CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. : 500-11-036133-094

**SUPERIOR COURT**

Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

**IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:**

**ABITIBIBOWATER INC. et al.**

**Debtors**

and

**ERNST & YOUNG INC.**

**Monitor**

and

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND AND LABRADOR**

**Petitioner**

and

**THE ATTORNEY-GENERAL OF HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA**

**Intervenor**

# MEMORANDUM OF ARGUMENT OF ABITIBIBOWATER INC. ON THE PETITIONER'S MOTION FOR A DECLARATORY JUDGMENT AND ON THE INTERVENOR'S INTERVENTION

All capitalized terms not otherwise defined herein shall have the meaning ascribed thereto in the following documents:

- the *Initial Order* issued by this Court on April 17, 2009 (as restated and amended from time to time);
- the *Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act, S.N.L. 2002, Chap. E-14.02* dated November 12, 2009 (the "**EPA Motion**") by the Province of Newfoundland and Labrador (the "**Province**");
- the *Amended Contestation of the Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act* dated January 20, 2010 (the "**Contestation**") by Abitibi;
- the *Intervention* by Her Majesty the Queen in right of the Province of British Columbia and the Attorney General of British Columbia (collectively, "**BC**");
- the *Memorandum of Argument of the Petitioners* dated February 15, 2010 (the "**Province's Argument**");

Unless otherwise indicated, any reference to the "**CCAA**" shall refer to the (pre-September 2009) version of the *Companies' Creditor's Arrangement Act* (R.S., 1985, c. C-36) applicable to the present proceedings and "**Amended CCAA**" shall refer to the version of the CCAA in force since the amendments of September 18, 2009.

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## OVERVIEW

1. This case is not about environmental protection or even about the treatment of environmental claims in insolvency matters. These matters have been settled and Parliament has made specific provision for the balancing of private and public interests in such cases through a variety of amendments to insolvency legislation over the past two decades, as discussed below. Rather, this case concerns five "orders" (the "**EPA Orders**") issued in the context of a vindictive campaign of unlawful and unprecedented confiscation of Abitibi's assets with a value of approximately $500 million[1] which would have a material impact upon the ability of the Petitioners to emerge from protection under the CCAA. The campaign launched by the Province, which has now moved to the field of abuse of environmental laws as a further tool in the continued harassment of Abitibi, was plainly and obviously triggered by Abitibi's decision to close its Grand Falls mill on December 4, 2008. This Court cannot ignore this context and Abitibi's status as victim of flagrant abuse of power in considering the true nature of the Province's motion and the relief being sought.

2. While the Petitioners deny that this motion raises any constitutional issues when properly construed, it is a matter of more than a little irony that the Province seeks to justify its attempted sabotage of a CCAA restructuring under Federal legislation by referring to its constitutional sphere of environmental law as being grounded by "property and civil rights in the province" when the object of its vendetta has been stripped of both property and civil rights by means of the *Abitibi Act*, a confiscatory statute passed twelve days after the Petitioners announced the closing of the Grand Falls mill. The Petitioners have no remaining operations in the Province nor assets of material value and the jurisdiction of the Province does not extend to property located elsewhere.

3. Abitibi submits that the central issue to be examined is whether monetary claims disguised as regulatory orders issued in relation to pre-filing activities on lands which are no longer in control of the debtor should, in a situation where the costs of the remediation efforts are reducible to money, be permitted to remain uncompromised and in existence against a debtor post-emergence in a context where to do so could threaten the approval of a viable compromise or plan of arrangement. The costs of complying with the EPA Orders are without doubt beyond the capacity of Abitibi to absorb.

4. Abitibi does not seek to be exempted from laws of general application and the EPA Orders cannot be so qualified. An order to pay minimum wages to employees or install a scrubber on a defective chimney in operation is clearly not an obligation that could be compromised. An order to install a scrubber on a chimney for a mill the Province has confiscated and which the debtor is obviously not operating cannot be dressed up as anything other than what it is – an order requiring the payment of money. The EPA Orders are not in relation to present activities as Abitibi has none in

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[1] Abitibi's NAFTA Notice of Intent noted damages in excess of $300 million. Oral evidence shall show that further research has determined that the claim amount is approximately $500 million which figure shall include the claim which is in the process of being finalized.

the Province. Having confiscated Abitibi's property, how would the Province propose to enforce these orders if not by seeking the payment of money in the courts of other provinces? The sole intended effect of the EPA Orders is financial and only the willfully blind would allege that they are the product of an unbiased application of laws of general application. The EPA Orders are discretionary, directed at a single target, intended to have a material adverse financial impact upon the restructuring and have been taken as the next step in an orchestrated vendetta whose origins and objects are as clear as they are carefully avoided in the Province's Argument.

5. When the Province claims that the EPA Orders are not intended to be financial, consider the credibility of that hollow claim coming from the same Province which moved before this Court last October seeking access to the *financial* data of the Petitioners in its data room a matter of weeks before the EPA Orders were issued and issued the Orders less than a week after being defeated in that motion.[2] While not a party *stricto sensu* to the NAFTA proceedings instituted by AbitibiBowater Inc. against the Government of Canada, the Province is certainly an affected party as payments made by the Government of Canada to discharge its treaty obligations to protect against unlawful confiscation would directly affect the Province which is a recipient of significant transfers from that government. Matters not complained of for fifty years or more do not suddenly leap on to the urgent pile of disinterested administrators by coincidence in such cases.

6. The EPA Orders are primarily founded on Abitibi's status as a "former owner" or person in control.[3] They relate to alleged contamination which, where it exists (and in many cases it plainly does not) has been the result of actions by third parties (including parties for whom the Province bears responsibility) and in all cases relates solely to past activities. Abitibi has no existing operations to which the orders relate and the EPA Orders could only be complied with by diverting assets and property located outside of the Province and held for the benefit of Abitibi's legitimate creditors. The compromise of the financial consequences of being a "former owner" of allegedly contaminated land is a matter at the core of insolvency jurisdiction and raises no conflict with the ability of the province to impose environmental regulations on those who possess property or civil rights in the province going forward. While the dividing line between regulatory claims and their financial consequences may be blurry at times, there can be no confusing the two when the regulatory authority is seeking to make orders in relation solely to past actions and activities in relation to

[2] In fact, oral evidence will demonstrate that the Province actually began the process of seeking third party tenders for at least some of the remedial work that it was allegedly expecting Abitibi to perform pursuant to the Orders a matter of days after issuing the Orders and weeks before the deadline for compliance by Abitibi had expired.

[3] Stephenville and Botwood were not expropriated, whether by accident or design. The oral evidence will disclose that Abitibi is in the process of transferring such properties to one of its affiliates which company shall be placed into the hands of a receiver to permit such properties to be disposed of in an orderly fashion without impacting upon the restructuring process of the on-going business of Abitibi.

properties which the debtor has disposed of (or been dispossessed of as the case may be).

7. At its core, the position taken by the Province amounts to the assertion that (i) the financial consequences of regulatory orders, however material, cannot be affected by the CCAA in any way, whether the obligations relate to past, present or future actions by a debtor; (ii) the regulatory authority alone gets to decide what is a regulatory order without court intervention; and (iii) immune regulatory orders can be converted into potentially compromisable monetary orders at the whim and caprice of the provincial regulator without court oversight or review.

8. This absurd contention amounts to claiming that a provincial regulator could have the unreviewable right to determine whether obligations it controls or creates will be subject to compromise under a Federal insolvency statute or whether they will enjoy a super-priority beyond the reach of compromise. The proposition, which need only be stated plainly to be rejected, would render meaningless the significant amendments made by Parliament in 1992, 1997 and 2009 to the CCAA and the BIA (discussed below) which were designed to strike and refine the balance between bankruptcy and insolvency laws and environmental obligations. No creditor gets to choose whether it is subject to compromise.

9. This naked assertion of a discretionary super-priority is all the more cynical when contended for by a Government which has unlawfully pillaged the estate of hundreds of millions in value, contributed greatly to its insolvency and is seeking this Court's aid to improve the value of that which it has unlawfully taken.

