CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N^{o}: 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)

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

ABITIBIBOWATER INC.

and

ABITIBI-CONSOLIDATED INC.

and

BOWATER CANADIAN HOLDINGS INC. and the other Petitioners listed on Schedules A, B and C

Debtors

and

ERNST & YOUNG INC.

Monitor

and

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

Petitioner

MEMORANDUM OF ARGUMENT OF THE PETITIONER

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

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OVERVIEW

1. May this court, at the stroke of its pen, extinguish Abitibi's obligations to comply with orders made by the Province of Newfoundland and Labrador ("**Province**") under its environmental protection legislation? And may this court require a minister of that Province to exercise a discretion given to her under the laws of the Province in a particular manner? The Claims Procedure Order ("**CPO**") has the effect of doing both these things. The question to be answered on this motion is whether this court has the statutory or constitutional authority to make an order with these effects.

2. The CPO contains a special definition of "Claim". That definition extends the meaning of "claim" far beyond the bankruptcy definition used in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**"). The bankruptcy definition does not encompass a debtor's legal or statutory duties or obligations to comply with the law by acting or refraining to act in a particular way – commonly known as regulatory obligations. The definition of "Claim" in the CPO, however, purports to capture these obligations, and to *extinguish* them, unless the relevant government turns Abitibi's breach of its statutory duty into a debt owing to the government. In turn, this debt would be subject to compromise in Abitibi's plan of arrangement.

3. This court does not have any statutorily or constitutionally effective power to do this. The court does not have the *statutory* authority because the definition of "claim" used in the CCAA does not permit this result and the statutory discretion given to the court in the CCAA does not permit the court to make orders with these effects. The court does not have the *constitutional* authority because the outer limits of the

court's powers are defined by Parliament's ability to legislate in the field of bankruptcy and insolvency and Parliament does not have the constitutional competence to bar or extinguish duties imposed on a bankrupt or insolvent person under provincial law or to direct how provincial law is to be applied in respect of a bankrupt or insolvent person.

4. The structure of the argument is as follows.

5. Part 1 summarises the salient facts. These facts include: **(1)** a description of the relevant orders issued by this court including an explanation of how the CPO bars the Province and other governments in Canada from enforcing their regulatory laws against Abitibi; **(2)** the structure of the Province's environmental protection legislation and the discretionary powers given the responsible Minister of the Province under that legislation; **(3)** the background to the Province's decision to issue orders against Abitibi under its environmental protection legislation; and **(4)** the importance to the welfare of the public that Abitibi comply with its statutory duties and obligations under the Province's environmental protection legislation.

6. Part 2 develops the legal argument as to why this court cannot bar or extinguish Abitibi's regulatory obligations to the Province and other governments. This argument is based on the following propositions: **(1)** that when Parliament defined "claim" in the CCAA it did not encompass, nor did it intend to encompass, a debtor company's regulatory obligations; **(2)** that Parliament, pursuant to the CCAA, has not given this court the discretionary power to make an order that has the effect of barring or extinguishing a company's regulatory obligations or which has the effect of requiring the Crown in right of a province to exercise a provincial statutory power in a certain way

– even the recent amendments to the CCAA do not purport to do these things; and **(3)** that, in any event, Parliament does not have the constitutional competence to give this court the power to do these things and therefore this court cannot, constitutionally, purport to exercise such powers.

7. Part 3 sets out the relief requested.

PART 1 - FACTS

A. The CCAA Orders

8. On 17 April 2009, this Honourable Court issued an initial order ("**Initial Order**") pursuant to the CCAA with respect to the Debtors (as defined in the Initial Order) and their predecessors (collectively, "**Abitibi**").

9. Since then this court has granted a number of orders in these proceedings, including the First Stay Extension Order dated 14 May 2009 and the CPO.

10. The First Stay Extension Order amended the Initial Order to ensure that the stay of proceedings imposed in the Initial Order could not be interpreted to prevent the federal or provincial governments from exercising their powers, rights or duties in relation to public health, safety, security, public order or the environment, except that financial or monetary fines or orders issued by these governments remained stayed.

11. On 26 August 2009, this court granted the CPO. Amongst other things, the CPO provides **(1)** that "every Creditor" asserting a "Claim" against any of the Debtors is required to describe its claim in a proof of claim and to deliver that proof of claim to the Monitor by no later than the claims bar date [CPO para. 10]; and **(2)** that unless otherwise ordered by this court, "any Creditor" who does not deliver its proof of claim in respect of its "Claim" or "Subsequent Claim" in the prescribed manner and by the specified date "shall be forever barred from asserting such a Claim or Subsequent Claim" against any of the petitioning debtors and "such Claim or Subsequent Claim shall be forever extinguished". [CPO para. 15]

12. The CPO defines "Creditor" as meaning "any Person asserting a Claim, Subsequent Claim or Restructuring Claim". [CPO para. 3(w)]

13. "Claim" is then defined in the CPO to mean "any right or claim of any Person against one or more [of the petitioning Debtors] in connection with any indebtedness, liability or obligation of any kind whatsoever … including any breach of duty (legal, statutory, equitable, fiduciary or otherwise) … together with any other claims of any kind that, if unsecured, would constitute a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act ...* ". [CPO para. 3(t)]

14. By virtue of its language, then, the CPO purports to extinguish any statutory obligation or duty the performance of which can be compelled by a government or its agencies at the time of Abitibi's CCAA filing, *unless* the government turns that duty or obligation into a debt that can be made the subject of a proof of claim and compromised through a plan of arrangement.

