IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: NovaLIS Technologies Ltd. (Re), 2008 NSSC 222

Date: 20080711
Docket: B 28772
Registry: Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 28772
Estate No. 51-122097

IN THE MATTER OF: **NovaLIS Technologies Limited**

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: March 6, 2008

Present: Stephen Kingston representing NovaLIS Technologies Limited

Carl Holm, Q.C. representing Atlantic Canada Opportunities Agency

Facts

[1] The applicant, NovaLIS Technologies Limited, ("NovaLIS") is a Nova Scotia company incorporated in 1992 and is owned by ESRI Canada Limited ("ESRI"). It had been in the business of developing and making commercial land records management software. Its operations were centered in Nova Scotia, but it served customers throughout North America, ranging from small municipalities to large cities, counties and provinces. As well it had projects with governments in Europe and the Caribbean. It had income from licensing fees, product implementation and customization, and ongoing maintenance. It had employees in Nova Scotia and elsewhere in Canada.

[2] It was financed by secured borrowing from Nova Scotia Business Inc. and ESRI, by an unsecured demand facility with the Royal Bank of Canada , a convertible unsecured debenture with Dr. Johannes Sittard and unsecured contributions from the Atlantic Canada Opportunities Agency ("ACOA").

[3] It incurred a substantial loss in 2004. Debt and operational losses mounted in 2005. It had delivery issues on a number of projects. There were implementation delays and revenue shortfalls. Subcontractors were

abandoning projects. This resulted in its Board of Directors on November 3, 2005, passing a resolution authorizing it to file a Notice of Intent to File a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) and to apply to this court for the appointment of an Interim Receiver. Green Jain Wedlake Inc. was appointed Interim Receiver on November 8, 2005.

[4] In due course the Interim Receiver sold its assets and paid the proceeds to the secured creditors leaving them with a substantial deficiency. As well there were many debts owed to unsecured creditors.

[5] NovaLIS filed a proposal under the *BIA* dated March 10, 2006. Notice of the proposal and of a creditors' meeting to be held on March 29, 2006, was given.

[6] The proposal is to be financed by ESRI with $400,000. These funds will be available to ESRI by it taking advantage, as owner of the shares of NovaLIS, of tax credits due to NovaLIS. It is understood that these credits will be lost if NovaLIS should become bankrupt. This proposal is the way

the unsecured creditors may receive some benefit. With bankruptcy they will receive nothing.

Contribution Agreements

[7] The contributions by ACOA were provided pursuant to three letter agreements.

[8] The First Agreement is dated September 26, 1994, and provides for "a provisionally repayable contribution" of the lesser of 54.46% of eligible costs and $2,999,966. (Article 3.00). The agreement was subject to a number of amendments, the last being #6, dated November 12, 2002.

[9] Article 4.04 of this amendment revised the terms of repayment of the contributions firstly by acknowledging payments made to date in Paragraph (a) and secondly providing in Paragraph (b) the following:

> subsequent payments shall be calculated as a percentage of "Net Revenue". Annual instalments due December 1, 2002 and July 1, 2003 shall be calculated at a one-half per cent (0.5%) of "Net Revenue" for NovaLIS Technologies Limited's immediately preceding fiscal year, annual instalments commencing July 1, 2004 shall be calculated at two per cent (2.0%) of "Net Revenue" for NovaLIS Technologies Limited's immediately preceding fiscal year and shall be allocated among the following projects: AAP #

> 2060-60-27473-1: 1.0%; BDP # 6004-60-30350-2: 0.5%; and BDP # 6004-015839-181055: 0.5%.
>
> Should any of these projects be repaid in full or should any not proceed, the royalty to be applied to such project would be reallocated equally among the remaining projects until such time as all projects have been fully repaid or until July 1, 2012; whichever occurs first.

[10] Article 4.05 provides:

> The first payment will be due on December 31, 1997, and subsequent repayments shall be due thereafter according to Clause 4.04 until such time as the project has been fully repaid or until July 1, 2012; whichever occurs first.

[11] The amount of the contributions not repaid by that date apparently will be forgiven.