10. In effect, the Province contends that purely historical obligations which relate to environmental matters are beyond the reach of the remedial provisions of the Federal CCAA unless they magnanimously agree to allow them to be compromised. Where, as here, historical environmental claims are of sufficient materiality to jeopardize a restructuring, the Province's claim amounts to an assertion of a super-priority; in effect a discretionary right to drive a viable business into liquidation and utterly defeat the objects of the CCAA in any case where it so chooses. As shall be noted, provincial attempts to create super-priority in a number of other social fields (pension, workers compensation, etc.) have been consistently rejected by the courts and there is no basis to assert a different outcome in this case where Parliament has repeatedly amended the statute to the precise opposite effect.

11. Of course, no such super-priority exists in liquidation. In a liquidation, environmental claims asserted, if proved, have been logically constrained by Parliament to the asset in question (if still owned by the debtor). The costs of remediation, if properly the obligation of the debtor, are unsecured obligations of the estate and rank *pari passu* with all other creditors. Parliament, in the exercise of its undoubted insolvency jurisdiction, has placed in creditors' hands the option of receiving all of the assets of a debtor once liquidated in accordance with the scheme of priority which it has sanctioned or, in the alternative, keeping those assets in an active business and re-launching the business with a fresh start thereby preserving a potentially greater value for the benefit of all while avoiding where possible the destructive collateral

impact of liquidation and insolvency. Case after case has asserted this to be the true and proper object of the CCAA and nothing could be more destructive of that proper and wholly constitutional object than the unilateral declaration of super-priority asserted by the Province in this motion.

12. Ironically, the Province's assertion is corrosive of the very environmental interest it purports to defend (we say "purports" advisedly since Abitibi asserts that the Province in this case is acting transparently as a confiscatory wolf in an environmental sheep's clothing). Were such a regulatory super-priority to be upheld, the effect would be more rather than less harm to the environment. Environmentally sensitive debtors would be forced into liquidation proceedings as debtor-in-possession funding would be withheld for all but the least needy of them in light of the uncertainty that such unlimited discretion would inject into the process.

13. Even receivers would likely decline to accept appointments to assert minimal care and custody of environmentally sensitive properties as the super-priority exemption claimed by the Province in this case would render hollow and nugatory the limitation of liability in favour of such receivers put in place by Parliament precisely to encourage them to accept such mandates and ensure that toxic properties are not abandoned to the detriment of the public at large. What receiver would accept to be appointed in respect of a debtor when environmental authorities could, at their whim, issue orders directed at the receiver personally requiring them to spend their own resources to fix a problem not of their making under the guise of it being a "regulatory" and not a "monetary" order? If a receiver will not accept an appointment, what DIP or other lender will lend to a business where its ultimate road to realization and repayment requires the ability to appoint a receiver?

14. Abitibi's argument can be divided into the following basic propositions:

    (i) this Court has jurisdiction to subject "claims" to the claims bar process and to determine who Abitibi's "creditors" might be. In the process, this Court may seek to uncover the true nature of the EPA Orders;

    (ii) the EPA Orders are truly monetary or financial orders in light of the facts of the present case, the compromise of which raises no new or unique issues of constitutional or insolvency law;

    (iii) in any event, any claims arising out of the EPA Orders are of a contingent nature which may be compromised under the CCAA and the Claims Procedure Order (the "**CPO**") was therefore clearly within the reach of the ordinary jurisdiction regularly exercised by courts under the CCAA;

    (iv) the position adopted by the Province runs counter to the principles of the CCAA and to the amendments which have been made to bankruptcy and insolvency laws in respect of environmental matters.

15. There can be little doubt that if the Province takes the steps which clearly lie within its power to take under the EPA (i.e. performing the allegedly necessary remediation and

making a claim for the costs so incurred), the resulting orders would be viewed as monetary claims provable in bankruptcy. The only difference in this case is that the Province maintains that the last step in the process of quantifying the claim under the EPA can be kept in its pocket and managed at its discretion for the purpose of gaming the CCAA and the priority of creditor claims thereunder. The position of the Province must be assessed in the context of the assets of Abitibi having been expropriated by it and accordingly, Abitibi no longer being in control of the bulk of the property which gave rise to the purported remediation orders. The contention of the Province merely serves to highlight the distinction between contingent claims and accrued claims. Both are subject to compromise under the CCAA - the difference between them simply goes to method of valuation, not jurisdiction.

## I. JURISDICTION OF THIS COURT

16. This Court's jurisdiction must be examined in light of the fact that on April 17, 2009, Abitibi applied for and obtained Court protection under the CCAA. A stay of proceedings was also issued and renewed most recently until March 15, 2010.

17. On August 26, 2009, this Court issued the CPO, thereby ordering the holders of Claims and Subsequent Claims (as said terms are defined in the CPO) to file their Proofs of Claim with the Monitor by the November 13, 2009 claims bar date failing which their claims would forever be barred.

18. The Province never contested the CPO, nor did it lodge any appeal within the prescribed period. In addition, to Abitibi's knowledge, the Province has yet to file a Proof of Claim with the Monitor as required under the CPO, nor does it seem to intend to do so.

19. By challenging the definition of "Claim" contained in the CPO, a definition which has been used in literally hundreds of similar orders, the Province is plainly launching a collateral attack on a settled order of this Court beyond the period allowed for appeals thereof. While a complete answer to the bulk of the matters raised in this motion, we shall nevertheless address the other arguments raised by the Province.

20. In addition, although the EPA Orders were issued on November 12, 2009, the Province did not seek to lift the stay of proceedings prior to issuing these orders.

21. The stay of proceedings was amended by this Court on May 14, 2009 at the request of the attorney for the Attorney General of Canada in order to ensure that the stay was not "*interpreted as to restrict or prevent Her Majesty the Queen, or her agents, from exercising powers, rights or duties in relation to matters involving public health, safety, security, public order or the environment against the Petitioners, the Partnerships, the Property, the Directors or others, providing that any financial or monetary fines or orders shall be stayed*" (s. 10.1 Initial Order). In voluntarily supporting this amendment, the Petitioners were adhering to the spirit of the impending amendments to the CCAA (now in effect as s. 11.1, see **Schedule A**).

22. The above limited amendment to the stay provisions of the Initial Order should be interpreted as recognizing that a government is not prevented from issuing regulatory orders in good faith in relation to *ongoing* health, safety, security, public order or environmental concerns. Abitibi is required to address these since Abitibi must abide by government regulations in relation to its ongoing business operations while under CCAA protection. Such concerns must be readily distinguished however, from past environmental liabilities in relation to assets which are, for the most part, no longer under Abitibi's control. The EPA Orders were thus issued in violation of the stay.

23. Section 11.1 of the Amended CCAA, while it does not apply to these proceedings, is instructive on the matter of jurisdiction. Section 11.1 operates to *limit* the broad jurisdiction of the Court to stay proceedings under what is now s. 11.02 of the Amended CCAA (see **Schedule A**) in relation to environmental matters. However, even s. 11.1 does not contain the bright line between regulatory and financial orders contended for by the Province. Section 11.1(2) restricts the power of the court in its general stay under s. 11.02 from impacting regulatory proceedings "*other than the enforcement of a payment ordered by the regulatory body*" <u>however</u> s. 11.1(3) allows the supervising court to *remove* this restriction on the general stay power in s. 11.02 (former s. 11(3) CCAA), on notice if it is of the opinion that "*a viable compromise or arrangement could not be made in respect of the company*" if the restriction were to apply and making such an order is not contrary to the public interest. Further, s. 11.1(4) reserves to the Court the power to decide when a regulatory body is seeking to enforce rights as a creditor.

24. These amendments make two points quite clearly. As stated, the structure of the Amended CCAA is (i) general stay power is granted in s. 11.02 in language identical to section 11(3) of the CCAA; (ii) the general stay is initially restricted from applying to regulatory proceedings other than payment orders; and (iii) that restriction may be lifted by the Court after a hearing. It follows from this that the general stay power in s. 11.02 of the Amended CCAA (section 11(3) CCAA) does permit the court to order a stay of regulatory proceedings - the only change is that a second hearing is now required to stay any proceedings other than "*a payment ordered*". There can be no jurisdictional argument here. Secondly, the Court and not the regulatory body will decide when a body is "*seeking to enforce its rights as a creditor*" and if so found, the court may stay that as well.