15. Many laws are caught by the scope of the CPO. Indeed, through its industrial activities in Ontario and Québec alone, Abitibi is required to comply with dozens of laws which impose upon it the duty or obligation to act in a particular way. A list of those laws is appended hereto as **Schedule "B"**. They include, but are not limited to, Abitibi's obligations to:

(i) refrain from discharging contaminants into the environment;

(ii) provide accessibility to persons with disabilities;

(iii) meet standards for reducing the risk of, or consequences of, a fire;

(iv) remedy health hazards on its premises; and

(v) ensure that it provides its employees with equipment, materials, and protective devices that are maintained in good condition.

B. The EPA Orders

16. On 12 November 2009, the Province's Minister of the Environment ("**Minister**") issued orders ("**EPA Orders**") against Abitibi pursuant to s. 99 of *Environmental Protection Act*, S.N.L. 2002, chap. E-14.02 (the "**EPA**").

17. Section 99 of the EPA provides:

> **Order**
>
> 99.(1) Where the minister believes on reasonable grounds that a person responsible has contravened or will contravene this Act or the terms or conditions of an agreement, approval, amended or varied approval, licence or an undertaking exempted or released under this Act, the minister may, whether or not that person has been charged or convicted in respect of the contravention, issue an order, in writing, requiring a person at that person's own expense, to
>
> (a) stop or shut down an activity or an undertaking immediately, permanently, or for a specified time, where, with respect to that activity or undertaking, there has been a contravention of this Act, the regulations or a term or condition applicable to that activity or undertaking;
>
> (b) do all things and take all steps that are necessary to control, manage, eliminate, remedy or prevent an adverse effect or an environmental effect and to comply with this Act, the regulations or terms or conditions

applicable to an approval, activity or undertaking in accordance with directions set out in the order;

(c) post a bond or other form of security acceptable to the minister or pay money to the Crown in an amount that the minister considers will ensure compliance with an order made under this section;

(d) install, remove, replace or alter equipment, a tank, container or thing designed to control, contain, reduce or eliminate the release into the environment of a substance;

(e) shut down or make a change to waterworks and to a source of water supply in accordance with directions set out in the order;

(f) shut down, alter or add to sewage works in accordance with directions set out in the order; and

(g) where that person is using, handling, storing, applying or disposing of dangerous goods, waste dangerous goods or pesticides, notwithstanding anything contained in an approval or licence, take the action specified in the order to manage, eliminate, remedy or prevent contamination or other adverse effects by those substances,

and there shall be served on the person responsible a copy of the order and a statement showing the reasons for the making of the order and upon receipt of the copy and statement, that person shall comply with the order.

(2) In environmentally sensitive areas, an order under subsection (1) may impose terms and conditions in excess of requirements provided under this Act and policies, guidelines, approval or standards prescribed or adopted by the department.

(3) In addition to other requirements that may be included in an order issued under this Part, an order may contain provisions

(a) requiring a person, at that person's own expense, to

(i) maintain records on a relevant matter and report periodically to the minister or a person appointed by the minister,

(ii) hire an expert to prepare a report for submission to the minister or a person appointed by the minister,

(iii) submit to the minister or a person appointed by the minister, a proposal, plan or information specified by the minister setting out an action to be taken by the person,

(iv) prepare and submit a contingency plan,

(v) undertake tests, investigations, surveys and other action and report results of these to the minister, and

(vi) take another measure that the minister considers necessary to facilitate compliance with the order or to protect or restore the environment;

(b) establishing the manner, method, or procedures to be used in carrying out the measures required by the order; and

(c) establishing a time within which a measure required by the order is to be commenced and the time within which the measure, order or a portion of the measure or order must occur.

(4) Where a stop order is issued under this section, the inspector, minister or other employee shall, by written notice, not more than 48 hours after issuing that order, give to the person against whom the order is made reasons for it and shall immediately forward a copy of the stop order and the notice to the minister.

(5) The minister may authorize an official, officer or employee of the department or the Department of Government Services to issue, amend, vary, revoke and give reasons for an order under this section.

(6) Where, before the coming into force of subsection (5), the minister delegated authority to an official, officer or employee of the Department of Government Services to make an order under this section, that order is valid as if it had been made after the coming into force of subsection (5).

18. As discussed in more detail below, the EPA Orders were issued as a result of the analysis contained in environmental assessments performed by independent third party consultants. The Province had to obtain these assessments because Abitibi had failed to comply with the undertakings it had given to provide environmental assessments, leaving the Province uncertain as to whether Abitibi fulfilled its statutory obligations with respect to the protection of the environment and human health.

