CANADA **PROVINCE OF QUEBEC** **DISTRICT OF MONTREAL** **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 BRITISH COLUMBIA AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA** **Intervener**

MEMORANDUM OF ARGUMENT OF THE INTERVENER, ATTORNEY GENERAL OF BRITISH COLUMBIA ON THE DISTRIBUTION OF POWERS

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A. Introduction

1. As with any regulatory scheme, the British Columbia *Environment Management Act* (EMA) and regulations impose obligations on persons responsible for environmental conditions ("regulatory obligations"). Performance of regulatory obligations is at the responsible person's own expense and is compellable by order.

2. In addition to creating regulatory obligations, EMA provides for statutory debts and liabilities ("debt obligations"). The Act makes all responsible persons potentially jointly and severally liable to contribute to any cost of remediation which has been incurred, whether by another responsible person or by the government. The Act also enables the government itself to undertake remediation in certain circumstances and to recover the cost of doing so as a debt. The Act also provides for the enforcement of orders through prosecution and monetary penalties.

3. EMA thus creates two discrete kinds of obligation. In these proceedings under the federal *Companies' Creditors Arrangement Act,* Abitibi has been granted a Claims Procedure Order containing an expansive definition of "Claim" which purports to capture both kinds.

4. The CCAA, in its definition of "claim", does not contemplate any such result. Nor does the Constitution of Canada.

B. British Columbia facts and concerns

5. HMQBC appears to put before this court the scheme of provincial environmental regulation in British Columbia, and Abitibi's current status with respect to its regulatory obligations under that scheme.

6. The situation in that regard in British Columbia presents a contrast from the situation in Newfoundland/Labrador. In British Columbia, Abitibi is engaged in independent remediation of a number of sites, has ongoing obligations with respect to

most or all of them, and is not in full compliance at some; but – unlike in Newfoundland/Labrador – no regulatory orders are outstanding. Although the environmental situation in British Columbia may show no present cause for alarm, HMQBC is nevertheless concerned about the effect of the Claims Procedure Order going forward. It creates the possibility that Abitibi may choose not to comply with its ongoing obligations and be free not to respond to emergent circumstances in respect of which it is a responsible person under EMA. That is simply unacceptable to the government and the people of British Columbia.

7. Further, although the environmental concerns of British Columbia may be less immediate and extreme than those of Newfoundland/Labrador, our constitutional concerns are exactly the same. The expansive definition of "Claim" under the Claims Procedure Order is constitutionally invalid and/or a constitutionally impermissible intrusion into the core of provincial legislative competency with respect to property and civil rights. That definition of "Claim" purports to nullify not only environmental regulatory obligations but also outstanding forestry obligations (e.g. reforestation), labour and employment relations obligations (e.g. union successorship), corporate and securities obligations (e.g. filings), and other obligations arising from the normal carrying-on of Abitibi's business before the initial filing date. None of those are debts or liabilities within the CCAA definition of "claim",[1] or properly within Parliament's constitutional power to make subject to compromise or arrangement under an insolvency statute.

8. The constitutional question in this case is also of practical importance for British Columbia insolvency proceedings. By one means or another (initial orders, claims bar orders, vesting orders, and/or plan approval orders), insolvent companies have sought to use CCAA proceedings in British Columbia to achieve a temporary or permanent regulatory holiday – sometimes in the face of known emergency situations where the immediate and long-term public interest requires regulation and compliance. AGBC's constant practice in such cases has been to raise the constitutional issues respecting regulatory obligations. We then try to negotiate modifications to over-broad order language. If negotiations fail, we put the company, its lenders, creditors and all stakeholders on notice that – if later on it becomes necessary to hear the constitutional question and it is decided against them – their proceedings and/or plan of arrangement

[1] It is doubtful if any of them could begin to be quantified for that purpose.

may be at risk of unravelling retrospectively. AGBC and insolvent companies have by those means so far avoided litigating the constitutional issue with respect to regulatory obligations in British Columbia. However, in the present proceedings, the constitutional question is now raised and must be decided.

C. Overview of AGBC submissions

9. AGBC will make two arguments:

- that Abitibi's expansive definition of "Claim", as it appears in the Claims Procedure Order, is beyond the federal legislative power over bankruptcy and insolvency under the *Constitution Act 1867,* and the CCAA should not be interpreted to allow the process of compromise and arrangement to be based in any way on such a definition (the constitutional invalidity argument); and

- in the alternative, that the expansive definition of "Claim" would impair the core of provincial legislative competence under the *Constitution Act 1867,* and the CCAA cannot not be applied to that effect (the constitutional inapplicability argument)

10. In order to make those arguments, it will first be necessary to review the law, principles and doctrines governing the distribution of powers under the Canadian constitution, as well as the nature and scope of the federal bankruptcy and insolvency power and provincial constitutional responsibility for the environment.