[12] Paragraph 10 of the General Conditions which are incorporated into the original agreement contains the following:

> 10. (a) The following constitute Events of Defaults:
>
> (i) the Applicant becomes bankrupt or insolvent, goes into receivership, or takes the benefit of any statute from time to time in force relating to bankrupt or insolvent debtors;
>
> (b) If an Event of Default has occurred, or in the opinion of the Agency is likely to occur, the Agency may exercise one or all of the following remedies:
>
> (ii) require the Applicant to repay part of or all of the Contribution forthwith to the Agency, and that amount is a

> debt due to Her Majesty in right of Canada and may be recovered as such.

[13] The Second Agreement is dated January 7, 1998, and provides for a contribution of the lesser of a 46% of eligible costs or $750,000, $375,000 of which is "Unconditionally Repayable" by consecutive monthly instalments, (Article 3.01) and $375,000 which is "Provisionally Repayable" in accordance with the revised Article 3.07 contained in amending letter #5, dated November 12, 2002. Again in Paragraph (a) specific provision is made for the money accrued to date and then Paragraph (b) provides:

> (b) commencing with the annual instalments due July 1, 2004, annual instalments shall be calculated at two per cent (2%) of "Net Revenue" for NovaLIS Technologies Limited's immediately preceding fiscal year and shall be allocated among the following projects: AAP # 2060-60-27473-a: 1.0%; BDP # 6004-60-30350-2: 0.5%; and BDP # 6004-015839-181055: 0.5%
>
> Should any of these projects be repaid in full or should any not proceed, the royalty to be applied to such project would be reallocated equally among the remaining projects until such time as all projects have been fully repaid or until July 1, 2012; whichever occurs first.

[14] Article 3.09 then provides:

> The first repayment shall be due on July 1, 2000, and subsequent repayments shall be due thereafter according to Clause 3.07 until such time as all projects have been fully repaid or until July 1, 2012; whichever occurs first.

[15] The General Conditions contain the clauses quoted above from the first

agreement.

[16] The Third Agreement is dated November 12, 2002, and provides for a contribution of the lesser of a percentage of eligible costs or $500,000. It is to be repaid by annual instalments of two per cent (2%) of Net Revenue, beginning July 1, 2004, and subsequent repayments are due annually thereafter until the contribution has been repaid in full or until July 1, 2012, whichever occurs first (Article 3.02).

[17] The General Conditions contain the following:

> 15. (a) The following constitute Events of Default:
>
> (i) the Applicant becomes bankrupt or insolvent, goes into receivership, or takes the benefit of any statute from time to time in force relating to bankrupt or insolvent debtors;
>
> (b) If any Event of Default has occurred, or in the opinion of the Agency is likely to occur, the Agency may exercise either or both of the following remedies:
>
> (ii) require the Applicant to repay part of or all of the Contribution forthwith to the Agency, and that amount is a debt due to Her Majesty in right of Canada and may be recovered as such.

Creditors' Meetings

[18] The creditors' meeting on March 29, 2006, was adjourned until June 20, 2006, in hope of ACOA finding a solution which would enable it to vote for

the proposal.

[19] On June 19, 2006, the day before the resumption of the creditors' meeting, I was presented with an emergency *ex parte* application by NovaLIS. After being assured that ACOA had notice, I granted an order that the meeting for the next day be further adjourned, that the trustee be permitted to receive further proofs of claim, and that the Official Receiver or nominee presiding at the meeting receive but not count the votes of the creditors with respect to any resolution regarding the acceptance or refusal of the proposal. Whether ACOA's votes respecting the approval of the proposal should be accepted or set aside and the proper amount of ACOA's claim were left for further determination. Essentially, these are the two questions now before me.

[20] Prior to this application there had been a telephone conference on June 1, 2006, between Doug Bayley, the Chief Financial Officer of ESRI and Donald Boudreau and Bonnie Christie both representing ACOA. A memorandum of this meeting was prepared by Mr. Boudreau and Ms. Christie.

[21] It outlines how ESRI would be entitled to significant tax credits should the proposal be accepted. These would provide the resources to ESRI to pay $400,000 to fund the proposal. ACOS would as an unsecured creditor, be entitled under the proposal to receive approximately $200,000. Should the proposal be rejected, NovaLIS would be put into bankruptcy. These tax credits would then not be available. There would be nothing for the unsecured creditors, but the Canada Revenue Agency would be relieved of the requirement to grant the tax credits.