19. The EPA Orders impose on Abitibi the duty or obligation to do the following things:

(a) submit to the Province's Department of Environment and Conservation ("**ENVC**") for approval a detailed Remedial Action Plan ("**RAP**") by 15 January 2010 for all of the Abitibi sites (as defined below) and the sites adjacent to the Abitibi sites that have been identified in the Environmental Site Assessment ("**ESA**") prepared by Conestoga-Rovers & Associates ("**CRA**") as having exceedances greater than the applicable provincial environmental legislation, Atlantic PIRI, CCME and CEQG;

(b) complete the approved site remediation actions by 15 January 2011 or by another date as may be agreed upon with ENVC; and

(c) once the RAP is approved by ENVC, file with ENVC, on a quarterly basis, progress reports outlining in detail the work completed on the Abitibi sites and the sites adjacent to the Abitibi sites.

20. Section 102 of the EPA permits, but does not require, the Minister to do the things that she has ordered Abitibi to do. Should the Minister do these things, s. 102 of the EPA creates a debt owing to the Province by Abitibi for the costs of the work that the Minister has done:

> **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 a debt owed to the Crown 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 a debt owed to the Crown 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.
>
> (5) Where a stop order is made under this Part, costs and expenses incurred by the proponent or person responsible for the stopped undertaking or activity with respect to that undertaking or activity shall not be recoverable from the Crown.
>
> (6) For the purpose of subsection (3), reasonable costs, expenses or charges include costs incurred by the department in investigating and responding to a matter to which an order relates or the failure to comply with an order, and costs and expenses for lodging, salaries, remuneration, transportation and meals incurred by the department in monitoring a person required to comply with an order and in carrying out an action necessary to comply with an order.

21. The Minister has chosen not to exercise her power pursuant to s. 102 of the EPA. Rather, the Minister has chosen to compel Abitibi to fulfil the terms of EPA Orders she issued under s. 99 of the EPA.

22. Abitibi has taken the position that it does not now and never will have to comply with the EPA Orders – whether it emerges from the CCAA process as an active company or not. If Abitibi's position is correct it will mean that this court may immunise for all time any of Abitibi's continuing environmental obligations to the Province arising out of its century long industrial activities in the Province and instead shift the burden of cleaning up the pollution from these activities on to the public of the Province.

23. Abitibi adopts this position: **(1)** in the face of evidence of serious environmental damage caused by its industrial activities in the Province which have taken place over a period of one hundred years; and **(2)** despite the fact that it has

consistently acknowledged that it owes the Province statutory environmental obligations flowing from its industrial activities.

24. Both of these propositions are explained below.

C. Abitibi's operations in the Province

25. Abitibi carried on extensive industrial activity in the Province since at least 1905. Its operations extended from mining and processing minerals, to cutting and milling timber, to making wood pulp and paper products, to shipping and storing materials, and to related activities.

26. These activities took place principally on five sites (collectively, "**Abitibi sites**"):

(a) **Buchans:** the Buchans site consists of a number of metal mines, and the associated ore processing and waste disposal facilities. Metal mining operations were conducted on the Buchans site from the 1920s until 1984.

(b) **Stephenville:** Abitibi operated a pulp and paper plant at Stephenville from approximately 1980, ending in 2005 with the closure of the plant by Abitibi.

(c) **Grand Falls-Windsor:** Abitibi operated a pulp and paper plant at Grand Falls-Windsor ("**GFW**") from approximately 1910. Abitibi closed the GFW plant, effective March 2009.

(d) **Botwood:** the Botwood site is a shipping terminal operated by Abitibi from approximately 1910. Abitibi closed the Botwood site at or about the same time as the GFW plant in 2009.

The shipping terminal had two principal purposes. One was a shipping terminal for ore mined at the Buchans site and for paper produced at GFW. The other was for the receipt of Bunker C oil used in the operations at Buchans.

(e) **Logging Camps:** Abitibi and its predecessors operated approximately 50 logging camps, spread across the Province.

27. At each of the Abitibi sites, Abitibi's industrial activities resulted in the release of substances into the environment in amounts, concentrations, and at rates that have caused and will in the future continue to cause an adverse effect on the natural and human environment both on and adjacent to the Abitibi sites.

D. Abitibi has consistently acknowledged its statutory environmental obligations

28. Abitibi conducted its operations in the Province against the backdrop of provincial statutory environmental obligations, among others, which it has consistently acknowledged apply to it.

29. Over the years Abitibi performed some environmental site assessment work at some of the Abitibi sites. It also completed some remediation work at some of the sites and over time continued to exercise control over them, notwithstanding that it no longer conducted operations at these sites.

30. Further details of Abitibi's acknowledgment of its environmental statutory obligations are set out below.

(i) Buchans

31. By a Co-Tenancy Agreement, dated 1 January 1976, between Price (Nfld.) Pulp & Paper Limited (a predecessor of Abitibi) ("**Co-Tenancy Agreement**"), Abitibi became a co-tenant with ASARCO Incorporated ("**ASARCO**") of the Buchans site. In the Co-Tenancy Agreement, ASARCO and Abitibi refer to themselves as the "**Co-Tenancy**" or the "**owners**" in relation to the Buchans site.

32. Following the cessation of the operations in 1984, some work was undertaken with respect to the closure of the mines and remediation of the contamination caused by the operations at the site.

33. In November 1991, the owners entered into an agreement for environmental remediation with Environment Canada and the Newfoundland Department of Environment & Lands ("**Compliance Schedule**").