25. The same arguments may be brought to bear in dispensing with the Province's arguments that the CCAA contains no jurisdiction to compromise claims on terms as broadly as contemplated by the CPO.

26. The CCAA contains no restrictive definition of "creditor" other than the circular definition of "unsecured creditor" to mean any "creditor" who is not a secured creditor (see **Schedule B**). Section 12(1) of the CCAA then defines "claim" in the broadest possible terms as "*<u>any</u> indebtedness, liability or obligation <u>of any kind</u>, that, if unsecured, would be a debt provable in bankruptcy*" and by s. 12(2)(a), the "*amount of an unsecured claim shall be the amount* [...] (iii) [...] *proof of which <u>might be</u> made*" under the BIA. Section 2 of the BIA (which has not been amended) has a **<u>non-exhaustive</u>** definition of

*"claim provable in bankruptcy"* which *"<u>includes</u> any claim or liability provable in proceedings under this Act by a creditor"*.

27. Significantly, the quotation of s. 2 of the BIA in the Province's Argument (paragraph 78) inexplicably omits the use of the word "includes" which clearly indicates the non-exclusive nature of this definition. While the definition is inclusive, even if the definition of "creditor" were read as contended for by the Province as modifying this broad language (which it does not), the argument would be of no assistance to the Province since "creditor" is circularly defined in the BIA as being *"a person having a claim provable as a claim under this Act"*.

28. The language of the CPO simply expands upon but does not depart from the expansive, non-exclusive foundational language contained in s. 12(1) of the CCAA, which serves to explain why similar language has been relied upon and repeated with immaterial variations in claims orders made and approved by courts in CCAA cases for years.

29. The Amended CCAA contains no material departure from this scheme but if anything, re-confirms the intentionally broad and remedial goals of the Act whose broad terms place in the court's hands all the powers necessary to secure its ends. Section 2(1) of the Amended CCAA (see **Schedule B**) now contains a definition of "claim" but effectively in identical language as the former section 12 CCAA (*"any indebtedness, liability or obligation of any kind that would be a claim provable"* within the meaning of s. 2 of the BIA).

30. These provisions contain no comfort for a regulatory authority seeking to limit the CPO from impacting their plainly harmful and financially material actions with artificial distinctions about "regulatory" orders and "financial" ones. To an insolvent company in CCAA restructuring, an order to pay tens of millions of dollars directly is no different from an order to spend an equivalent amount on specific actions and is not mitigated by the utterly impractical offer of years of court challenges against an arbitrary provincial authority who will not hesitate to pass special statutes to deprive them of any and all of their civil rights at a time when the company is fighting for its survival and is seeking to raise exit financing.

31. To suggest that the CCAA provides no jurisdiction in the Court to supervise such actions is ludicrous. Where, as here, the Orders are founded exclusively upon alleged actions in the past and relate in no way to activities taken after the commencement of proceedings, there can be no serious argument that the supervising court applying such broad, purposely inclusive definitions as are found or incorporated by reference in s. 12 of the CCAA has been given the jurisdiction to take action. With the CPO, this court has done so and as noted, the Province took no steps to challenge or set aside the CPO in a timely manner.

32. The assertion that the CPO exceeds the jurisdiction granted by the CCAA simply cannot hold water under the CCAA or under the Amended CCAA which, if anything, confirms the broad and remedial intentions of the Act. Clearly the Province "might" file a claim in respect of the matters raised in the Orders – as such, the claim that they

"might" file, not the one they did NOT file - is open to be compromised on the plain and unambiguous reading of s. 12 of the CCAA.

33. CCAA courts have long taken a pragmatic approach to these matters and have never ceded to regulatory authorities the sole jurisdiction to determine where the public interest in regulatory matters and the public interest in restructuring intersect and where they part company. In *Air Canada*, Justice Cummings made a clear distinction between the exercise of deciding whether a monetary penalty was indeed a "claim" that could be stayed under the CCAA and judicial review proceedings on the merits of that penalty.

   - *Air Canada, Re*, 2006 CanLII 42583 (Ont. S.C., ) **[TAB 1]** at paras. 12 and 13.

34. CCAA courts have a broad jurisdiction to decide all matters that arise during the course of CCAA proceedings. The purpose of the CCAA is to create an orderly environment for the restructuring which would be negatively affected if the debtor was forced to expend resources to deal with claims outside of the CCAA process. By way of example, the jurisdiction enjoyed by CCAA courts extends to deciding a dispute which arises under a contract despite the provincial statutory authority and the terms of a contract which provide for an arbitration process.

   - *Smoky River Coal Ltd., Re*, 1999 CarswellAlta 71; aff. in *Smoky River Coal Ltd., Re*, 1999 CarswellAlta 491 (Alta. C.A.) **[TAB 2]**;
   - *Hayes Forest Services Ltd. (Re)* [2009] B.C.J. No. 1725 (BC S.C.) **[TAB 3]**.

35. The Ontario Court of Appeal recently provided another example of the broad jurisdiction and authority enjoyed by CCAA courts by sanctioning a plan of arrangement which included contested third party releases. The narrow confinement of CCAA jurisdiction contended for by the Province simply cannot be reconciled to these cases.

   - *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 3523; aff. in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 92 O.R. (3d) 513 (Ont. C.A.) **[TAB 4]**.

36. While a CCAA liquidation plan in respect of Abitibi (i.e. the transfer of Abitibi's assets to a "newco" to be owned by Abitibi's creditors under a Plan) would certainly achieve the same result as the CPO and leave the Province without its claimed super-priority remedy, the complexities of accomplishing such a liquidation could delay emergence by months, risk assets whose transferability may be complex and have far reaching tax and other consequences which could imperil or significantly impair the restructuring. The assertion that the CPO had no jurisdiction to accomplish directly (compromise the financial consequences of existing conditions, including under regulatory laws) what can undoubtedly be achieved indirectly by a liquidation Plan accomplished under the auspices of the same statute is neither logical nor sustainable.

37. This debate is not a question of the Court controlling the exercise of ministerial discretion but rather, the court's reservation of the right to determine what obligations

relating to past activities are open to compromise and, in this case, the method of valuing a contingent claim. As such, the jurisdiction exercised by the CCAA Court to decide whether the EPA Orders give rise to claims which may properly be compromised falls squarely with the CCAA Court.

## II. THE EPA ORDERS

38. Abitibi submits that despite being framed as "regulatory orders", the EPA Orders themselves are in pith and substance financial or monetary in nature, their characterization as such is clearly within the jurisdiction of this Court and the eventual compromise of any claims arising therefrom raises no new questions of bankruptcy or insolvency law.

### 1. Context and Nature of the EPA Orders

39. The context of the EPA Orders is set forth in paragraph 5 of the Contestation and was already argued before this Court in the context of the hearing which took place on the Province's *Motion for a Declaration that the Petitioner is Entitled to Access the Electronic Data Rooms Created by the Debtors* (the "**Data Room Motion**"), a motion rejected by judgment of this Court on November 9, 2009 (the "**Data Room Judgment**").

40. When considering the true intent and nature of the EPA Orders, the broader context in which they have been made is clearly material. This context includes the following facts from which the Court can reasonably infer that these orders are part of an orchestrated campaign designed to punish Abitibi for its decision to close an uneconomic mill and to mitigate the potential adverse impacts upon the Province of the NAFTA proceedings arising therefrom:

- The Abitibi Act was announced and passed without warning in a single day less than two weeks after Abitibi announced the intended closure of its Grand Fills mill operation;

- The Orders were issued *three days* after the Province was denied access to the *financial* data room of Abitibi which it claimed was necessary to defend its interests as a "creditor" - a cloak which it now claims the right to don at its leisure, whether before or after the restructuring:

  - Data Room Judgment, paragraphs 15, 19 and 20:

    "[15] *The Province pleads that it needs to have access to the electronic data rooms* ***to properly assess Abitibi's financial status*** *and to make informed decisions in the restructuring. It maintains that it has a duty to inform itself of the present and future* ***potential ability of Abitibi to cover the Province's claims*** *against it.* [...]