11. That review will provide touchstones for the ensuing analysis

- of the "pith and substance" of Abitibi's expansive definition of "Claim";

- of how any provision or interpretation of the CCAA which provided statutory authority for an order containing such a definition would be inconsistent with the presumption that Parliament intends not to exceed its constitutional authority; and

- of how, in any event, any such provision or order would be constitutionally inapplicable under the doctrine of provincial interjurisdictional immunity.

D. Constitutional law, principles and doctrines

Distribution of legislative powers under the Constitution of Canada

12. The *Constitution Act 1867* provides for the distribution of legislative authority between Canada's provincial and federal governments.[2]

13. Section 92 sets out the matters assigned exclusively to the provinces. Most prominent is the power to make laws in relation to property and civil rights in the province – a matter which the courts have long recognized has plenary reach. The other generalized areas of exclusive provincial authority relate to local works and undertakings, and to local and private matters generally.

14. Section 91 empowers Parliament to make laws in relation to matters not assigned exclusively to the provincial legislatures. That section goes on to identify certain enumerated matters which are thereby specifically removed from exclusive provincial authority.[3]

The bankruptcy and insolvency power

15. Bankruptcy and insolvency is one of the enumerated heads of federal legislative power, under section 91(21) of that Act.

16. Bankruptcy and insolvency is a sub-set of the broader matter of property and civil rights in the province(s). While constitutionally federal, the bankruptcy and insolvency power nevertheless depends for its operation on provincial enactments and/or the common law.[4] Only if provincial enactments artificially interfere with the intended

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[2] *Constitution Act 1867* , 30 & 31 Victoria, c. 2 (U.K.). sections 91 and 92

[3] There is also a subset of matters which are, by sections 91 and 92, taken out of exclusive provincial legislative authority. Section 92(10) identifies certain works and undertakings not within provincial jurisdiction. And the closing words of section 91 make clear that the matters specifically assigned to Parliament in that section shall not be treated as local or private, even though that may be their nature.

[4] *Re Giffin* [1998] 1 S.C.R. 91, citing *Husky Oil Operations Ltd. v. Canada (Minister of National Revenue – M.N.R.*, [1995] 3 S.C.R. 453.

operation of a federal legislated scheme, and an operational conflict ensues, will provincial laws become (by federal paramountcy) inoperative to the extent of the conflict.[5] Otherwise, provincial laws of general application continue to apply in bankruptcy or insolvency proceedings, even if that may affect the bottom line in bankruptcy or insolvency – i.e. reduce the money available to creditors in a bankruptcy, or require a restructured company, following CCAA proceedings, to fulfill its regulatory obligations at its own expense.

17. The conceptual limits of the bankruptcy and insolvency power were considered by Justice Beetz in *Robinson v Countrywide Factors Ltd.* His Lordship explained that "insolvency" in section 91(21) of the *Constitution Act 1867* is meant in a *technical* sense – the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a court, to stop individual action by other creditors and to secure administration of the debtor's assets in the general interest of creditors [i.e. through the *Bankruptcy and Insolvency Act*]; or to allow an insolvent debtor company to apply for similar administration, including through the CCAA.[6]

18. Thus, the main purpose of the bankruptcy and insolvency power is to give Parliament exclusive jurisdiction over the establishment of particular legislative systems to regulate the distribution of a debtor's assets through bankruptcy; or, in the case of the CCAA, to maintain the *status quo* while an insolvent company attempts to gain the approval of its creditors for a mutually-beneficial plan of compromise or arrangement, through the procedures contemplated under the Act.[7]

19. However, it is not part of Parliament's constitutional mandate to *cure* insolvency, nor to improve post-restructuring solvency – as, for example, by improving a restructured company's post-proceedings bottom line. Rather, the insolvency power in its technical sense is limited to providing legislative mechanisms, and allowing court orders, which deal with and/or avoid the outcomes which would otherwise accrue from insolvency. As

[5] Contrast the outcome in *Husky Oil* with the outcome in *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General),*[2005] S.C.J. No. 52, 2005 SCC 52
[6] *Kozen Furniture (Yorkton) Ltd. (Trustee of) v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753, at
[7] *Re Lehndorff General Partner Ltd.* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.), as quoted in *Cansugar Inc.* 2005 NBQB 199 and elsewhere

Justice Tysoe put it in *Cliffs Over Maple Bay*,[8] "[t]he fundamental purpose of the CCAA is expressed in the long title of the statute: An Act to facilitate compromises and arrangements between companies and their creditors".