34. Amongst other things, the stated objectives of the Compliance Schedule are as follows:

(a) to protect the water quality and aquatic life of Buchans Brook, Red Indian Lake, and the Exploits River;

(b) to comply with the federal *Fisheries Act*, and the *Metal Mining Liquid Effluent Guideline* made pursuant to section 36 of that Act, and the *Newfoundland Environmental Control (Water and Sewage) Regulations, 1980*; and

(c) to establish and undertake environmental monitoring and evaluation programs.

35. The mining and related operations caused the discharge of contaminants that affected areas beyond the Buchans site, including, for example, Buchans Brook, Red Indian Lake and the Exploits River. As a result, the Compliance Schedule included those areas.

36. The obligations described in the Compliance Schedule were those required by federal and provincial law. The Compliance Schedule imposed specific time lines on fulfilling those obligations, as well as certain reporting requirements.

37. Pursuant to the Compliance Schedule, ASARCO, on behalf of the Co-Tenancy, filed quarterly reports with Environment Canada and the Province. In addition to the quarterly reports, ASARCO, directly or through its environmental consultants, filed periodic reports on behalf of the Co-Tenancy, on matters related to the environmental condition of the site.

38. Almost immediately following the signing of the Compliance Schedule, and from time to time thereafter, the Co-Tenancy asked for extensions to the deadlines in the Compliance Schedule. The extensions were requested because the remediation work required by the Compliance Schedule had not been completed. The most recent was a request for an extension until June 2009 i.e., after Abitibi had made its CCAA filing.

39. In August 2005, ASARCO filed for reorganisation under Chapter 11 of the *United States Bankruptcy Code*.

40. In July 2006, Abitibi submitted, to Environment Canada, and to ENVC, what was called a "Buchans Mine Action Plan Towards Environmental Compliance and Closure" ("**Action Plan**").

41. The Action Plan contains the following statement:

> Abitibi-Consolidated ("Abitibi") is continuing its commitment to the required environmental compliance and closure of the Buchans mine site ("Site"). An Environment Closure Schedule ("**Schedule**") has been agreed between the provincial and federal governments and the former Co-Tenancy (ASARCO and Abitibi) and this continues to be the guideline for which all remediation and compliance roles are established. Since cessation of mining operations at the Site in 1984, numerous initiatives have been undertaken to assist in meeting the Schedule. Results to date have been encouraging with natural, passive, bio-remediation techniques taking priority over mechanical or chemical treatment systems.

42. The Action Plan also sets out the following objectives:

(a) to comply with the federal *Fisheries Act* and the *Metal Mining Liquid Effluent Regulation and Guidelines*, made pursuant to section 36 of that Act, and the *Newfoundland Environmental Control (Water and Sewage) Regulations, 1980*;

(b) to protect the water life and aquatic life of Buchans Brook, Red Indian Lake and the Exploits River; and

(c) to establish and undertake environmental monitoring and evaluation programs.

43. In August of 2008, Abitibi wrote to ENVC to indicate that Abitibi had retained AMEC Earth & Environmental ("**AMEC**") to conduct a Phase I ESA at the Buchans site to "identify potential areas of concerns ("**AOCs**") posed by the past mining operations at the above-mentioned location".

44. Abitibi further stated that:

> As part of the Phase I ESA, AMEC will also perform a preliminary risk screening of each AOC to determine the need for subsequent Phase II ESA work. The risk screening will identify if there is any potential for exposure and impact to human health and/or to the environment. The results of this screening assessment, as well as recommendations for next steps, as appropriate, will be included in a Phase I ESA report, to be submitted to NLDOEC [Newfoundland and Labrador Department of Environment and Conservation] who will review and concurrence.

(ii) Stephenville

45. Following the closure of the Stephenville plant, Abitibi took steps to decommission the site. Those steps included the preparation of a Phase II/III ESA and RAP.

(iii) Grand Falls-Windsor

46. In order to conduct its operations at GFW, Abitibi required both a general certificate of approval, issued pursuant to the EPA, as well as certificates of approval for specific aspects of its operations. Abitibi was required to report to the Province on compliance with those certificates of approval. In addition, Abitibi provided the Province with reports, from time to time, on specific incidents involving the discharge of contaminants.

47. Following the closure of the GFW operations, Abitibi was required, by the terms of its general Certificate of Approval, to provide, amongst other things, an "Industrial Site Decommissioning and Restoration Plan" ("**Plan**"). One of the things the Plan was to address was Abitibi proposed to deal with environmental contamination on the site.

48. On 18 June 2009 (i.e., after Abitibi had made its filing under the CCAA), Abitibi advised the Province that the preparation of the Plan was "ongoing".

(iv) Botwood

49. Between approximately 2001 and 2009, Abitibi commissioned a number of reports on the environmental condition of its facilities at Botwood.

E. The Province issued the EPA Orders in response to Abitibi's failure to fulfil its statutory environmental obligations

50. While Abitibi acknowledged its statutory environmental obligations, it did not fulfil them.

51. With the closure of the GFW plant, Abitibi ceased all business operations in the Province. In respect of every site at which Abitibi had operated, the Province had information, much of it supplied by Abitibi, indicating the discharge of contaminants into the environment.