    *[19]* [...] *the Province claims that because of Abitibi's economic activities, the latter has exposed itself to numerous environmental obligations, the precise extent of which remains to be determined.*

*[20] **<u>The Province alleges that it has incurred significant costs</u>** in that regard.*
[...]" (our emphasis)

- As appears from Abitibi's *Notice of Intent to Submit a Claim under Chapter 11 of the North American Free Trade Agreement* (Exhibit R-3 to Abitibi's Contestation to the Data Room Motion), AbitibiBowater Inc. is pursuing its remedies against the Government of Canada for the arbitrary confiscation of its property rights in clear violation of NAFTA (which, unsurprisingly and in common with the *Magna Carta,* prohibits confiscation without compensation and guarantees access to the courts - rights denied by the *Abitibi Act*); and

- While the Province is not a direct party to such NAFTA proceedings, the Government of Canada has the means to recoup from the Province any amount it is found liable to pay from discretionary transfers to the Province. The latter therefore has every motive to use what powers it believes it has left at its disposal to apply such pressure as it can upon Abitibi to abandon or settle its claim on favourable terms. Abitibi will not succumb to such pressure and this Court should not assist the Province in its continued abuse of power.

41. Despite being framed as injunctive orders, Abitibi submits the facts demonstrate that the practical, intended and inescapable result of the EPA Orders is the creation of monetary claims and that money is clearly an adequate remedy in this case. As noted above, given the entire lack of assets or activities of the Petitioners in the Province, the Orders can only be enforced by action outside the Province.

42. The EPA Orders were issued on <u>November 12, 2009</u>, that is, over six (6) months after Abitibi filed for Court protection under the CCAA. The EPA Orders order Abitibi to perform certain positive acts including, *inter alia*, the following:

    - the submission for approval by Newfoundland, by <u>January 15, 2010</u>, of a detailed Remediation Action Plan for all sites which have been identified by CRA has having exceeded the (allegedly) applicable limits;

    - the completion of the approved site remediation actions by <u>January 15, 2011</u> or by another date as may be agreed-upon with the Newfoundland's Department of Environment and Conservation;

    - the closure of all landfills and lagoons/impoundments associated with each site by <u>January 15, 2011</u>.

43. The evidence shall demonstrate that the cost of complying with such orders, while not known with precision, would be very financially material and could indeed be of a magnitude to imperil the restructuring. The evidence will also show that the Province began the process of seeking third party tenders to perform the work it is ostensibly waiting upon Abitibi to perform *before* the time for Abitibi's performance had even expired.

44. On February 8, 2010, the Newfoundland's Minister of the Department of Environment and Conservation (the "**Minister**") noted in her decisions rejecting Abitibi's appeals of the EPA Orders (Exhibit NL-14) that, in respect of each site, Abitibi had failed to comply with the EPA Orders. Similar accusations of non-compliance were leveled against Abitibi in Newfoundland's Argument at paragraphs 22 to 70.

45. Such a position is adopted in bad faith since the Province knew or should have known, at the time the EPA Orders were issued in November 2009, that it would be clearly impossible for Abitibi to comply with them. There are a number of reasons for this:

    - since the approval of the ACI DIP Facility on May 6, 2009, Abitibi's operations have been funded through debtor-in-possession facilities under the supervision of the Monitor and Abitibi's creditors, including its secured lenders. Abitibi's access to funds is therefore limited to funding for its ongoing business operations and Abitibi enjoys little discretion as to how these funds are allocated;

    - as outlined in detail in paragraph 49 of the Contestation, even if Abitibi was in possession of the funds which are necessary to comply with the EPA Orders, it would not be possible for Abitibi to comply with the EPA Orders in the sequencing and timeframe imposed by said orders while seeking to manage the complex task of raising financing and organizing its emergence from CCAA proceedings;

    - the EPA Orders target certain sites that were expropriated (Grand Falls-Windsor, Buchans and the Logging Camps) or surrendered to Newfoundland long ago and Abitibi could not, in any event, access sites which are in the possession of third parties to complete the remediation efforts. Among other absurdities or impossibilities, the Orders purport to require Abitibi to prepare a plan for the demolition of the Grand Falls mill which is now owned by and in possession of the Province.

46. To claim that the EPA Orders were issued, as alleged in paragraph 18 of the Province's Argument, "*as a result of the analysis contained in environmental assessments performed by independent third party consultants...*[which]*...the Province had to obtain...because Abitibi had failed to comply with its undertakings*" beggars belief and this Court's credulity.

47. In this case, the "third party consultant" was retained not by the Minister in exercise of any statutory duty but by Toronto litigation counsel to the Province in the NAFTA proceedings as is apparent from the face of each of the CRA Reports filed by the Province which is addressed not to the Minister but to the Toronto NAFTA lawyers of the Province.

48. The sudden and allegedly urgent interest of the Province's Toronto NAFTA lawyers in seeking studies regarding fifty year-old logging camps, long abandoned US Air Force fuel dumps (on sites that the Province was responsible for at the relevant time) or railway beds abandoned by other parties decades ago was no coincidence. These

events all flow in a straight line from the announced closure of the Grand Falls mill and the vendetta unleashed by the Province in its wake to mitigate the fall-out of its actions under NAFTA.

49. The Province's EPA contains, at s. 102, a "debt-creating provision" (discussed in greater detail below) in the event that a person targeted by an environmental remediation order fails to comply with it. To this day, although it is aware of the fact that Abitibi cannot comply with the EPA Orders, the Province maintains that it has chosen to compel Abitibi to fulfill the terms of the EPA Orders (Province's Argument, para. 21) rather than resort to an exercise of its powers under s. 102 of the EPA.

50. The Province adopts this approach because it needs to argue, for strategic purposes, that it is not a "creditor" of Abitibi (a few short weeks after arguing the opposite position in the Data Room Motion). Indeed, as discussed in greater detail below, the Province's argument rests on the *Panamericana* distinction between a situation "*where the government insists that the person fulfill his or her statutory duties or obligations from his own resources*" (Province's Argument, para. 98) from one where the government avails itself from the debt-creating provision in its environmental legislation to perform the remedial work, in which case the government would create a "*debt owed to the Crown*" (s. 102 EPA) and cannot be anything else than a creditor.

51. The Province does not contend that, if it chose to invoke s. 102, the effect of its Orders would be the creation of a debt which the CCAA can certainly compromise. If the Province can "create" a debt next year based on the same jurisdictional cloth as now exists (supplemented only by its own decisions to cause the remedial work to be done by a third party), that future obligation based on presently existing facts is as clearly compromisable as the debt "created" today. As in the *Marathon* case, the Province's EPA Orders, on a true reading, are thus a "*transparent attempt to find a 'deep pocket'*".

- *Marathon Pulp Inc., Re.*, 2009 CarswellOnt 4570 (Ont. S.C.) **[TAB 5]** at paras. 40 and 42.

### 2. **<u>Questionable Validity of the EPA Orders</u>**

52. Based upon the facts of this case, it is open to this Court to conclude that the EPA Orders were in fact issued in bad faith as part of the continuing vendetta of the Province which has involved the denial of the basic rights of Abitibi in the Province.