20. Section 91(21) of the *Constitution Act 1867* does not allow Parliament to legislate relief from provincial regulatory obligations simply because an insolvent company would be better off without them. To give the bankruptcy and insolvency power such breadth would entirely disregard the scheme of distribution of legislative powers and upset the intended balance between the national and provincial governments. Doing so would potentially engulf any and all aspects of the exclusive provincial power respecting property and civil rights. That goes well beyond the limits of bankruptcy and insolvency, in *any* sense.

<u>Constitutional responsibility for the environment</u>

21. The *Constitution Act 1867* has not expressly assigned the matter of "environment" to either the provinces or Parliament. Rather, the "environment" cuts across many different areas of constitutional responsibility.[9]

22. A variety of analytical constructs have been applied to deal with the abstruse nature of the environment for constitutional purposes. It is a matter of such local, national and global importance as to be subject to both provincial and federal legislative jurisdiction. In some of its aspects, protection of the environment is a matter of property and civil rights and/or provincial responsibility for local matters.[10] In other aspects, it may be a matter of national or international dimension,[11] or auxiliary to the exercise of enumerated federal powers such as navigable waters, fisheries, Indians and Indian lands, etc.[12] Protection of the environment can also be achieved through the exercise of the federal criminal law power.[13] However, in all those respects, federal legislative authority *supplements* rather than supplants or impairs provincial law-making.

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[8] 2008 CarswellBC 1758

[9] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at para. 93

[10] *Oldman River*, at para. 99

[11] *R. v Crown Zellerbach* [1986] 1 S.C.R. 401

[12] *Oldman River*, at para. 106

[13] *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213

23. The Supreme Court of Canada has repeatedly recognized that protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels.[14] Nevertheless, each level of government must be respectful of the division of powers that is the hallmark of our federal system: there is a fine line between laws that legitimately complement each other and those that invade another government's protected legislative sphere.[15] The approved approach is to consider how the catalogue of federal and provincial powers may be employed to meet or avoid environmental concerns,[16] rather than have the jurisdiction of one level of government oust or override the legislation of the other.

Basic principles of Canadian federalism

24. Parliament and the provincial legislatures are each sovereign in their respective spheres. For the courts to approach constitutional questions otherwise

> would be incompatible with the essential principle of the Confederation scheme, the object of which ... was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority. .... Within the spheres allotted to them by the [*Constitution Act 1867*], the Dominion and the Provinces are ... rendered on general principle co-ordinate governments.[17]

25. The scheme of federalism in Canada was intended

> to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local and regional level and to foster co-operation among governments and legislatures for the common good.[18]

Relevant constitutional doctrines

26. The courts have developed constitutional doctrines which "permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in

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[14] *114957 Canada Ltée (Spray-Tech, Société d'arrasage) v. Hudson (Ville)*, 2001 SCC 40, at para. 3
[15] *Spray-Tech* at para. 3 and 4
[16] *Oldman River*, at para. 94
[17] *Attorney General for Ontario v Reciprocal Insurers* (1924), 41 C.C.C. 336 (P.C.), at 345 and 348
[18] *Canadian Western Bank v. Alberta*, 2007 SCC 22, at para 22

rules made at the two levels of legislative power ...."[19] The doctrines relevant to the present application are constitutional characterization through a "pith and substance" analysis; double aspect; the presumption of constitutionality; and interjurisdictional immunity.

Constitutional characterization

27. The first step in any constitutional analysis is to determine the "pith and substance" or true nature or "dominant and most important characteristic" of the challenged law, as a whole or with respect to certain provisions.[20]

28. The constitutional validity of the CCAA as a whole is well established.[21] However, the question here will be the true nature of any provision or combination of provisions in that Act which would allow regulatory obligations to be treated as "Claims" and made subject to extinguishment through a plan of compromise or arrangement under the Act.

29. The test articulated by the Supreme Court of Canada in *Kitkatla* applies to the pith and substance analysis respecting such provisions:

> Do the impugned provisions intrude into a [provincial] head of power, and to what extent?
>
> If the impugned provisions intrude into a [provincial] head of power, are they nevertheless part of a valid [federal] legislative scheme?
>
> If the impugned provisions are part of a valid legislative scheme, are they sufficiently integrated with the [federal] scheme?[22]

30. Determining the true nature of such provisions includes consideration of both the purpose of the enacting legislature and the legal effect on the other legislature's constitutional jurisdiction.[23]

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[19] CWB, at para. 24
[20] CWB, para. 25
[21] *Ref. re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659.
[22] *Kitkatla Band v British Columbia (Ministry of Small Business, Tourism and Culture)* 2002 SCC 31
[23] CWB, at para. 27