52. Accordingly, on 12 June 2009, the Province wrote to Abitibi asking to provide ESA reports for the Abitibi sites, as well as an update on the status of remediation work at those sites.

53. On 18 June 2009, Abitibi responded that either the reports did not exist, or if they did exist, they had not been reviewed by Abitibi. In particular:

(a) with respect to the Stephenville site, counsel for Abitibi advised that the outstanding Phase II ESA report was in draft form, and that the bulk of the RAP remained to be developed in light of the pending Phase II ESA work;

(b) with respect to the Botwood site, counsel for Abitibi stated that "Although a limited number of reports do exist, they have not been reviewed and approved by our client's senior environmental personnel in Montréal, and are, accordingly, not from our client's point of view, final"; and

(c) with respect to the Logging Camps sites, counsel for Abitibi advised the Province that "respecting the suggested ESA reports from our client's former logging camps and woodlands operations, none exist as the ESA process has not yet been initiated".

54. With respect to the Buchans site, as at June 2009, the work and studies variously promised in the Compliance Schedule, the Action Plan, and the August 2008 letter, had not been, respectively, completed and filed.

55. The Province therefore had no complete, up-to-date reports on the environmental conditions at the Abitibi sites, and on whether, or to what extent, Abitibi had remediated contamination at those sites.

56. As a result, the Province had reason to believe that, if there had been contaminants on the site, there had been either no remediation or the remediation was incomplete.

57. Consequently, the Province arranged for an independent assessment of the environmental condition of those sites. In July of 2009, CRA was instructed to undertake independent Phase I and II ESAs of the Abitibi sites.

58. In order to expedite the assessment process, the Province asked Abitibi for permission to get access to the sites to conduct its assessments.

59. After extensive negotiations that lasted more than one month, on 3 September 2009, Abitibi and the Province entered into an agreement ("**Access Agreement**") whereby Abitibi would provide access to CRA to the Abitibi sites for the purpose of conducting the ESAs, subject to a number of conditions.

60. The Access Agreement contained two categories of conditions that caused delays in CRA obtaining access to the Abitibi sites and beginning and, therefore, completing its work. One was the condition that Abitibi pre-approve the location of soil and groundwater testing sites due to safety considerations. On several occasions, Abitibi used the condition to delay CRA's access to the sites, and performance of the tests, for reasons unrelated to safety.

61. The second condition related to the supply of information by Abitibi with respect to environmental testing it had done at the Stephenville, Botwood, and GFW sites. If CRA were satisfied that the information so supplied was sufficient to allow it to

prepare a report without intrusive testing, CRA would not need to do that testing. If, however, the information was not sufficient, CRA was to return it to Abitibi and then undertake its own testing.

62. Abitibi supplied some information, in or about the middle of September 2009, with respect to the Botwood and Stephenville sites. The information was incomplete, however, and Abitibi undertook to provide further information. Abitibi did not supply the final information until the first week of October 2009.

63. As a result, CRA was not able to do the required testing for the ESA at the Stephenville and Botwood sites until the end of October 2009.

64. CRA completed its assessment and issued reports in or about November 2009. Each report concludes that the particular Abitibi site that was the subject of the assessment (and, in many instances, the property adjacent to the Abitibi site) suffers from extensive contamination in excess of applicable standards.

65. The Province then issued the EPA Orders. The EPA Orders were issued in order to ensure that Abitibi fulfils its legal obligations to remediate the contamination it has discharged, on its sites, into the environment.

66. The EPA Orders were also issued to ensure that when it is developing its plan of arrangement for consideration by its creditors, Abitibi, its creditors, and this court are aware of and can take into account Abitibi's continuing environmental obligations to the Province.

F. Abitibi has unsuccessfully appealed the EPA Orders and has otherwise done nothing to comply with them

67. Abitibi has not made any attempt to comply with the EPA Orders.

68. On 11 January 2010, Abitibi appealed the EPA Orders, to the Minister, pursuant to s. 107 of the EPA.

69. In its appeals, Abitibi raised many of the same arguments it raises in its Contestation in the within motion.

70. The Minister considered those arguments and rejected them. On 8 February 2010, the Minister issued decisions dismissing the appeals of the EPA Orders.

PART 2 - LAW AND ARGUMENT

Issue 1: Obligations to comply with the law are not "claims" under the CCAA

A. The CPO contains a special definition of "Claim" and not the definition prescribed by Parliament in the CCAA

71. When Parliament defined "claim" in the CCAA it did not intend to nor did it encompass a debtor company's obligations to follow the general law by acting or refraining to act in a certain way – the company's regulatory obligations in other words.

72. As is well known, the court's analysis of a statute must be guided by "the modern rule" of statutory interpretation. Pursuant to this rule, as expressed in *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

73. The object and purpose of the CCAA is to provide a court-supervised process to facilitate negotiations between an insolvent debtor company and its creditors to determine if the creditors will agree to compromise their claims in order to permit the debtor company to continue as a going concern. As explained by the Court of Appeal for Ontario in *Re Stelco* (2005), 75 O.R. (3d) 5, at para. 36:

> [i]n the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will allow it to emerge and continue as a viable economic entity … .