53. The limits on discretionary power in this context have been expressed in a variety of ways:

- *Roncarelli v. Duplessis*, [1959] S.C.R. 122 **[TAB 6]** at p. 140:

> "*In public regulation of this sort there is no such thing as absolute and untrammeled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator;* ***<u>no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for</u>***

> ***any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.*** " (our emphasis)

- *Cokes Report,* (1958) (5) **[TAB 7]** p. 99 (Rooke's Case):

> "[...] *discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance,* ***between equity and colourable glosses and pretences,*** *and* ***not to do according to their wills and private affections*** [...]"(our emphasis)

- *Mavi v. Canada (Attorney General),* 2009 ONCA 794 **[TAB 8]** at pp. 40-41:

> "*[121]* ***Discretionary authority must be exercised in good faith and not for improper purposes.*** *Relevant factors must be taken into account. Irrelevant factors must play no part in the consideration. The decision must be neither arbitrary nor unreasonable: see Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817 at paras. 52-53; Maple Lodge Farms Ltd. v. Government of Canada, 1982 CanLII 24 (S.C.C.), [1982] 2 S.C.R. 2 at pp. 7-8;* Roncarelli *v. Duplessis, 1959 CanLII 50 (S.C.C.), [1959] S.C.R. 121 at pp. 140, 155-157.*
>
> *[122] As David J. Mullan et al. explain in Administrative Law: Cases, Text, and Materials, 5th ed. (Toronto, Emond Montgomery, 2003), at p. 952:*
>
> ***It is for the courts to ensure that the agency does not use its power for some purpose not authorized by the legislature or base its decision on a range of factors that are either narrower or broader than those intended by the legislature to inform the exercise of the discretion.*** " (our emphasis)

54. Abitibi further submits that the EPA Orders should be given no comity by this Court under the general principle that no state will apply a law of another which offends against some fundamental morality or public policy. Viewed in their true context as part of a continuum in a scheme to confiscate the property of Abitibi without compensation, the EPA Orders are entitled to no extra-territorial effect or comity.

55. In the *Estonian State* case, a new constitution of the Estonian Soviet Socialist Republic purported to nationalize the shipping enterprises of juridical and natural persons. The decrees were found by the Supreme Court to be of an evident confiscatory nature and, even if they purported to have extra-territorial effect, could not be recognized by a foreign country under the well-established principles of international law. Quite independently of their illegality and unconstitutionality, the decrees were of such a character that they could not be recognized in a Commonwealth Court of Law following the British traditions of law.

- *Estonian State Cargo & Passenger Steamship Line v. "Elise" (The),* [1949] S.C.R. 530 **[TAB 9]**.

## III. Contingent Claims May be Compromised under the CCAA

56. Whether or not the EPA Orders themselves are truly monetary in nature, the principles which generally apply to the determination and compromise of contingent claims under the CCAA process can and should apply to any claims arising from these orders.

### 1. The Compromise of Contingent and Unliquidated Claims under the CCAA

57. As illustrated above, even if Abitibi was willing to do so, it would not be in a position to comply with the EPA Orders. The Province will therefore need to decide whether it steps-in to perform these tasks. Once it does so, the expenses incurred in this respect are recoverable as "Crown debts" against Abitibi in accordance with the debt-creating provision of the Province's environmental legislation (s. 102 of the EPA). Given the lack of any presence of Abitibi in the Province and the obvious inadequacy of money as a remedy to these alleged claims, the only effective means by which the Orders can be enforced is by invoking s. 102 of the EPA now or at some later date.

58. As a result, any claims arising out of the EPA Orders may properly be compromised under the CCAA as contingent claims. Any debts arising in this respect constitute claims which, by virtue of being founded on Abitibi's pre-filing obligations, may be dealt with under these proceedings.

59. Although the Province's debts are qualified as "contingent" in this analysis, in truth there is clearly a portion that may more properly be characterized as being "partially liquidated". Indeed, the Province alleged in its Data Room Motion (paragraphs 12 and 13) that it had already incurred significant costs and liabilities as a result of Abitibi's alleged failure to meet its obligations and as a result of its hiring of CRA environmental consultants. The Province is therefore already in a position to begin compiling the costs associated with Abitibi's alleged non-compliance with the Province's EPA.

60. As noted above, s. 12 of the CCAA authorizes the Court to determine the "amount" of a claim that may be compromised. The amount that may be compromised is the amount that "proof of which *might* be made". The CCAA clearly does not provide solely for the compromise of filed, actual claims but has from its inception been correctly interpreted as permitting contingent claims to be filed. There can be no doubt that, if the facts alleged in the EPA Orders were taken as true, there *is* a claim "proof of which *might* be made" as required by s. 12. There may be difficulty in proving the amount, there may be difficult in proving the right; Abitibi certainly contests every element of them. However, these objections would not put such a claim on a footing any different from other complex contingent claims the court is called upon to consider in the course of CCAA proceedings. The reason that there is no such claim actually extant is because the Province chose not to avail itself of its right to file one – that is not the test of whether a claim is subject to compromise under the CCAA. Clearly, there is a claim which "might" be filed. That objective fact, not the subjective choice of the creditor to hold the claim in its pocket for tactical reasons, is the test under the CCAA.

61. In practice, the fact that a claim may not be ascertained and may in fact be contested in its entirety during the CCAA process does not prevent it from being compromised. In many cases, Courts have been called upon to determine the value of contingent or disputed claims for the purpose of having such claims included in compromises or arrangements. The provable values of such claims are determined based on an assessment of the likelihood of the contingency occurring, followed by a quantification of the claim.

   - *Air Canada, Re,* 2004 CanLII 6674 (Ont. S.C.) **[TAB 10]** at para. 6:

     "*[6] **It is indeed troubling that a Canadian Human Rights Act / pay equity case could rattle around the Commission, the Tribunal and the courts for 14 years** and for this Court to be advised that it is likely to take another decade before this matter can be adjudicated to the end under that legislation. However, **that process is not the one which is required to be followed in the determination of a claim under the CCAA**. Contingent unliquidated claims are determined under the CCAA claims process even in the most complicated of litigation and even though a claim may not have been actually initiated in a court or otherwise.*"

   - *Air Canada, Re,* 2006 CanLII 42583 (Ont. S.C.) **[TAB 1]** at paras. 24 and 25:

     "*[24] **The Attorney General's second submission**, at para. 12 of his supplementary factum, **is that the Monetary Penalty is not a claim provable in bankruptcy because there is no "obligation" on Air Canada to pay the penalty until a tribunal or court makes a finding that Air Canada breached the noise abatement regulations and affirms the Monetary Penalty**. **I reject this submission**.*

     *[25] The Attorney General did not provide, and I am not aware of, any authority to support the proposition that a debt or liability subject to review or appeal can never be a claim provable in bankruptcy. If the Attorney General's submission were correct, a judgment creditor, for example, would never have a provable claim where the judgment debtor appeals the judgment and thereafter files for bankruptcy. This cannot have been the intention of Parliament. **In my view, the Monetary Penalty can be a claim provable in bankruptcy notwithstanding the fact that it was subject to an unresolved review by the TATC when Air Canada applied for CCAA protection.***"

     (our emphasis)

62. The process of valuing contingent claims entails assessing the nature of the contingency (such as its likelihood to occur and likely timing) together with an assessment of the amount of the claim that would then occur. The same process may be adopted whether the claim is a complex litigation claim, a claim under human rights legislation, a claim under a guarantee not yet demanded or a claim for environmental remediation under the EPA in respect of formerly-owned properties.

   - See with respect to guarantee claims: *Algoma Steel Corp. v. Royal Bank,* 1992 CarswellOnt 162 (Ont. S.C.) **[TAB 11]** at paras. 12 and ff. and the cases cited therein.

63. There is no reason to make an exception in this case. In *Anvil Mining Range Corp.*, Justice Farley sanctioned a liquidation plan of arrangement under the CCAA in respect of mines against which certain government creditors held secured claims. One of these was a $60 million claim by the Department of Indian Affairs and Northern Development ("**DIAND**") which included, *inter alia*, future environmental remediation costs. Justice Farley, in a judgment upheld by the Ontario Court of Appeal, noted that the DIAND claim had been acknowledged as "*contingent since it relates to reclamation costs in the future*" although a portion of the claim related to monies already expended.

- ➢ *Anvil Range Mining Corp., Re*, 2001 CarswellOnt 1325 at para. 15 (Ont. S.C.); aff. in *Anvil Range Mining Corp., Re*, 2002 CarswellOnt 2254 (Ont. C.A.) **[TAB 12]**.