Double aspect

31. The courts have recognized that some matters are by their very nature impossible to categorize under a single constitutional head of power. A matter may, for one purpose or in one aspect, be brought within federal jurisdiction while for a different purpose or aspect remain provincial. The purpose of the double aspect doctrine is to ensure that the constitutionally-valid policies of the elected legislators of both levels of government are respected to the maximum extent possible.[24]

32. The doctrine has traditionally been applied with caution lest exclusive provincial legislative jurisdiction set out in section 92 be combined with section 91 into a single more or less concurrent field of powers governed solely by the rule of federal paramountcy.[25] More recently, the Supreme Court of Canada has recognized that provincial jurisdiction and the intended balance of powers under the Constitution are protected, not diminished, by the double aspect doctrine – *but only* because that doctrine operates in tandem with a restrained approach to other constitutional doctrines.[26]

Presumption of constitutionality

33. Where there is an apparent operational conflict between federal and provincial enactments, courts are sometimes able to invoke what is known as the "presumption of constitutionality" as a means of resolving potential conflict.[27]

34. In such circumstances, the legislation is interpreted in accordance with the presumption that Parliament or the legislature knew and intended to remain within the scope of its constitutional powers.

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[24] CWB, at para. 30

[25] *A.G. Can. v A.G. Alta,* [1916] 1 A.C. 588 (P.C.) at 596, ref'd. to in *Comm. de la santé et de la securite du travail (Que.) v Bell Canada,* [1988] 1 S.C.R. 749, at 766.

[26] *CWB* at para. 45 and *passim.*

[27] *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, at paras. 11-25; *Siemens v. Manitoba (Attorney General),* [2003] 1 S.C.R. 6, at para. 33

35. The presumption of constitutionality can be used in a situation where a broad interpretation of federal legislation would place it beyond the reach of the federal constitutional power under which it was enacted. In such circumstances, the courts apply the doctrine of 'reading down'.[28]

Interjurisdictional immunity

36. The courts have recognized that, in certain circumstances, the constitutional jurisdiction of one level of government must be protected against competing aspects or intrusions, even incidental ones, by the other level of government. The doctrine of interjurisdictional immunity applies in those circumstances.

37. Consistent with the principles inherent in the double aspect doctrine, interjurisdictional immunity is properly applied with restraint.

38. In most cases of intrusion by provincial legislation into federal jurisdiction, issues of overlap are better resolved through recourse to the doctrine of federal paramountcy.[29]

39. In cases where the operation of *federal* legislation would impair the core legislative competence of provinces, and it is not possible to "read down" the federal enactment to avoid constitutionally-invalid effect, then the doctrine of interjurisdictional immunity remains available to ensure the intended constitutional balance.[30]

40. Interjurisdictional immunity has been applied recently by the British Columbia Court of Appeal in *PHS Community Services Society v Canada* (AG)[31] to preserve core provincial legislative competence with respect to health care from impairment by a federal criminal law. The Insite facility is a provincial undertaking (a hospital) providing safe injection services (which the courts found to the provision of health care) in the Downtown East Side of Vancouver. The issue in *PHS* was whether the federal Minister of Health, by deciding not to grant exemption from criminal sanction for the possession

[28] Hogg, p. 15-23 and 15-26 and following
[29] CWB, at para. 46 and 67
[30] CWB, at para. 48 to 50 and para. 36
[31] 2010 BCCA 15, at para. 152 and following

of restricted drugs on the premises, should have effective control over whether Insite continues in operation.

41. Justice Huddart, writing for the majority in *PHS*, observed that "[i]t would be difficult to envisage anything more at the core of the province's general jurisdiction over health care than decisions about the nature of the services it will provide" at Insite.[32] She further wrote that "[i]f the federal executive, in exercising or failing to exercise authority granted to it by Parliament, can effectively prohibit a form of health care vital to the delivery of a provincial health care program, that means Parliament has an effective veto over provincial health care services ...."[33] She concluded as follows:

> This is precisely the restrained use of the interjurisdictional immunity doctrine the jurisprudence supports: to prevent intrusive incidental effects by one legislature on the domain of the other. In this case, its application would prevent two provisions of the [*Controlled Drugs and Substances Act*] from sterilizing essential elements of a provincial undertaking, and would do so without undermining the federal criminal law power to any significant degree.[34]

E. Constitutional characterization in the case at bar

<u>The CCAA as a whole</u>

42. The "pith and substance" or true nature or "dominant and most important characteristic" of the CCAA as a whole is to enable insolvent companies time and space to restructure their financial and business arrangements in order to achieve a plan of compromise and/or arrangement with creditors.

