gonthier J. of the Quebec Superior Court, as he then was, agreed to issue an injunction because the disciplinary proceedings had been rendered ineffective, as they were paralysed by multiple evocation proceedings and actions in nullity brought by the professionals involved. Gonthier J. wrote the following:

> [TRANSLATION] The Ordre des optométristes du Québec acts as a public body to enforce a law of public order for the protection of the consumer public relating, in the instant case, to corrective lenses, that is, to tools that are necessities of life for a very large portion of the public. The order's function in this par-

> ticular field is thus equivalent to that of the Attorney General, in terms of defending public order. It is recognized that the Court has discretion to grant an injunction to enforce penal or disciplinary provisions at the Attorney General's request if the statutory remedy is ineffective, or if there have been repeated violations of the law. The instant case is not one in which the defendants have been convicted multiple times and been placed in a situation in which they could buy their peace by paying multiple fines, as one frequently finds in the case law.
>
> Rather, the applicants rely on the ineffectiveness of the statutory remedy attributable to multiple evocation proceedings that are unduly delaying the outcome [page549] of disciplinary proceedings and the fact that, in the interim, the defendants have published a second circular that, because of its wide distribution, undermines the order's ability to enforce its regulations. This type of advertising is contrary to the letter and the spirit of the order's ethical regulations, which allow informational advertising only and prohibit advertising that encourages consumption, thereby upholding the quality of professional services while minimizing the commercial aspects. The case at bar is of the same nature as those that have resulted in injunctions against the advertisement of professional services by pharmacists and lawyers. [Emphasis added; p. 119.]

62 In applying the analytical framework established by Gonthier J., the courts have specifically held in certain decisions that the ineffectiveness of the remedy provided for in s. 191 *Prof. C.* could in certain circumstances make recourse to a general law injunction necessary: *Deveault v. Centre Vu Lebel & Des Roches Inc.*, Sup. Ct. Montreal, No. 500-05-003478-854, May 24, 1985 (*per* Dugas J.); *Ordre des optométristes du Québec v. United States Shoe Corp.*, SOQUIJ AZ-89021102 (Sup. Ct.) (*per* Flynn J.). In *Barreau du Québec v. Descôteaux*, SOQUIJ AZ-95021889 (Sup. Ct.), Forget J., as he then was, also adopted the reasoning of Gonthier J. and refused to dismiss an application for an injunction on the ground that it duplicated the penal proceeding provided for in s. 191 *Prof. C.* Forget J. nevertheless concluded that, where the conditions of that provision are met, it must be used. I agree with this reservation.

3. Review, by the Judge Hearing the Application for Injunction, of the Difficulties Inherent in Disclosing the Information and of the Protection of the Parties' Interests

63 The importance of and weight given to the remedies and penalties provided for in a special statute will depend on the particular context of a given case. Ultimately, the judge will have to determine whether the public interest requires that an injunction be issued to put an end to the violation of a law even though another remedy is available. In the circumstances that gave rise to the dispute in the case at bar, the injunction provided for in s. 191 *Prof. C.* to prevent the repeated commission of [page550] penal offences would not have been an appropriate and effective remedy. The case before the syndic was not, strictly speaking, one of repeated violations, and no penal prosecution had been instituted. Moreover, such proceedings could not have been commenced without prior authorization from the Attorney General, as a syndic cannot act alone. A judge might therefore conclude that it is difficult to reconcile the importance of the *Professional Code* and the syndic's inquiry for the protection of the public with the requirements and time limits inherent in this particular remedy. A timely and effective remedy to the failure to co-operate with the syndic's inquiry

was needed to allow the syndic and the Ordre des pharmaciens to fulfil their obligation of diligence in disciplinary matters. I would add that the judge hearing the application for injunction can solve any problems that might result from the disclosure of the information requested from third parties by defining the third parties' obligations and the terms and conditions of their performance so as to dispel any fears that the injunction would lead to the fishing expedition apprehended by the respondents.

4. Merits of the Application for Injunction in the Circumstances

64 I believe that Déziel J. exercised his discretion properly in granting the injunction requested by Syndic Binet. An accurate interpretation of s. 122 *Prof. C.* would give the syndic the right to require Pharmascience to disclose documents concerning the payment of rebates and other benefits. The syndic, who is responsible for protecting the public, obviously had the interest required to make the application. The fact that it was impossible for him to apply on his own for the specific remedy provided for in s. 191 *Prof. C.* made a general law injunction all the more appropriate and necessary.