64. Contingent claims are nothing more than incomplete claims the enforceability of which depends on some contingency or future event which has not yet occurred (and may never occur). In the case of a guarantee, it might be the non-payment by the principal debtor. In the case of an environmental claim of the sort advanced by the Province, it would be the decision of the Province to carry out the remediation and to pass along the cost as the EPA provides. The fact that all the elements of the claim do not presently exist does not deprive a contingent claim of its essential element of being a claim that can be quantified and the amount of which can be compromised.

65. All contingent claims are, by definition, lacking in some element or another necessary to make them presently exigible. Just as the holder of a guarantee which has not been called cannot seek to avoid the compromise of his or her claim by saying "*you cannot compromise the guarantee I hold as I have not demanded on it yet*", neither can the Province allege that the claims for the costs of remediating properties which it has seized without compensation cannot be compromised until it chooses to actually ask for the money. A conditional creditor cannot have the luxury of electing whether or not its claim is subject to compromise under the CCAA.

### 2. <u>Policy Reasons in Favour of Compromising Contingent Claims</u>

66. It is well established that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor and its creditors in order for the debtor *to be able to continue in business* so as to avoid the devastating social and economic consequences of the cessation of business operations.

- ➢ *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.) **[TAB 13]** at para. 22:

> *"10 <u>**The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business**</u>. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the*

> *point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.* [...]
>
> 22. [...] *The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent, liquidation followed because that was the consequence of the only insolvency legislation which then existed – the Bankruptcy Act, R.S.C. 1927, c. 11, and the Winding-up Act, R.S.C. 1927, c. 213. Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment.* ***The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.*** " (our emphasis)

- See also SARRA, Janice, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thompson Carswell, 2007) **[TAB 14]** at p. 9.

67. An important contingent claim such as an environmental claim of this magnitude will, if it remains uncompromised upon emergence from the CCAA process, act as a sword of Damocles over the debtor by threatening a debtor's continuity post-emergence. In fact, its very existence could very well repel needed exit financing and prevent a plan from being adopted unless a potentially risky and costly strategy of devising a liquidation plan were employed. Such a result would defeat the very objectives of the restructuring process and militates in favour of determining and compromising the Province's contingent claims.

68. A link between the objective of continuing the debtor's business and the compromise of contingent claims under the CCAA was made in *Smoky River*, where relying on the judgment of Justice Blair in *Campeau v. Olympia & York Developments Ltd.*, the Alberta Court of Appeal stated that claims which are "unripe" must be dealt with comprehensively in the context of CCAA proceedings, especially in cases where it may be difficult for a plan of arrangement to be prepared and voted upon without a resolution of such claims.

    - *Smoky River Coal Ltd., Re*, 1999 CarswellAlta 491 (Alta. C.A., 1999) **[TAB 2]** at paras. 43-44:

> "[...] *It is true that, in comparison to CCAA proceedings, bankruptcy proceedings are by nature more final. If it is ever to be dealt with, a claim must be resolved during the bankruptcy proceedings. In contrast, if a CCAA plan of arrangement is accepted, there is the future possibility of a going concern against which a claim may be asserted.*
>
> 44 ***But there may also be situations (like the present one) where it would be difficult for a plan of arrangement to be prepared and voted upon***

> ***without some resolution, in the same process, of a claim that is relatively unripe***. *This appears to have been the reasoning of Blair J. in Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.). There, the plaintiffs had served a statement of claim (seeking damages for breach of contract against the debtor company) before an initial stay under the CCAA was ordered. In refusing to lift the stay and permit the action to proceed, he noted that, unless the claim was dealt with in the context of CCAA proceedings, the creditors would have no way to assess whether to accept or reject the debtor company's plan (notwithstanding that the plan itself had treated the plaintiffs as parties that were unaffected by it). His language at 311 suggests a tacit acceptance of the fact that the plaintiffs were not "creditors" in the same sense as other creditors. He held, nevertheless, that their "claim" should be dealt with under the CCAA."*

69. More recently, the Alberta Court of Queen's Bench rejected the proposition that "*the CCAA process was concerned solely with the restructuring period and ensuring that it is not threatened by creditors pursuing their claims*". The Court stated that such a view would unduly restrict the purpose of the CCAA and chose instead to adopt a broad interpretation of the term "Claim" which would allow *all* the obligations of the debtor to be dealt with during the restructuring process.

   - *677960 Albert Ltd. v. Petrokazakhstan Inc.* [2009] A.J. No. 282 **[TAB 15]** at para. 27.

70. In line with the rehabilitative objectives of the CCAA, unlike section 178 of the BIA, the CCAA does not contain an analogous provision whereby certain "excepted claims" (such as fines or penalties) could constitute debts which survive bankruptcy (or in the CCAA's case, emergence). In *Air Canada*, Justice Cummings qualified excepted claims as "*exceptions to the normative policy objective of rehabilitation*" and concluded that section 178 of the BIA did not apply to proceedings under the CCAA. Recent amendments to the CCAA have conformed the CCAA somewhat to the BIA, but neither statute contains an exception for remediation claims in respect of formerly owned properties.

   - *Air Canada, Re,* 2006 CanLII 42583 (Ont. S.C.) **[TAB 1]** at paras. 34 and ff.

71. In paragraphs 135 to 143 of the Province's Argument, the Province argues that s. 11.1 of the Amended CCAA should be interpreted as being in support of the Province's position. However as noted above, s. 11.1(3) of the Amended CCAA allows a court to make an order staying any steps taken by a governmental body to enforce the general law if the court concludes that (1) a viable plan of compromise or arrangement could not be made in respect of the company without such an order and (2) the order is not contrary to public interest. Parliament has therefore concluded that the CCAA may be employed to place an appropriate check on regulatory actions, even if these are not purely "monetary orders".

## IV. THE AMENDMENTS TO BANKRUPTCY AND INSOLVENCY LAWS

72. The position adopted by the Province not only runs counter to the spirit of the CCAA and the well-established principle of compromise of contingent claims, it also fails to take into account highly relevant amendments to the law since 1992.

### 1. The Province's Position

73. The Province's position rests on the premise that obligations or duties to comply with the law are not "claims" but rather, are "obligations" that cannot be "extinguished" upon a debtor's insolvency (Province's Argument, paragraphs 86 and following). It will be noted as an aside that claims cannot properly said to be "extinguished" upon insolvency but rather, are called for, determined and ultimately compromised under a plan of arrangement, only after the latter has been voted upon by the debtor's creditors (including its unsecured claimholders) and approved by the Court.

74. The Province's position is founded on the *Panamericana* judgment and on a few cases which have followed it. The core of the *Panamericana* argument is that the RECEIVER, having determined to operate the business, could not shirk its duty to follow a regulatory (or government) order arising from that very operation under general law. This narrow view, which is the ratio of the case, was relatively uncontroversial (although recent amendments have effectively overruled it by placing limits on a receiver's obligations and thereby closing that back door to priority). By contrast, Abitibi has not carried on business in the Province since the time of filing and the Orders were issued primarily in respect of properties formerly owned by Abitibi and in regard to activities in most cases years in the past.

75. Viewed as a case that found liability of a court-appointed receiver, *Panamericana* was a case of little relevance following the amendments to the BIA and CCAA (described below) which limited such liability explicitly. However, in its analysis, the *Panamericana* Court went beyond a consideration of the receiver's responsibility as an operator of the business to consider what claims may or may not be provable in bankruptcy. Such analysis was a flawed *obiter* to its decision and has not been followed by major CCAA courts in subsequent decisions.