43. The basic elements of the Act in that regard are the identification and classification of creditors; the proof of their claims; the development, creditor approval and court approval of a plan of compromise or arrangement with respect to proven claims; and the emergence of the company and/or disposition of some or all of its assets free of the compromised claims. The Act also provides breathing space to carry out that process through temporary stays of proceedings.

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[32] PHS, at para. 157
[33] PHS, at para. 162
[34] PHS, at para. 168

44. As such, the Act as a whole has been correctly recognized as legislation in relation to bankruptcy and insolvency, in the technical sense described by Justice Beetz in *Robinson v Countrywide Factors*, and held to be constitutionally valid.

The statutory definition of "claim"

45. The legislation contains the following definitions of or material to what may constitute a "claim" under the CCAA:

- *CCAA section 2:* "claim" means any indebtedness, liability or obligation that would be a debt[35] provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;
- *BIA section 2:* "claim provable" ... includes any claim or liability provable in proceedings under this Act by a creditor;
- *BIA section 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 under this Act.

46. The language of section 121(1) of the BIA referring to the "bankrupt's discharge" should be read *mutatis mutandis* for CCAA purposes. The recent amendments to the CCAA, although not in force when these proceedings commenced, provide guidance in that regard. Section 19(1) of the CCAA now provides in material part as follows:

> ... [T]he only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of (i) [the initial filing date], and (ii) [the date of an initial bankruptcy event], and
>
> (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before [the initial filing date or date of an initial bankruptcy event].

[35] On a broad and purposive interpretation, the word "debt" should be taken to include "debts and liabilities".

47. Thus, there are three principal features of "claim" as defined for purposes of the CCAA:

- It does not include all obligations of the company but only those which constitute a debt or a liability.
- It creates temporal limits for inclusion of obligations. The definition includes only those obligations incurred before the initial filing date or date of the initial bankruptcy event.
- It creates temporal limits for inclusion of debts and liabilities. The definition includes only those debts or liabilities to which the company is or may become subject before the plan sanction date. A company is subject to a debt when it becomes payable and to a liability when all the facts comprising the cause of action giving rise to liability have come into being.

48. The statutory definition of "claim", by virtue of those features, clearly meets the three-part test in *Kitkatla*. The definition, by dealing with debts and liabilities, does intrude into the provincial power over property and civil rights. However, in doing so, the definition is the well-spring of a valid federal legislative scheme. The definition determines which obligations of an insolvent company may be compromised and which persons constitute creditors for the purpose of voting on any plan of compromise or arrangement. In sum, the definition is integral to that scheme – both in what it includes and, importantly, in what it doesn't.

<u>An expansive definition of "claim"?</u>

49. Abitibi's expansive definition of "Claim" is far broader than the statutory definition:

> "Claim" means any right or claim of any person against one or more of the Canadian Petitioners in connection with any indebtedness, liability or obligation of any kind whatsoever of one or more of the Canadian Petitioners or Partnerships ... with respect to any ... matter ... based in whole or in part on facts which existed on the Canadian Filing Date, together with any other claims of any kind that, if unsecured, would constitute a debt provable in bankruptcy ....

The words "together with" show that the expansive definition purports to capture not only debts and liabilities that would be claims provable in bankruptcy but also non-debt obligations of any and every kind.

50. The expansive definition of "Claim" is clearly beyond even a broad, liberal interpretation of the CCAA's statutory definition. In *Jameson House Properties Ltd.*,[36] the British Columbia Supreme Court confirmed that rights of the pre-sale purchasers were not claims under the CCAA, even though they could fall within the similarly-broad definition of "Claims" under the Plan in that case and, if they existed, would be extinguished.[37] So it follows, in the case at bar, that environmental regulatory obligations would not be "claims" under the CCAA definition but would fall within the definition of "Claim" under the Claims Procedure Order.

51. Since the expansive definition of "Claim" in the case at bar is far broader than the statutory definition, some other legal basis must be found for the court to include it in the Claims Procedure Order or any subsequent order in these proceedings. The pith and substance analysis thus shifts to whether some other provision or provisions of the CCAA to that effect would be beyond insolvency in the technical sense, and thus *ultra vires* Parliament.

Statutory interpretation and the presumption of constitutionality

In general

52. In previous cases, the courts have found considerable interpretive flexibility in the provisions of the CCAA, enabling them to facilitate achievement of the purposes of that Act. In *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*,[38] the Ontario Court of Appeal observed that

> [t]he CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left

[36] *Jameson House Properties Ltd.* 2009 BCSC 844
[37] In *Jameson House*, the motions court eventually found, on the facts, and the Court of Appeal confirmed that the rights asserted by the pre-sale purchasers did not exist, and the issue of whether they could be extinguished by the Plan became academic: 2009 BCSC 964, 2009 BCCA 339.
[38] 2008 ONCA 587

the shape and details of those deals to be worked out within the framework of comprehensive and flexible concepts of a "compromise" and "arrangement".