65 In my opinion, when analysing the issue of serious harm, the syndic's request for disclosure must not be considered in isolation. This case concerns not only the interest of the syndic or the professional order in having the documents disclosed, but also the interest of Quebec drug consumers in doing business with pharmacists who are not in a [page551] conflict of interest. In a field as specialized as this one, where public health imperatives are at stake, the seriousness of the risk that pharmacists might put their own interests ahead of those of patients in choosing certain medications must not be underestimated. It should also be noted, as Déziel J. did, that if the syndic's information proved to be true, the kickback scheme in the case at bar was exploiting public funds allocated to health care for all Quebecers. Moreover, some of the evidence indicated that kickbacks continued to be paid despite the institution of the RAMQ's proceedings (A.R., at pp. 203-4).

66 In an analysis of serious harm resulting from an offence under the *Professional Code*, the fact that this statute is a law of public order must be taken into account. The comments of Brossard J.A. in *Ordre des pharmaciens du Québec v. Meditrust Pharmacy Services Inc.*, [1994] R.J.Q. 2833, a case in which the Court of Appeal granted an injunction against a company that sold drugs by mail order, are enlightening:

> [TRANSLATION] What is striking at first glance upon reading the judgment *a quo* is that the trial judge does not at any moment appear, in assessing harm and the balance of convenience, to have taken into consideration the fact that the appellant's mandate under the *Professional Code* and the *Pharmacy Act*, that is, to monitor and supervise the practice of pharmacy in Quebec, is merely one of public order and public interest that was delegated to it by the state.
>
> In this context, the harm to be taken into consideration is that which is likely to be caused to public order, not that caused to the Ordre des pharmaciens, and in the absence of a clear and indisputable right, what must be considered or weighed are, on the one hand, the inconveniences for a commercial corporation that alleges no specific inconvenience in the event the injunction is granted and,

> on the other hand, those that affect the public interest and public order. [Emphasis added; p. 2836.]

Brossard J.A. went on to note that, in certain cases, the serious harm required for an injunction to be issued can be inferred from the simple fact that the *Professional Code* has been violated:

[page552]

> [TRANSLATION] As an extension of the state, from which it inherited through a delegation of power the mandate to enforce the provisions of both the *Professional Code* and the *Pharmacy Act* in respect of all aspects of the practice of that profession, the appellant has not only the power but also the duty to enforce those provisions. The present injunction is consistent with that mandate of public order and of public interest. Insofar as the appellant has established *prima facie* a serious colour of right on the merits, the ongoing violation of the public order provisions of the *Professional Code* and the *Pharmacy Act* during the proceedings, and until the rendering of a final decision on the merits, constitutes in itself sufficient harm to warrant granting an injunction for the sole purpose of temporarily forcing the respondent to obey the law while the proceedings are in progress. [Emphasis added; p. 2839.]

67 As I mentioned above, the case at bar does not involve the types of repeated violations or acts of bad faith that are characteristic of some of the cases of general law injunctions I have discussed. But the case law on this subject confirms that the demonstration of such circumstances is not essential. When the public interest is at stake, a proliferation of court challenges may make an injunction under the *Code of Civil Procedure* necessary. In light of the evidence of Syndic Binet's difficulties in obtaining essential documents for his inquiry, Déziel J. took Pharmascience's court challenges into account; those challenges extended over a seven-month period and were appealed all the way to this Court, which dismissed an application for a stay (S.C.C., No. 30188, March 17, 2004). In exercising his discretion, Déziel J. properly found that Pharmascience's refusals and its conduct were intended to paralyse Syndic Binet's inquiry. The Court of Appeal was not justified in questioning that finding.

68 In my view, the Court of Appeal also erred in holding that the trial judge should have considered other methods by which, in its opinion, Syndic Binet could have tried to obtain the names of pharmacists he needed for his disciplinary inquiry. The Court of Appeal thus considered that the syndic could have waited for the information to be disclosed in the course of the civil proceedings brought against the [page553] manufacturers by the RAMQ, or when the complaints were heard by the committee on discipline, which has the power to require the production of documents by way of *subpoena duces tecum*.

69 Neither of these options would have allowed Syndic Binet to conduct a diligent, effective and complete inquiry. The first is not only slow, but quite random: I agree with the syndic that there is no guarantee the documents will ever be made available. For example, in the event of an out-of-court settlement, the documents may never be filed. As for the second option, I have already

mentioned the complementary relationship between the evidence collected by a syndic and the filing of a disciplinary complaint. A syndic is required to investigate alleged misconduct and, where appropriate, to lodge a complaint with the committee on discipline. Syndic Binet states in his affidavit dated November 14, 2003 that it was impossible for him [TRANSLATION] "to know precisely which 1,340 pharmacy owners out of a total of 1,575 received benefits or discounts" (A.R., at p. 255). If the syndic's inquiry is recognized to be legitimate, and if it is open to him to approach third parties, it would be unreasonable to require him to prove that there is no other way to obtain certain information or that any other means would in practice be impossible. Such an approach would prevent the syndic and the Ordre des pharmaciens from carrying out their duty to protect the public.