76. Among other flaws, the *Panamericana* decision failed to note the fact that the BIA (like the CCAA) explicitly contemplates the proof of contingent and unliquidated claims which, in combination with the "debt creating" provisions of statutes such as the EPA, leaves little doubt as to the status of the Crown as a contingent creditor with an eminently provable claim. The "debt-creating provision" found in most environmental laws (including at section 102 of the EPA and indeed, in the *Panamericana* case) must be examined in this light. The EPA provides that:

> ***Compliance***
>
> **102.** *(1) Where an order is served upon the person to whom it is directed, that person shall comply with the order immediately or, where a period of compliance is specified in the order, within the time period specified.*
>
> *(2) Where a person to whom an order is directed does not comply with the order or part of the order or service of that order cannot be carried out, the minister may take whatever action he or she considers necessary to carry out the terms of the order.*

> *(3) Where the minister*
>
> *(a) takes an action under subsection (2) to carry out the terms of an order; or*
>
> *(b) incurs costs, expenses or charges in order to investigate and monitor the compliance of a person with an order,*
>
> *the reasonable costs, expenses or charges incurred by the minister in taking that action are recoverable by the minister from the person to whom the order was directed as **<u>a debt owed to the Crown</u>** and the minister shall notify the person against whom the order is made of his or her determination of the amount of the recoverable costs, expenses and charges.*
>
> *(4) Where a person defaults in paying **<u>a debt owed to the Crown</u>** in accordance with subsection (3), the minister may issue a certificate stating the amount due and remaining unpaid to the Crown and the name of the person by whom it is payable, and file the certificate with the Registrar of the Supreme Court and when that certificate is filed with the Registrar of the Supreme Court, it is of the same effect and all proceedings may be taken on the certificate, as if it were a judgment of the Trial Division for the recovery of the amount stated in the certificate against the person named in the certificate.*
>
> [...]

77. As long as the law provides that the regulatory agency may perform the task itself and assert a claim against the debtor in respect of the costs of the performance of the obligations, then the mechanism of a monetary judgment is clearly contemplated as a means of enforcing environmental compliance. The fact that the step has not been taken signifies nothing more than the difference between an accrued claim and a contingent one. This is explicitly the case in subsection 102(4) of the EPA. Indeed, as noted, on the facts of this case, a money claim is the ONLY mechanism for enforcement that is open to the Province. In such a context, it becomes difficult to sustain a demarcation between enforcement of the law and pursuit of a monetary judgment.

78. This debt-creating provision may be likened to civil damages. A judgment creditor has a claim provable in bankruptcy but that judgment represents the culmination of the process of enforcing private law. The enforcement of private law obligations rests on the notion that monetary payments can be substituted for the performance of the actual obligation. If Abitibi's duty to comply with the EPA were likened to an implied contractual obligation, the Province's claim would be equivalent to an unliquidated damages claim for breach of contract.

### 2. <u>The Amendments to the BIA and *General Chemical*</u>

79. Prior to the 1992 amendments to the BIA, cases involving significant environmental contamination discouraged trustees and receivers from taking appointments. Indeed,

no specific legislation prevented trustees from being held personally responsible with respect to potential environmental damages.

80. In 1992, following certain court decisions that fashioned an exception for trustees to avoid such liability, subsections 14.06(2) and 14.06(3) of the *BIA* were enacted accordingly. These new rules did not, however, extend similar protection to receivers. In 1997, the 1992 provisions were replaced with new provisions which provided, *inter alia,* that:

   - the protection extended to trustees in 1992 was extended to receivers and interim receivers (s. 14.06(1.1) BIA);

   - the standard for personal liability of trustees was raised from mere negligence (failure to exercise due diligence) to gross negligence or willful misconduct (s. 14.06(2)(b) BIA); and

   - the Crown has a lien against the contaminated property or contiguous property for the costs of remedying any environmental condition or damage (s. 14.06(7)) (See **Schedule C**).

   - clean-up costs were acknowledged as provable claims under the BIA (s. 14.06(8)).

81. It should be noted that the Crown lien is exclusively attached to the contaminated property and other contiguous real property of the debtor that is related to the activity that caused the contamination. In other words, *the lien does not give the Crown any priority over the rest of the creditors on the other assets of the debtor.* In that regard, the Crown remains an ordinary unsecured creditor.

   ➢ *General Chemical Canada Ltd.*, Re, 2006 CarswellOnt 4675; aff. in *General Chemical Canada Ltd.*, Re, 2007 CarswellOnt 5497 (Ont. C.A.); leave to appeal to the Supreme Court of Canada refused at 2008 CarswellOnt 879 **[TAB 16]** at para. 42 of the C.A. decision.

82. In 1997, similar amendments were introduced to the CCAA in respect of Crown claims for environmental contamination. Section 11.8(3) of the CCAA provides that the Monitor is not personally liable for any environmental condition or damage that occurred before the Monitor's appointment, or after the appointment (provided in the latter case that the condition or damage did not arise as a result of the Monitor's gross negligence or willful misconduct).

83. In addition, subsections 11.8(8) and (9) of the CCAA specifically deal with Crown claims for environmental remediation costs:

> ***Priority of claims***
>
> *(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or*

> *environmental damage affecting real property of the company* ***<u>is secured by a charge on the real property and on any other real property of the company that is contiguous thereto</u>*** *and that is related to the activity that caused the environmental condition or environmental damage, and the charge*
>
> *(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and*
>
> *(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.*
>
> ***Claim for clean-up costs***
>
> *(9) A* ***<u>claim</u>*** *against a debtor company* ***<u>for costs of remedying any environmental condition</u>*** *or environmental damage affecting real property of the company* ***<u>shall be a claim under this Act</u>****, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.*

84. Parliament has carefully weighed the place of environmental remediation claims in the context of insolvency and has struck a deliberate and considered balance with three consecutive sets of revisions and refinements (in 1992, 1997 and 2009). There can be no room to claim that Parliament intended to open the door to cute and artificial arguments that the timing of the "monetization" of claims can be artfully manipulated to defeat the manifest intent of Parliament. Abitibi submits that these amendments have substantially altered the way in which courts must approach environmental contamination situations in an insolvency context. In fact, in *General Chemical,* the Ontario Court of Appeal relied on these amendments in declining to follow *Panamericana*:

- *General Chemical Canada Ltd.,* Re, (Ont. C.A.) **[TAB 16]** at paras. 45 and ff.:

> *"[45] In this court, the MOE repeats its arguments below and raises, as it did there, the case of* Panamericana De Bienes Y Servicios (Receiver of) v. Northern Badger Oil and Gas Ltd. *1991 CanLII 2698 (AB C.A.), (1991), 81 D.L.R. (4th) 280 (Alta. C.A.). In that case, the court found that provincial environmental legislation concerning oilwell clean up costs did not conflict with the scheme of distribution under the* BIA, *and had to be complied with even though that reduced the amounts otherwise available for distribution in the bankruptcy.*
>
> *[46]* ***<u>I agree with the motion judge that the reasoning in that case has been overtaken because of subsequent amendments to the BIA</u>****. Section 14.06(7) now expressly provides for priority to be accorded to environmental clean up costs and* ***<u>s. 14.06(8) now ensures that a claim against the debtor for environmental clean up costs is a provable claim</u>****. Neither were in effect at the time of Panamericana.* ***<u>To give effect to provincial environmental legislation in the face of</u>***

> ***<u>these amendments to the BIA would impermissibly affect the scheme of priorities in the federal legislation</u>."***

85. It should be noted that at paragraph 46 of the Court of Appeal decision in *General Chemical*, the Court expressly approved of the motion judge's finding which it resumed at paragraph 44 as "[...] *to permit the MOE to effect a delay in distribution would be to give a quasi- priority over other unsecured creditors* [...]". The premise of the first instance judge's reasoning was that federal legislation is paramount and that a provincial law may not seek to reorder the scheme of distribution set out in the BIA:

   - *General Chemical Canada Ltd.*, Re, (Ont. S.C.) **[TAB 16]** at para. 37:

     > *"37 Disposing of the issues here requires an analysis of the interplay among the provisions of the Bankruptcy and Insolvency Act, the Pension Benefits Act, the Environmental Protection Act, and the Personal Property Security Act. I will set out briefly the most salient features of each of these statutes that bear on these motions. In this context, it must be remembered that **<u>the BIA, as federal legislation, occupies the field of bankruptcy and insolvency, and has paramountcy over the other statutes</u>**, which are all provincial legislation. **<u>Central to this discussion is the concept that provincial legislation may not, either directly or indirectly, seek to reorder the priorities set out in the BIA</u>**."*

86. The above premise has been affirmed by the Supreme Court on various occasions and in different contexts.

   - *Deputy Minister of Rev. (Que.) v. Rainville*, [1980] 1 S.C.R. 35 **[TAB 17]**;
   - *Deloitte Haskins & Sells v. Workers' Comp. Board*, [1985] 1 S.C.R. 785 **[TAB 18]**;
   - *Federal Business Development Bank v. Québec (CSST)*, [1988] 1 S.C.R. 1061 **[TAB 19]**;
   - *British columbia v. Henfrey samson belair ltd.*, [1989] 2 S.C.R. 24 **[TAB 20]**;
   - *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 **[TAB 21]**.