[22] The following quote from this memorandum outlines ACOA's position:

> Bayley was reminded of the Agency's position previously explained prior to the creditors meeting on March 29, 2006 in Halifax. The Agency had advised the Trustee and Bayley that the offer of $400,000 by itself was not reasonable for the Agency. It offered approximately 5 cents on the dollar before deductions for trustee costs and superintendent levy. Additionally, the company was asking the Agency to support the company accessing future tax credits which is the only reason why the proposal was being submitted. The company is not continuing to exist and no employment is being generated. Should the Agency support the proposal, it would receive approximately $200,000 in dividends and the company would access a substantial amount of tax credits at the end expense of the Crown. The Agency is the Crown agent and cannot support the deterioration of the Crown's position. Bayley acknowledged that this had been explained to him at the prior meeting.
>
> Bayley was advised that the documents had been reviewed and that for the Agency it cannot support the proposal as presented. The Agency has an obligation to the Crown's overall interests and the proposal does not benefit the Crown. The main beneficiary is

> ESRI Canada. The proposal has been submitted solely for the purpose of accessing tax credits to ultimately benefit ESRI Canada. Bayley confirmed that this was the case however they feel it is reasonable as they wish to recover as much of their funds since they supported the company and thus provided jobs and taxes to the Region.
>
> Bayley questioned as to whether the Agency would accept something more. It was explained to Bayley that the Agency would have to be paid out. The Agency is the Crown and it cannot participate in supporting the ultimate goal of the proposal to maximize tax credits so as to reduce future tax payments to the Crown by ESRI and NovaLIS.

[23] The meeting took place on June 20, 2000. It was presided over by Mike Chisholm, the Official Receiver. It was primarily an information session. No vote was taken and it was adjourned pending further order of the Court.

Statutory References

[24] ACOA was established by the *Atlantic Canada Opportunities Agency Act***,** R.S.C. 1985 (4th Supp), c.41

[25] I quote from it the following sections:

> 4. The purpose of this Part is to increase opportunity for economic development in Atlantic Canada, more particularly, to enhance the growth of earned income and employment opportunities in that region.
>
> 10. There is hereby established an agency of the Government of Canada to be known as the Atlantic Canada Opportunities Agency.

> 12. The object of the Agency is to support and promote opportunity for economic development of Atlantic Canada, with particular emphasis on small and medium sized enterprises, through policy, program and project development and implementation and through advancing of the interests of Atlantic Canada in national economic policy, program and project development and implementation.
>
> 13. In carrying out its object, the Agency may . . . (e) make loans to any person with respect to the establishment and development of enterprises, and more particularly small and medium sized enterprises, in Atlantic Canada.

[26] The Canada Revenue Agency ("CRA") receives its corporate status in the *Canada Revenue Agency Act*, S.C. 1999, c.17. I quote part of Section 4:

> 4. (1) The Canada Customs and Revenue Agency is continued as a body corporate under the name of Canada Revenue Agency.
>
> (2) The Agency is for all purposes an agent of Her Majesty in right of Canada.

[27] These sections established that ACOA and CRA are each agents of a common principal, Her Majesty in right of Canada. The sections relating to ACOA express the relevant purposes for which it was established and help to establish the context or surrounding circumstances in which ACOA made the contributions in question.

[28] These passages may be relevant in the interpretation of the contract in that they make it clear that the contributions are not just simple commercial loans

granted by a bank or other financial institutions as part of its business and thus motivated by the opportunity of making money. Rather they are loans granted with the object of economic improvement in Atlantic Canada, which might not be possible, if the only sources of financing were commercial lending institutions.

Improper Use of the Bankruptcy Act

[29] I shall first consider whether ACOA's votes once taken should be received. NovaLIS alleges that, in light of the position taken by ACOA, namely that as the proposal is presently framed, it will vote against the proposal, its votes should not be counted, as it would be making an improper use of the *BIA*.