53. Interpretive flexibility has allowed CCAA courts to fill in legislative gaps or extend the legislative scheme for dealing with insolvencies in various ways.[39] Even so, interpretive flexibility is not open-ended.[40] Among other things, as in all cases of statutory interpretation, the courts must consider not only the purpose and scheme of the legislation but also the intentions of the enacting legislature. In the case at bar, the court must interpret the CCAA consistent with the presumption that Parliament, in enacting that Act, intended not to exceed its constitutional authority.

54. A provision of federal law allowing for the compromise of or arrangements respecting debt obligations of an insolvent company is constitutionally valid because it is intrinsically related to resolution of insolvency issues. The compromise of existing debts and liabilities is the essence of corporate financial restructuring. By contrast, a provision or provisions whose purpose was to relieve a restructuring company from its regulatory obligations, as distinct from debt obligations, would not be within the bankruptcy and insolvency power in the technical sense described by Justice Beetz in *Robinson v Countrywide Factors*. The dominant and most important characteristic of any such provision would be to provide substantive enhancement of the company's post-proceedings financial condition and to reduce its future cost of doing business. Thus it would fail the *Kitkatla* test.

55. For reasons of constitutional law, interpretive flexibility therefore does not extend to reading the CCAA as providing for a definition of "Claim" which would extinguish Abitibi's existing regulatory obligations. Any such provision(s) would be constitutionally

[39] Courts have created super-priority for DIP financing charges over statutory liens: see *Re Sulphur Corporation of Canada Ltd.* 2002 ABQB 682; relieved a restructuring company from having to pay provincial statutory pension obligations where the only source of money for such payments was DIP financing: *Collins & Aikman Automotive Canada Inc.* (2007), 63 C.C.P.B. 125 (Ont. S.C.); and released – as if they were petitioners in the CCAA proceedings – solvent third parties who had participated in the insolvent market as a *quid pro quo* for contributions those parties would make to the restructuring: *ATB Financial*, at para. 45 to 52. Note that on each occasion the courts' expansive interpretation was directly in support of persons financing the procedural goals of the CCAA.

[40] Flexibility does not extend to granting relief to a restructuring company with respect to obligations arising after plan implementation: *Doman Industries Ltd.* 2003 BCSC 376, at para. 21 ff.; or relief from compliance with certain regulatory filing requirements which have nothing to do with the restructuring process: *Richtree Inc.* (2005) 74 O.R. (3d) 174 (Ont. S.C.).

invalid. For a court to interpret the CCAA as enabling such an outcome would be equally unconstitutional.

Re General Chemical Canada Ltd.

56. Abitibi may seek to rely on the *General Chemical*[41] decision as the basis for statutory authority for its expansive definition of "Claim". However, the facts in *General Chemical*, and the legal consequences flowing from those facts, make it clearly distinguishable from the present case.

57. *General Chemical* involved a provisional certificate of approval and security posted in favour of the Crown for the costs of closure of the soda ash settling basin. The Ministry, in applying to defer distribution of money realized by the interim receiver, was taken to represent the Crown as creditor. The motions court observed that, in addition to the posted security, the Crown had BIA security on the contaminated property; but that for any shortfall in the combined security, the Crown would be an unsecured creditor. In that factual context, the motions court refused to allow the Ministry, by causing a delay in distribution, to use the bankrupt company's regulatory obligations and the interim receiver's duty to fulfill them as an indirect means of enhancing the Crown's position as a creditor. Thus, *General Chemical* did not involve compliance with regulatory obligations, *simpliciter*, but addressed an attempt by the Crown to use them in a way which would create a payment priority contrary to the scheme of distribution in the BIA.

58. The comments of the motions court with respect to *Panamericana*[42] likewise refer to "an inchoate liability for the ultimate abandonment (or clean closure) of certain oil wells".[43] The court's reference to the post-*Panamericana* enactment of section 14.06(7) addresses the issue of priority of such a liability as a claim provable in bankruptcy. Similarly, the Ontario Court of Appeal dealt with the effect of the new enactment on "claims":[44]

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[41] *Re General Chemical Canada Ltd.* (2007), 22 C.B.R. (5th) 298, aff'd by 35 C.B.R. (5th) 163
[42] *Panamericana de Biens y Servicios SA v. Northern Badger Oil & Gas Ltd.*, [1991] 81 D.L.R. (4th) 280 (Alta. C.A.)
[43] Ont S.C., at para. 56
[44] Ont C.A., at para. 46

> Section 14.06(7) now expressly provides for priority to be accorded to environmental clean up costs ["the costs of remedying an environmental condition or environmental damage"] and s. 14.06(8) now ensures that a claim against the debtor for environmental clean up costs is a provable claim.