V. Conclusion

70 I would therefore allow the appeal with costs throughout and restore the injunction order made by the Quebec Superior Court.

The reasons of Fish and Abella JJ. were delivered by

71 ABELLA J. (dissenting):-- The public is entitled to know that the professionals on whom it relies behave competently and with integrity. It is to protect the public's interest in that professionalism that the conduct of those professionals is subject to scrutiny through mechanisms such as those delineated [page554] in the *Professional Code*, R.S.Q., c. C-26 ("Code"). In this respect, I am in agreement with my colleague Justice LeBel. Where we differ, however, is on how and by whom that supervisory responsibility is to be discharged in the context of this specific statutory scheme.

72 There is no doubt that the overriding purpose of the Code is the protection of the public, but this purpose manifests itself through specific legislative language about the syndic's powers. A syndic is confined by s. 122 to requesting information only in relation to allegations that a particular professional has breached the Code. I do not see in that language any power on the part of the syndic to go on a "fishing expedition". In this case, the syndic lacked this information. Nor do I agree that an injunction can be issued in these circumstances in the absence of the consent of the Attorney General.

73 Section 122 of the Code states:

> **122.** The syndic and assistant syndics may, following an [*sic*] information to the effect that a professional is guilty of an offence contemplated in section 116, inquire into the matter and require that they be provided with any information or document relating to such inquiry... .
>
> Section 114 shall apply to every inquiry held under this section.

It permits the syndic to launch an investigation "following an information to the effect that a professional is guilty of an offence". It does not confer a general investigatory power. This power is reserved to the Inspection Committee of the Bureau.

74 With great respect to the contrary view, in my view this case is governed by this Court's decision in *James Richardson & Sons Ltd. v. Minister of National Revenue*, [1984] 1 S.C.R. 614. In that case, this Court dealt with the Minister's powers under s. 231 of the *Income Tax Act*, S.C.

1970-71-72, c. 63, which gave the Minister the power to require from any person, for any purposes related to the administration or enforcement of the Act, any information or production of any documents. Relying on this provision, the Minister decided to investigate compliance with the *Income Tax Act* by traders in [page555] the commodities futures market and, as a result, requested information from a particular broker in the field about its clients. The broker provided some information but refused to provide the information necessary to identify the clients. The Minister, as a result, made a formal demand under s. 231. This Court held that the Minister had no power to make such a request, stating:

> It seems to me that what the Minister is trying to do here, namely check generally on compliance with the statute by traders in the commodities futures market, cannot be done by conducting a "fishing expedition" into the affairs of one broker's customers under s. 231(3) of the Act... .
>
> ... If the tax liability of its customers or one or more of them were the subject of a genuine inquiry, then the Minister would clearly be entitled under s. 231(3) to single out the appellant even although innocent taxpayers' trading activities were disclosed in the process. But it cannot, in my opinion, be singled out otherwise. It cannot be compelled under s. 231(3) to provide the random sample for a check on general compliance by the entire class... . [pp. 625-26]

75 Similarly, in *Beaulne v. Kavanagh-Lemire*, [1989] R.J.Q. 2343, the Quebec Court of Appeal held that a syndic has a specific limited power of investigation, but not the power to investigate the practices of the profession at large. Although the conduct investigated in *Beaulne* was not an offence, the Court of Appeal made clear that that was not the only reason it found the syndic to have exceeded his jurisdiction:

> [TRANSLATION] Section 122 of the *Professional Code, supra*, allows syndics to conduct inquiries only in specific circumstances and under certain conditions. The power the statute confers on them is not general and discretionary but, on the contrary, specific and limited. There must be *information* that *a* professional has committed an offence. [Emphasis in original; p. 2346.]

The syndic, in other words, must have information that a specific, identified professional may have committed a specific offence.

[page556]

76 For a syndic to engage in a valid investigation under s. 122, he or she must have information or a complaint regarding the possibility that a particular professional, or group of professionals, has committed an offence. The scope of investigations, it seems to me, is clearly limited by the individualized nature of disciplinary hearings. This individual disciplinary investigation, which is based on the receipt of a complaint about individuals or groups of individuals, is in contrast to the wider

powers of the Bureau's Inspection Committee which has responsibility for overseeing the entire profession and for investigating matters affecting it.