74. The CCAA provides the court with two fundamental powers designed to achieve this objective: **(1)** the power to impose a comprehensive, *but temporary*, stay of

proceedings against all creditors and, in certain circumstances, non-creditors; and **(2)** the power to bind all *creditors* to a plan of compromise or arrangement that permanently extinguishes various rights they have, provided that the plan is approved by the required double-majority of creditors, and that the court accepts the plan as being fair and reasonable.

75. In Part 1 of the CCAA (ss. 4 - 8) the supervising court, the Québec Superior Court in this case, is provided with the ability to sanction the compromise of "claims" made by "creditors".

76. "Claim", is defined as follows in s. 12 of the CCAA:

> any indebtedness, liability or obligation of any kind that would be a <u>debt provable</u> within the meaning of section 2 of the *Bankruptcy and Insolvency Act*.
>
> [underlining added]

77. Although "debt provable" is not defined in the BIA, it is accepted that this definition refers to "claim provable" which is defined in s. 2 of the BIA. The difference in nomenclature is likely an inadvertent drafting error, which has now been corrected.

> *Luscar Ltd. v. Smoky River Coal Limited*, [1999] 175 D.L.R. (4th) 703 (Alta C.A.)

78. Section 2 of the BIA defines "claim provable" as "any claim or liability provable in proceedings under this Act by *a creditor*" [emphasis added].

79. Subsection 121(1) of the BIA defines "Claims provable" as:

> 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.

80. The CCAA defines "secured creditor" and "unsecured creditor" in s. 2 as follows:

> "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 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 purposes of voting at a creditors' meeting in respect of any of those bonds.
>
> […]
>
> "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.

81. As can be seen, these definitions are dependent on the existence of a debt or liability *owed by the bankrupt or insolvent person to the person with the claim*. This was the conclusion of the British Columbia Court of Appeal in *Jameson House*

Properties Ltd. (Re), [2009] 11 W.W.R. 425 at para. 47, for example, which confirmed that a claim for the purposes of the CCAA must consist of "a debt or liability … that must be owed by the [debtor] to the person seeking to prove the claim…".

82. The definition of "Claim" in the CPO encompasses a far wider ambit of legal relationships than just debts or liabilities owed by Abitibi to the person asserting the claim, however. Indeed, the statutory definitions "debt provable", "creditor" and "unsecured creditor", are relegated to a subordinate status in the CPO as being mere inclusions in the expansive definition of "Claim" in that order.

83. Moreover, far from being confined to these statutory concepts, the definition of "Claim" in the CPO purports to capture *any and every right* that *any government* in Canada has to require any of the petitioning debtors to comply with *any and every one of their statutory duties or obligations* at the time of Abitibi's CCAA filing.

84. It is thus evident that the definition of "Claim" provided in the CPO is both different from and materially broader than the definition of "claim" found in the CCAA and, by express reference to that statute, the BIA. The CPO definition is designed to and in fact does capture all obligations – not just debts – imposed on Abitibi by law and unfulfilled at the time Abitibi made its application under the CCAA.

85. As will be explained below, courts throughout Canada accept that statutory duties or obligations to comply with the law by acting or refraining to act a certain way – regulatory obligations in short – are neither common law claims nor "claims provable" under the BIA. Rather, it is only when the government or regulatory body *chooses* to create a debt in its favour out of the regulatory obligation that the government or regulatory body becomes a creditor with a claim against the debtor.

B. Obligations or duties to comply with the law are not claims and such obligations are not extinguished upon a debtor's insolvency

86. For many years it has been accepted in Canada that debtors cannot avoid complying with regulatory obligations just because the costs they will incur in doing so will come out of their creditors' pockets.

87. Thirty years ago, the Court of Appeal for Ontario, for example, held that a court-appointed receiver-manager was required to expend money under its control – money that would otherwise be paid to secured creditors – in order to comply with regulatory obligations.

> *Canada Trust Co. v. Bulora Corp.* (1980), 34 C.B.R. (N.S.) 152 (Ont. C.A.), affirming (1980), 34 C.B.R. (N.S.) 145 (Ont. S.C.) *per* Cory J. (as he then was)

88. In that case the regulatory obligation was an order to demolish a building that was issued by the Ontario Fire Marshall. Since the regulatory obligation had to be complied with by using money that would otherwise have been used to pay secured claims, the regulatory obligation could not be characterised as a claim. Had it been a

claim, the costs of regulatory compliance would have been subject to the prior ranking security, but it was not.

89. As the Court of Appeal stated, at para. 1:

> There was an order made by the fire marshall the legality and appropriateness of which is not challenged by the appellant. We are of the view that under the circumstances it was not only within the jurisdiction of the learned judge to direct that the court-appointed receiver-manager carry out that order but those circumstances necessitated that the receiver-manager be so directed. Although Cory, J. referred to a "social duty" to comply with the order that language, with deference, was inappropriate. The duty involved was a statutory one and it was unnecessary for him to consider the social implications of the order.

90. This decision and the principles it contains was applied by the Court of Appeal for Alberta in the leading case of *Panamericana de Biensey Services SA v. Northern Badger Oil & Gas Ltd.*, [1991] 81 D.L.R. (4th) 280 ["*Panamericana*"]. In *Panamericana*, the Court of Appeal (reversing an order of the motion judge) held that an environmental order imposed by the Alberta Energy Resources Conservation Board on a receiver of a bankrupt company was not a "claim provable".