59. Consistent with the BIA definition of "claim", if costs have been incurred, or are required to be incurred before discharge from bankruptcy, to remedy an environmental condition or environmental damage, they could (as in *General Chemical*) give rise to liability and be treated as "claims". However, in corporate bankruptcies, different timeframes apply for the coming into being of such a liability than apply in CCAA proceedings. In the latter, regulatory obligations *simpliciter* cannot treated as "claims". Such obligations, if unperformed, could only be the occasion for a "claim" if orders were made and clean-up costs incurred in that regard before the plan sanction date.[45]

60. Just as the courts properly defer to the legislative decisions of provincial governments in determining whether there is a cause of action in debt as the legal basis for a claim provable in CCAA proceedings, so the courts should likewise defer to the decisions of provincial statutory authorities in determining whether or not to take the steps which would, if taken, create a statutory debt obligation, and thus a "claim" in CCAA proceedings.[46] Courts should not deem regulatory obligations to be "claims" when they are not.

CCAA section 11.8(9)

61. The provisions of CCAA sections 11.8(8) and (9) only apply to "claims" as defined in that Act, and not to regulatory obligations generally. Further, subsection (9) only expands, for purposes of the definition, the time during which debt obligations may arise. It does not change the time-frames within which debts and liabilities must arise in order to be treated as "claims" under the CCAA.

62. If Parliament had intended section 11.8 to apply to regulatory obligations *simpliciter*, it would be expected to have used explicit language to that effect.

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[45] The quantum of such claims in CCAA proceedings would be the cost of such work incurred, at the latest, before the plan sanction date.
[46] *JTI – Macdonald Corp.* 2009 Canlii 59159 (Ont. S.C.) at para. 26.

63. In *T.C.T. Logistics*,[47] the order appointing KPMG as interim receiver provided that its employment-related actions could not be considered those of a "successor employer" under provincial or federal labour legislation. The union sought a declaration from the Ontario Labour Relations Board that the purchaser of the business was a successor employer of T.C.T. Logistics and/or KPMG as interim receiver and trustee.

64. Section 215 of the BIA requires leave of the bankruptcy court before legal proceedings are taken against a trustee or interim receiver. The issue in *T.C.T. Logistics* was whether section 215 allowed the court, in the appointment order, to override the provisions in provincial labour legislation which grant exclusive jurisdiction to labour relations boards to decide matters such as union successorship. That would be the effect if a union were required to seek leave of the court in bankruptcy before applying to the Labour Relations Board for a hearing and ruling on that issue.

65. The majority judgment in *T.C.T. Logistics* commenced with an analysis of section 47(2), containing the court's power to appoint interim receivers. The majority found that that subsection, while "sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, [is] not open-ended [and] ... does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes [i.e. unionized employees]".[48] The majority concluded as follows:

> If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it advisable under s. 47(2)(c). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of preservation of provincially created civil rights in s. 72.

66. Similarly, express language in the CCAA would be required before all forms of regulatory obligations, and not just debts and liabilities, could be swept away by means of an order made under the CCAA.[49]

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[47] *GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.* 2006 SCC 35

[48] *T.C.T. Logistics*, at para. 45

[49] The absence of a provision equivalent to section 72 of the BIA makes no difference in the analysis. That section was a codification of the double aspect doctrine as it applies to bankruptcy

67. The lack of any such express language in the CCAA creating or supporting an expansive statutory definition of "Claim" indicates that Parliament correctly considered it was not part of its own constitutional competence in matters of bankruptcy and insolvency to legislate to that purpose or effect.

Conclusion

68. For all those reasons, it would be unconstitutional to interpret the CCAA as enabling this court to include in the Claims Procedure Order, or to base any other order on, Abitibi's expansive and constitutionally over-inclusive definition of "Claim".

F. Interjurisdictional immunity in the case at bar

The core of provincial competence

69. It is within the core of provincial legislative competence respecting the environment to be able to enforce environmental standards.

70. In *Imperial Oil Ltd. v Quebec (Minister of the Environment)*,[50] the Supreme Court of Canada noted that the Quebec *Environment Quality Act* provides a variety of mechanisms for taking action to ensure that the right to a healthy environment may be effectively protected. (British Columbia's EMA and regulations contain similar mechanisms.)

71. In that regard, the minister plays a key role in the administration of the Quebec and British Columbia Acts. Both schemes give the minister broad powers to act in order to prevent harm to the quality of the environment. Those powers include making various categories of orders; instituting civil or criminal proceedings; or having the necessary corrective work done and recovering the cost of doing so from responsible persons.[51]

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and insolvency power and property and civil rights. It reflects the modern, restrained approach to federal paramountcy and overcomes the now-discredited "occupied field" approach.