87. In *Husky Oil*, the Supreme Court found that the combined effect of ss. 133(1) and 133(3) of Saskatchewan's *Worker's Compensation Act* was an effective reordering of the priorities of s. 136 of the BIA such that the worker's compensation board would recover against the bankrupt by way of set-off ahead of the federally mandated priority in s. 136(1)(h). The impugned provincial law accordingly intruded into an exclusive federal sphere and was declared to be inapplicable. In so doing, the Supreme Court reiterated that one of the goals of the bankruptcy system is to ensure an equitable distribution of a bankrupt debtor's assets among the estate's creditors, the whole in accordance with the federal system of bankruptcy priorities.

   - *Husky Oil*, pp. 13-14, citing with approval Aleck Dadson, "Comment" (1986) 64 *Can. Bar Rev.* 755 **[TAB 21]** at p. 755:

> *"... bankruptcy serves this goal by replacing a regime of individual action with a regime of collective action. While the pre-bankruptcy regime of individual action allows creditors to pursue their separate and competing claims to the debtor's assets, bankruptcy's regime of collective action sorts out those diverse claims and deals with the debtor's assets in a way which brings benefits to creditors as a group (reduced costs, increased recovery) ... **The collectivization of insolvency proceedings can only be achieved by denying to creditors the use of pre-bankruptcy remedies**."*
>
> (our emphasis)

88. Abitibi notes that courts will typically refuse to give effect to "colourable" legislation, the true "pith and substance" of which falls outside of that legislature's field of competence. In this case, the same reasoning should apply to a colourable enactment made by the Province under an otherwise valid environmental legislation:

    - *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 **[TAB 22]** at p. 332:

    > *"Where, however, the **pith and substance of the provincial enactment** is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be ultra vires. **A colourable attempt to preserve the appearance of constitutionality in order to conceal an unconstitutional objective will not save the legislation**. I refer to the words of Lord Atkin quoted above that "a colourable device will not avail".*

89. In this case, the Province's attempt at fashioning a superpriority for the satisfaction of its environmental claims by crafting the Orders and "managing" the timing of the creation of the "Crown debt" under s. 102 of the EPA is not only contrary to the principles of the CCAA, it is also unjust vis-à-vis Abitibi's other creditors whose claims are effectively stayed and will be compromised. In effect, the Province's acts amount to a transparent and colourable attempt to circumvent the insolvency process through the use of its own legislation. As in *Churchill Falls*, the impact of the Orders is, and was intended to be, an interference with the property and civil rights of Abitibi outside of the Province. While a discretionary regulatory order rather than a special statute, the clearly intended impact of the governmental action in this case makes it indistiguishable from the *Churchill Falls* case.

90. In effect, by expropriating Abitibi, the Province quite literally took the law into its own hands and effectively realized on any security to which it would be entitled under section 11.8(8) CCAA should the expropriated lands be contaminated. It now seeks to go further and expropriate for its benefit property and assets located beyond its borders – this it cannot do, regardless of the disguise employed.

## CONCLUDING REMARKS

91. The Province's motion is but the latest in a long line of cases where provincial authorities have sought in vain to carve out "deemed trusts" and "super-priority" status for various provincial interests. Each of these attempts have been turned back at the gates by courts at all levels including the Supreme Court of Canada on multiple occasions. This latest attempt, once unmasked for the priority grab that it nakedly is, should meet the same fate.

92. The Province has said that it is bringing this motion so the Petitioners' creditors can formulate their restructuring plans with knowledge of the Province's intentions. Their message to creditors can be none other than that the Province, which has nakedly pillaged the estate of virtually all of its assets in Newfoundland and Labrador to the tune of hundreds of millions of dollars reserves the right to pursue its destructive and vindictive campaign beyond its borders at the time and place of its choosing. However, their lawless writ does not run beyond their borders and the Petitioners respectfully request this court send the appropriate return message back on behalf of the affected creditors of the Petitioners, from the workers and retirees across the country, from bondholders, trade creditors and bankers alike: this will not be tolerated.

*****

**THE WHOLE RESPECTFULLY SUBMITTED**

Montreal, February 19, 2009

Stikeman Elliott

**STIKEMAN ELLIOTT LLP**
Attorneys for the Petitioners

## SCHEDULE A

| Section 11.1 of the Amended CCAA |
|---|
| *Meaning of "regulatory body"*<br>**11.1** (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.<br>*Regulatory bodies – order under section 11.02*<br>(2) 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.<br>*Exception*<br>(3) 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<br>(*a*) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and<br>(*b*) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.<br>*Declaration – enforcement of a payment*<br>(4) 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 both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed. |

| Section 11(3) of the CCAA | Section 11.02 of the Amended CCAA |
|---|---|
| *Initial application court orders*<br>(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,<br>(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);<br>(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and<br>(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company. | *Stays, etc. – initial application*<br>**11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,<br>(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;<br>(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and<br>(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company. [...] |

# SCHEDULE B

## CCAA and Amended CCAA: "secured creditor" and "unsecured creditor"

**"secured creditor"**

"secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;

**"unsecured creditor"**

"unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

## BIA: " claims provable"

**"claim provable in bankruptcy", "provable claim" or "claim provable"**

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

[...]

**Claims provable**

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.

**Contingent and unliquidated claims**

(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.

[...]

| Section 12 of the CCAA | Section 2(1) and 20 of the Amended CCAA |
| --- | --- |
| *Definition of "claim"*<br>**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*.<br>*Determination of amount of claim*<br>(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as | "claim"<br>"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act;*<br>[...]<br>*Determination of amount of claims*<br>20. (1) For the purposes of this Act, the amount represented by a claim of any secured or |

| | |
|---|---|
| follows:<br>(*a*) the amount of an unsecured claim shall be the amount<br>[...]<br>(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[...] | unsecured creditor is to be determined as follows:<br>(a) the amount of an unsecured claim is the amount<br>[...]<br>(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 is to be determined by the court on summary application by the company or by the creditor; and[...] |

## SCHEDULE C

| Subsections 11.8(8)&(9) of the CCAA | Subsections 14.06(7)&(8) of the BIA |
| --- | --- |
| *Priority of claims*<br>(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge<br>(*a*) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and<br>(*b*) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.<br><br>*Claim for clean-up costs*<br>(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. | *Priority of claims*<br>(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security<br>(*a*) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and<br>(*b*) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.<br><br>*Claim for clean-up costs*<br>(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy. |

**SUPERIOR COURT**
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*)

**N°. 500-11-036133-094**

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

**In the matter of Plan of Compromise or Arrangement of:**

**ABITIBIBOWATER INC.** *et al*

**Debtors**

**- and -**
ERNST & YOUNG INC.

**Monitor**

**- and -**
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND AND LABRADOR

**Petitioner**

BS0350 **n/dos.:** 041053-1170

MEMORANDUM OF ARGUMENT
OF THE PETITIONERS - AMENDED CONTESTATION OF THE MOTION FOR A DECLARATION REGARDING ORDERS ISSUED PURSUANT TO THE *ENVIRONMENTAL PROTECTION ACT*, S.N.L. 2002, CHAP. E-14.02

ORIGINAL


**Me Guy P. Martel** **(514) 397-3163**
**Fax : (514) 397-3493**

**STIKEMAN ELLIOTT**
**Stikeman Elliott LLP BARRISTERS & SOLICITORS**
**40th Floor**
**1155 René-Lévesque Blvd. West**
**Montréal, Canada H3B 3V2**