91. The court, at para. 30, characterised the issue for decision as being whether the BIA "requires that the assets in the estate … should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public." The court answered this question by reference to whether the board's order was "claim" being asserted by a "creditor". The court concluded that the board was not a creditor, nor was it pursuing a claim in seeking compliance with its order.

92. This conclusion was based on the fact that while compliance with the order would require monetary expenditure from the estate, and thus constitute a form of liability, *that liability was not an obligation owed to the board that was to be satisfied by paying money to the board*. Rather, it was an obligation owed to the public at large that was to be satisfied by the debtor spending his own money and performing himself the remedial work that was required to bring himself into compliance with the general law. In other words, the regulatory board which made the order did not, by virtue of making the order, become a creditor for the money the debtor would have to spend to comply with the order.

93. The critical passage from the decision is as follows, at para. 33:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money, nor is that the object of the whole process. Rather it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

94. Accordingly, the fact that a person is insolvent does not immunise him from obligations imposed by a public statute, even if those obligations require the insolvent person to expend his own money to comply with the law leaving less money for his creditors. To the contrary, obligations owed by the insolvent person under a

public statute must be honoured because that is what the law requires. As stated by the Court of Appeal for Alberta in *Panamericana*, at para. 36:

> In my view, the board is not, at this point, a "creditor" of Northern Badger with a claim provable in its bankruptcy. The problem presented by this case is not to be solved, therefore, by determining whether the board ranks as a creditor of Northern Badger before or after the secured creditors. Rather, it must be determined whether the receiver, which was the operator of the oil wells in question, had a duty to abandon them in accordance with the law.

95. The British Columbia Supreme Court also accepts that protecting the rights of society through enforcing regulatory obligations is paramount over the rights of creditors to get paid, thereby confirming that such obligations do not make the state a "creditor".

> *Re Lamford Forest Products* (1991), 10 C.B.R. (3d) 137 (B.C.S.C.) at para. 26

96. Importantly, in the words of the Ontario Superior Court, "none of the cases [on this issue] is authority for the proposition that a public officer ordering a citizen to obey the general law thereby becomes a creditor for any amount the citizen may ultimately be required to spend in complying".

> *Re Shirley*, [1995] 129 D.L.R. (4th) 105 (Ont. Gen. Div.) (this is now the Ontario Superior Court of Justice) at para. 26

C. It is only when the government *chooses* to create a debt in its favour out of the regulatory obligation that it becomes a creditor and the debt a claim

97. Some regulatory schemes, such as the EPA in this case, permit the government to fulfil a person's regulatory obligations and to demand reimbursement

(or in some cases security) from the person for the costs incurred (or to be incurred) by the government in this regard. When the government chooses to go down this road the resulting monetary obligation makes the government a creditor (or, in the case of a demand for security, a future creditor).

98. This, of course, is a very different situation from one where the government insists that the person fulfil his or her statutory duties or obligations from his own resources, including resources that the person would otherwise have used to pay his creditors.

99. For example, in *Re Shirley, supra,* the Ontario Ministry of the Environment fulfilled the debtor's obligation to clean up his property and thereby became – and was treated as – a creditor for the costs the ministry had incurred.

100. In *Strathcona (Country) v. Fantasy Construction Ltd.*, [2005] 261 D.L.R. (4th) 221 (Alta Q.B.) [Strathcona No. 2] at para. 46, the Alberta Court of Queen's Bench accepted that an insolvent debtor must comply with his regulatory obligations to the public before paying his creditors. However, the cout also held that where the regulatory authority has chosen to make itself a creditor by monetising the regulatory obligation, the authority's status changes from that of a "enforcer" outside the scheme of bankruptcy distribution to a "creditor" within it:

> Clearly, it is essential to this reasoning that the public agency charged with enforcing the general law of Alberta not have taken steps to make itself a creditor. If it has exercised a statutory authority or authority obtained from some other source, such as a Court Order, to do whatever ought to have been done by the party with the obligation and to recover the costs of doing so, it has become a creditor. From then on,

> the object of the whole process has changed. The public agency is no longer seeking to require the party with the general law obligation to comply. It is seeking to recover money. If the party with the obligation is in bankruptcy, collection of the money, its debt, by the public authority must be subject to the scheme of distribution created by the BIA.

101. This same point was made, although in different circumstances, in *Re JTI-Macdonald Corp.*, 2009 CanLii 59159 (Ont. S.C.). In this case, the court had to determine, amongst other things, whether provincial legislation, which had not been proclaimed in force and that purported to impose monetary liability on the debtor for health costs arising from the use of tobacco products, created a "claim" for the purposes of the CCAA proceedings involving the debtor company. The court held, at para. 29, that it did not:

> Until the underlying special purpose provincial legislation, like the TDHCCRA, is passed and proclaimed in force, creating a HCCR [Health Care Costs Recovery] claim, a province has no cause of action to assert, no claim recoverable by legal process, and no claim provable in bankruptcy capable of being asserted in a *CCAA* proceeding.

102. This principle necessarily applies whether the legislature of a province has not yet proclaimed in force a law that creates what would be a claim provable in bankruptcy or whether a minister or regulatory body has chosen not to act pursuant to a discretionary power to create what would be a claim provable in bankruptcy.