[50] 2003 SCC 58

[51] *Imperial Oil*, at para.21 and 22

72. Section 31.42 of the Quebec Act empowers the minister to impose an obligation on the parties responsible for the contamination to do investigative work at their own expense. That section reflects the so-called 'polluter pay' principle, which is firmly entrenched in environmental law in Canada and well as at the international level.[52] The procedure which authorizes the minister to issue such orders, together with related provisions, represent "one of the most important enforcement tools available in Quebec's environmental legislation".[53]

73. The Court in *Imperial Oil* went on to say the following: [54]

> In performing his functions, the minister is involved in the management of an environmental protection system. He must make decisions in a context in which the need for the long-term management of environmental problems plays a prominent role, and in which he must ensure that the fundamental legislative policy ... is implemented. The minister has the responsibility of protecting the public interest in the environment and must make his decisions in consideration of that interest.

74. The authority of provincial legislatures to enable provincial government ministers to make such decisions and orders is therefore vital and essential to the provinces' core legislative competence with respect to the environment. Any federal legislation which made such orders permanently unenforceable would impair that core competence in a constitutionally-impermissible fashion. Any such federal legislation, even if constitutionally valid, would properly be ruled constitutionally inapplicable by the doctrine of interjurisdictional immunity.

75. A similar analysis applies with respect to provincial legislative competence to enforce all other types of regulatory obligations.

<u>Impairment</u>

76. As noted earlier, regulation of the environment is a matter of property and civil rights within the exclusive legislative purview of the provinces. Parliament can

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[52] *Imperial Oil*, at para. 23
[53] *Imperial Oil*, at para. 25
[54] *Imperial Oil*, at para. 34

supplement such regulation with laws of its own enacted under the POGG power, the criminal law power or as ancillary to other federal enumerated heads of power. However, the existence of the power to pass supplementary legislation does not make the provincial power any less exclusive. (Moreover, no-one could reasonably suggest that the bankruptcy and insolvency power even incidentally gives Parliament authority over regulation of the environment.)

77. Parliament cannot pass laws which impair the core constitutional competence of the provinces, with respect to environmental regulation or in any other respect. The ability to make and enforce orders is vital and essential to effective regulation. If Parliament could pass a law allowing a court in CCAA proceedings to make orders which include regulatory obligations of restructuring companies as Claims, that would give the court an effective veto over provincial regulation. If a court were to make an order to any such effect, that equally would impair the core of provincial legislative and regulatory competence. The doctrine of interjurisdictional immunity would operate, as in the case at bar, to make any such law or order constitutionally inapplicable to the core provisions of provincial regulatory enactments.[55]

[55] That reasoning applies even if the restructured companies fully intend to fulfill most or all of their regulatory obligations going forward. Likelihood of environmental compliance does not change the constitutional analysis. Restructured companies are not the arbiters of which regulatory obligations they meet and which not. Allowing that to happen would create the very sort of legal vacuum which concerned the Supreme Court of Canada in CWB.

G. Conclusion

78. Abitibi's primary purpose in seeking the expansive definition of "Claim" would seem to be to compel provincial environmental regulators to seek recourse now with respect to existing environmental conditions or damage, or forever lose the ability to do so. Its primary (if not exclusive) concern would appear to be the expense of having to comply, post-restructuring, with orders in that regard.

79. The company may protest that those are not its concerns or intentions in British Columbia. But that is nevertheless the effect, and not only for environmental regulatory obligations but for all other regulatory obligations as well. Nor is there any no distinction, under the expansive definition of "Claim", between or among regulatory obligations in Newfoundland/Labrador and in British Columbia. That definition is equally applicable to and unconstitutional with respect to them all.

80. Abitibi's expansive definition of "Claim" attempts to convert what, for any other company, would be the normal responsibilities and costs of doing business going forward into an immunity for the company once it has been restructured. In that regard, Abitibi does not seek, through CCAA proceedings, to preserve the company's *status quo* while dealing with its creditors, but rather to improve upon it afterwards. That simply cannot be the law, whether under the CCAA or the Constitution, even if it would enhance the substantive likelihood of a successful restructuring.

81. For all of those reasons, this court should now declare that the definition of "Claim" in the Claims Procedure Order, and in all subsequent orders, does not apply to regulatory obligations, in keeping with the definition of "claim" in the CCAA, the proper limits of the bankruptcy and insolvency power, and preservation of the core competence of provinces to legislate in respect of matters for which they are made responsible under the Constitution of Canada.

All of which is respectfully submitted

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