[30] Improper use of the *Act* was reviewed by our Court of Appeal in *Laserworks Computer Services Inc., Re* (1998), 6 C.B.R. (4th) 69, 165 N.S.R. (2d) 297 (N.S. C.A.). A competitor of the debtor had bought debts owing to creditors for the purpose of being able to vote to defeat the debtor's proposal and thereby put the debtor out of business. The Court of Appeal confirmed the Registrar's determination that the votes of the competitor should not be considered. This enabled the proposal to be approved. The

purpose of the *BIA* is to provide for the orderly distribution of the debtor's assets among its creditors. The competitor was not a creditor, but one who went about buying up debts one by one from several creditors, not in the interest of collecting the proportionate share of the assets provided for under the *BIA*, but with the intention of destroying the debtor, something the original creditors would not have wanted to do. Therein lies the improper purpose on the competitor's part.

[31] This case came before the court without precedents regarding improper purposes in the proposal context. However, it was found that the law for bringing a petition against a debtor with an improper purpose based on S.43(7) of the *BIA* would apply by analogy. If one's motive would result in the denial of a petition for a bankruptcy order, the same motive should also result in one's votes against a proposal being rejected.

[32] I quote the Appeal Court's discussion of "improper purpose" in the following paragraphs.

> 54. The four cases cited by the Registrar establish that the threshold is crossed when the *BIA* is used for an improper purpose. An improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by

> Parliament.
>
> 55. Farley, J. held in *Dimples Diapers Inc.*, that:
>
> > ...the *Bankruptcy Act*, R.S.C. 1985, c. B-3 has as its purpose the provision of "the orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis."
>
> 56. In the cases cited, the improper purpose takes the form of abuse of process or tortuous behavior analogous to abuse of process. In each case the court reacted to what could be seen as substantial injustice. The remedy of choice arising under s.43(7) is refusal of the petition. The appropriate remedy in the present case is rejection of the tainted votes".

[33] Against the discussion of "improper purpose" one must contrast the principle expressed in paragraph 74 of the Appeal Court's decision:

> A creditor is not to be deprived of the right to vote for wrongful motives alone; motive must be coupled with a tortious act to support an improper purpose.

[34] ACOA is a body corporate and agent of the Federal Crown. It is charged with administering various projects on behalf of the Government of Canada for the economic betterment of the Atlantic Provinces.

[35] CRA is also a body corporate and agent of the Federal Crown, charged with administering the *Income Tax Act* and other taxing statutes, to raise funds for the financing of the Government of Canada.

[36] NovaLIS argues that, as they are separate corporations, ACOA using its position as a creditor of NovaLIS has an improper purpose in voting against the proposal. It is conspiring with CRA to save it from the substantial burden of acknowledging tax credits.

[37] ACOA asserts that as an agency of the Federal Crown it has the obligation to work with CRA and other agencies of the Federal Crown for the overall betterment of their common principal. Using approximate figures, it is better for the Crown to be relieved of $400,000 tax credits at the cost losing a share of $200,000 as an unsecured creditor under the proposal, than for it to have to grant the tax credits and recover its share under the proposal. $200,000 in the Crown coffers is in issue.

[38] I have referred to *Laserworks* in two decisions. In *Dunham, Re* (2005), 9 C.B.R. (5th) 205, it was argued that it would be improper for a creditor with a liquidated debt to be able to proceed in pressing a claim in a proposal without the contingent liability of this creditor in favour of the debtor being determined and set off against the creditor's claim. It was specifically alleged that the creditor wanted to take advantage of ridding itself of a

counterclaim by voting against the proposal and putting the debtor in bankruptcy. I was of the view that the creditor was entitled to have its claim properly reflected in the vote on the proposal. The debtor's unliquidated claim could not be set off from the liquidated claim. It would have to be pursued in other proceedings. Furthermore it would not necessarily follow that bankruptcy would end the debtor's counter claim. There was nothing on which to find the creditor had an improper purpose. It simply wanted to have its liquidated claim recognized in the vote on the proposal, a right unaffected by its intention to vote against it.

[39] In the other, *Atlantic Ova Pro Ltd., Re* (2006), 4 18 C.B.R. (5th) 101, it was argued that the creditor, a leading company in the aquaculture industry, which was petitioning a debtor, a supplier of salmon eggs, into bankruptcy, was attempting to obtain an improper collateral advantage by putting the debtor out of business. I did not see that the creditor was doing anything other than appropriately seeking a remedy under the *BIA*. Nothing turned on this allegation as I dismissed the petition for other reasons.