77 Where the legislature has intended to give broad investigatory powers, it has expressly done so. Section 112 of the Code, for example, defines the broad powers of an inspection committee:

> **112.** The committee shall supervise the practice of the profession by the members of the order and it shall in particular inspect their records, books, registers, medications, poisons, products, substances, apparatus and equipment relating to such practice, and inspect the property entrusted to them by their clients... .
>
> At the request of the Bureau, the committee or one of its members shall inquire into the professional competence of any member of the order indicated by the Bureau; the committee or one of its members may also act of his own initiative in this regard... .

In addition, the Bureau has regulation-making powers, which allow it to implement global solutions, such as its recent revision of the *Code of ethics of pharmacists*, R.R.Q. 1981, c. P-10, r. 5, with regard to rebates and kickbacks.

78 In this case, the syndic, Jocelyn Binet, launched an investigation to try to identify members who had committed an infraction. Binet had no information regarding any specific, identifiable pharmacists. What he had was general information, obtained from as yet unconcluded legal proceedings against generic pharmaceutical companies, that unnamed pharmacists had been receiving kickbacks.

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79 This kind of general compliance investigation is wholly analogous to what this Court found to be unauthorized in *Richardson*. As in *Richardson*, where the Minister had some general information relating to the non-compliance of some traders in the commodities futures market, Binet had only a generic concern. And, as in *Richardson*, Binet's investigation was in the nature of a "fishing expedition", rather than a response to a specific complaint. If such expeditions are not permitted pursuant to the much broader and more general power of a Minister under s. 231 of the *Income Tax Act*, it is difficult to see how they could be permitted under s. 122 of the Code.

80 I would therefore find that the syndic did not have the information necessary to trigger his power of investigation under s. 122.

81 I agree with LeBel J., however, that, in circumstances where s. 122 applies, the syndic can obtain information and documents from third parties. The language used in the provision is sufficiently broad to encompass third parties, and I see nothing in the rest of the Code indicating that the provision should be interpreted more narrowly. But having concluded that the provision was not activated in the circumstances of this case, Binet had no derivative authority to invoke such authority.

82 Nor do I agree, with respect, that an injunction can be issued in these circumstances in the absence of the consent of the Attorney General. The enforcement mechanism envisioned in the Code is found in the interplay of ss. 114, 122, 188 and 191. Section 114, which is explicitly said to apply to the procedure under s. 122, prohibits a professional from refusing to furnish the documents requested pursuant to the Code. Section 188 makes contravention of any provision of the Code an offence. The combined effect of these two sections is that any third person who refuses to supply the syndic with documents pursuant to an investigation under s. 122 is committing an offence. This opens the door to [page558] the Attorney General to institute penal proceedings pursuant to s. 191, which states:

> **191.** If a person repeats the offences contemplated in any of sections 188, 188.1, 188.1.1, 188.1.2, 188.2 and 188.3, the Attorney General or, following his authorization and upon a resolution of the Bureau or the administrative committee of the interested order, the interested order, after penal proceedings have been instituted, may require of the Superior Court an interlocutory writ of injunction enjoining that person or his officers, agents or employees to cease the commission of the offences charged until final judgment is pronounced in penal proceedings.
>
> After pronouncing such judgment, the Superior Court shall itself render final judgment on the application for an injunction.

83 Binet submits that s. 751 of the *Code of Civil Procedure*, R.S.Q., c. C-25, empowers the Superior Court to order an injunction in this case. Section 751 states:

> **751.** An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his senior officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties.

84 Although this provision provides the Superior Court with broad powers to order injunctions, the question is whether these powers yield to the particular procedures in the *Professional Code*. In my view, they do. I see the Code as exhaustively defining the remedies available when it is violated. Section 191 sets out the required procedures with respect to injunctions. The legislature has therefore expressed the view that injunctions can only be requested under the Code in particular circumstances, namely, when the Attorney General requests or authorizes them and when there has been the repeated commission of an offence. It is difficult to reconcile the stringency of the requirements in s. 191 with a syndic's ability to circumvent them under s. 122 by ignoring the Code's procedural constraints on obtaining an injunction.

85 There is disagreement between the Superior Court and the Court of Appeal about whether [page559] Pharmascience had already violated a provision of the Code when it refused to provide the requested documents, such that this latter condition in s. 191 was fulfilled. The Court of Appeal concluded that even if s. 122 applied to Pharmascience, the injunction granted was premature as there was no evidence that Pharmascience would not have complied with a request under s. 122 once the court had declared it to be subject to the section. Even assuming that the request for an injunction was not premature, it is clear from s. 191 that Binet was not permitted to ask the court for an injunction as the Attorney General neither authorized nor requested it.

86 I would therefore dismiss the appeal.

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Court File No. CV-12-9667-00CL

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 AND ARRANGEMENT OF SINO-FOREST CORPORATION

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

RESPONDING MOTION RECORD OF THE CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO

(Returnable: November 18, 2015)

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