[40] The ACOA officers assert that they must act for the best interest of its

principal, Her Majesty in right of Canada. It is entitled and may well be bound to collaborate with CRA and other agents of this principal.

[41] I do not see any merit in the suggestion that either of these agencies has an equity in their respective entitlements. The equity of each in this context belongs not to these corporations or their officers, but to Her Majesty in right of Canada and it, like any other creditor , is entitled to press its net claim as it sees fit. There is nothing in "the form of abuse of process or tortuous behavior analogous to abuse of process".

[42] I therefore find ACOA is entitled to have its votes counted. How many votes it has and the result thereof depend on how much the indebtedness of NovaLIS to ACOA is. This is the other question I must decide.

ACOA's Provable Claim

[43] ACOA's position is that its proper claim is the total balance of the unpaid contributions, which amount I understand is $3,726,177.12. NovaLIS says that it is the total of the unpaid royalties which had crystalized, that is, had

been calculated by reference to net revenue accrued to the time it closed its business, for it had agreed to repay only by way of royalties actually earned. This amount is $254,759.00.

[44] The answer depends primarily on how the specific repayment clauses and the general conditions are interrelated and interpreted together.

[45] ACOA says reading the two together has a very clear result. NovaLIS says that there is an ambiguity and that the *contra proferentem* rule should apply against ACOA, the author of the documents.

[46] Before resolving this question, let me comment on the submission of counsel for ACOA regarding the amount owing to ACOA as shown on the NovaLIS's financial statements and on its statement of affairs.

[47] The financial statements are the product of the analysis of NovaLIS accountants and auditors, who must characterize assets and liabilities according to certain principles. Apparently they saw fit to characterize the provisionally repayable contributions as outright liabilities. This should not

estop the company from later characterizing them otherwise, if further review gives good reason to do so.

[48] The same point is made about NovaLIS listing the full outstanding contributions in its list of liabilities in the proposal proceedings. Statements of affairs are subject to revision during the course of administration of a bankruptcy or proposal, as new information may come to light. By themselves, I do not think that such statements are necessarily final, nor create an estoppel as against creditors. In effect I do not think the financial statements and the statement of affairs have any bearing on the determination I must make. Rather it is now for me to give meaning to the clauses from the agreements which I have quoted above.

[49] In the new book, Geoff R. Hall, *Canadian Contractual Interpretation Law*, 1st ed (Markham, ON: Lexis Nexis, 2007) at page 11, the author states:

> Contractual interpretation is all about giving meaning to words in their context.

[50] In this regard, I quote from *Eli Lilly & Co.* v. *Novapharm Ltd.* (1998), 227 N.R. 201 (S.C.C., Iacobucci, J.)

> 54...The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
>
> 55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in *Lampson v. The City of Quebec* (1920), 54 D.L.4. 355(P.C.):
>
> > "...the intention by which the Deed is to be construed is that of the parties as revealed by the language they have chosen to use in the Deed itself ...[I]f the meaning of the Deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our Deed expresses ..."

[51] It is clear that when interpreting a contract the emphasis must be on the words themselves. Where they give clear meaning one need not and should not go further. However, the words may demand reference to the surrounding circumstances or the factual matrix underlying the contract. Let me venture to briefly describe the present factual matrix.

[52] I begin by looking at the corporate purposes granted to ACOA by it enabling *Act.* Section 4 states its purpose is to support economic activity in Atlantic Canada and to do so it is enabled by Section 13 to make loans to small and medium sized enterprises. It is an agent of Her Majesty, in right of Canada.

It has the task to carry out the will of the Federal Government to assist in economic development in Atlantic Canada. It lends money on terms which might not be otherwise available. It is thus understandable that the structure of its loans may have elements not normally found in usual commercial loans, but rather elements designed to better enable it to carry out its purpose. The use of the word "contribution" in the documentation may be because it better describes what is being provided than would the usual word "loan".

[53] ACOA was loaning money or making contributions knowing that the prescribed percentage of NovaLIS' net revenue may well not be sufficient to repay the provisional contributions by June 2014. That may be why they are called "provisional". It may have been more concerned with NovaLIS being in business during that time than with having the contributions repaid in full. But on the other hand it provided that, if NovaLIS were in default, it wanted the balance, or whatever part of it it may determine, to be owing. The possible penalty of full repayment would discourage NovaLIS from simply abandoning its projects.

[54] ACOA looks to the language of the General Conditions. Its says that when there is an event of default, which clearly there is, it has the option to require NovaLIS " to repay part or all of the Contributions". Such is what it is asking for in its Proof of Claim.

[55] NovaLIS in contrast says that all it has agreed to pay is the amount or royalty calculated on its net revenue from year to year until July 1, 2012. It further says that there is an ambiguity between the specific repayment provisions and the General Conditions. ACOA being the author of the documents the ambiguity should be resolved against it according to the *contra proferentum* rule. It makes much of the use of the terms "Unconditionally Repayable" and " Provisionally Repayable". As I read the letter agreements they are not part of the essential repayment terms, they are simply convenient names to distinguish or identify the two basic types of contributions which were made to NovaLIS.

[56] The words of each repayment provision say to me that the so called provisional contributions are to be repaid by percentages of net revenue during a specific period. However, these repayment provisions are

overridden where there is an event of default under the General Conditions. Revenue or lack of revenue is no longer relevant. What is repayable is the Contribution in whole or in part as determined by ACOA.

[57] This may produce a result which one might find peculiar, but I do not see any ambiguity. I come to this conclusion from the words alone. However, for what it is worth, I think it is consistent with what I have suggested in the relevant factual matrix. I see no ambiguity. I need go no further.

[58] I am fortified in this decision by an analysis of the *contra proferentem* rule in Hall's book beginning at page 53.

I quote the learned author from pages 55 and 56.

> The first major restriction on use of the rule is the well-established requirement that a contract must be ambiguous before the rule can be applied.
>
> Since an ambiguity must exist before the *contra proferentem* rule is applied, it is an error for the analysis to go in the reverse order, with the rule applied first and an ambiguity being found as a result. As a result, the Supreme Court of Canada has described the application of the *contra proferentum* rule as the second step of a two-step interpretive process, the first step being the finding of an ambiguity. As a result of the requirement for ambiguity, it is not uncommon for consideration of a *contra proferentum* argument to stop abruptly as soon as the court finds that there is no ambiguity.
>
> Despite the clarity of the requirement that there be an ambiguity before the rule can be applied, it is somewhat less clear exactly

> what constitutes an ambiguity for purposes of invoking the rule. In general, ambiguity is considered only to exist if the provision in question can be read in either of two opposed senses. In other words, an ambiguity does not exist simply because there is a difficulty of interpretation or because a provision has an uncertain breadth. As a result, the rule is inapplicable where the two supposedly conflicting clauses can be reconciled.

[59] *Nautical Data International Inc., Re* (2005), 13 C.B.R. (5th) 223, (NLTD, Hall J.) was referred to me by counsel for the Applicant. In particular I was referred to the application of the *contra proferentum* rule in resolving ambiguities. This case involved the same creditor, ACOA, and similar documentation prepared by ACOA. This demands that I explain why it has not helped in the present case.

[60] ACOA made contributions to *Nautical Data International Inc.* (NDI). As in the present case the agreement letters contained both specific provisions and general conditions. NDI gave a Notice of Intention to make a Proposal. ACOA's claim became an issue in the proceedings which followed. In particular ACOA claimed interest relying on a clause in the General Conditions.

[61] The date from which interest was to be calculated was not clear. It was held

that the occurrence of an event of default does not by itself trigger the obligation to pay this extra interest. It requires that ACOA must first make a demand for payment. It was observed that ACOA could have specifically made this point clear in its drafting of this clause. It did not. It was caught by the *contra proferentum* rule. The clause as drafted was ambiguous as to from when interest should be calculated.

[62] This is a good example of where this rule may be applied. It does not help in the present case simply because my analysis of the contract does not result in an ambiguity in the first place.

Conclusion

[63] I therefore find that the greater amount is owing by NovaLIS to ACOA and that voting against the proposal will not be an improper use of the *BIA*.

[64] As a result of this decision there may be some follow up matters requiring direction or adjudication. Accordingly, I remain seized with the matter.

[65] If costs are sought, I shall hear the parties.

R.

Halifax, Nova Scotia
July 11, 2008