103. In this case, the Province has not taken steps to make itself a creditor of Abitibi. Rather, the EPA Orders were made in furtherance of the Province's attempt to have Abitibi honour and fufil the duties it owes the people of the Province under the

EPA. The Province, therefore, is not a creditor of Abitibi in respect of the EPA Orders and Abitibi must honour them.

D. *General Chemical* does not change anything in the above analysis

104. In *Re General Chemical Canada Ltd.* (2007), 35 C.B.R. (5th) 163,[1] the Court of Appeal for Ontario had to decide whether the Ontario Ministry of the Environment was entitled to obtain from the interim receiver of a bankrupt company cash security beyond what the company had posted before its bankruptcy for costs that the ministry might have to incur to clean up pollution that the bankrupt had caused by its industrial activities.

105. Consistent with the above analysis, the motion judge (whose decision is reported at 22 C.B.R. (5th) 298) and the Court of Appeal concluded that the ministry was not entitled to demand such security in priority to the bankrupt's creditors and thereby dismissed the ministry's motion.

106. Unfortunately, in denying the ministry's motion, the motion judge held that the amendments to the BIA that added s. 14.06 (along with the corresponding addition of s. 11.8 of the CCAA) had overturned *Panamericana*. In a short four sentence paragraph, the Court of Appeal agreed. Writing for the court Goudge J.A. stated, at para. 46:

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[1] Leave to appeal to SCC denied [2007] S.C.C.A. No. 539.

> I agree with the motion judge that the reasoning in [*Panamericana*] has been overtaken because of subsequent amendments to the *BIA*. Section 14.06(7) now expressly provides for priority to be accorded to environmental clean up costs and section 14.06(8) now ensures that a claim against the debtor for environmental clean up costs is a provable claim. Neither were in effect at the time of *Panamericana*. To give effect to provincial environmental legislation in the face of these amendments to the *BIA* would impermissibly affect the scheme of priorities in the federal legislation.

107. It is anticipated that Abitibi will attempt to rely on *General Chemical* and this passage as support for the erroneous contention that obligations to comply with the law are claims provable within the meaning of the BIA and hence the CCAA. Neither this passage nor that case supports such a conclusion, however.

108. While the correct outcome was reached by the Ontario courts in *General Chemical*, the broad statement that *Panamericana* has been overruled by Parliament, and that provincial environmental legislation could no longer be given effect by virtue of these amendments to the BIA, was unnecessary for the decision the court reached on the merits and is too broadly stated to be an accurate statement of the law. Three points demonstrate why this is so.

109. <u>First</u>, the reason the ministry could not block a partial distribution to the secured creditor in this case was not because the BIA/CCAA amendments had overturned *Panamericana*, but rather because the ministry was simply a creditor advancing a claim against the debtor, as opposed to a public body seeking to enforce compliance with the general law. The ministry was a creditor because it wanted the

receiver to use the debtor's cash to increase the ministry's "financial assurance" or security (i.e., pay money directly to the ministry).

110. Second, unlike *Panamericana* (and all of the subsequent decisions cited above that rely upon *Panamericana*), the bankrupt debtor in *General Chemical* was not in breach of any order requiring it to comply with a particular statute or regulation. In the words of the motion judge, at para. 50, "There is no suggestion General Chemical has failed to comply with any statutes or regulations. There is also no evidence of any imminent environmental effects." In other words, the ministry had not issued a statutory compliance order and there was no underling statutory duty or obligation that General Chemical was breaching that could have served as the basis for such an order.

111. Third, the courts incorrectly concluded that the enactment of s. 14.06 of the BIA (and s. 11.8 of the CCAA) overturned *Panamericana*. Put simply, those sections do not deal with the enforcement of statutory compliance orders.

112. Section 14.06 of the BIA provides (s. 11.8 of the CCAA is identical, *mutatis mutandis*):

> **Priority of claims**
>
> (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

> (*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
>
> (*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.
>
> **Claim for clean-up costs**
>
> (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.

113. If Parliament had intended these sections to apply to regulatory obligations generally, and thereby to overrule the general principle in *Panamericana* that provincial laws of general application, including with respect to regulatory duties and obligations, continue to apply in insolvency proceedings, Parliament would have had to use explicit language to this effect.

> *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123

114. Parliament did not do so because that was not the purpose of these subsections. Rather, the subsections: **(1)** create a limited priority in favour of the government for certain environmental claims (which did not otherwise exist); and **(2)** deem all environmental claims provable claims regardless of when those claims arose relative to the insolvency filing (which would not otherwise have been the case).

115. None of the provisions are applicable to the facts in *Panamericana*, or any of the subsequent cases cited above that rely upon the principles developed and applied in *Panamericana.* More to the point, the provisions do not turn an obligation to comply with the law into a claim provable by the government; nor do they bar or extinguish such obligations.

116. Indeed, the issue of whether the principles in *Panamericana* were affected by these amendments was extensively considered by the Alberta Court of Queen's Bench in *Strathcona (Country) v. Fantasy Construction Ltd.*, [2005] 256 D.L.R. (4th) 536 [Strathcona No. 1], at para. 37:

> The principle established in *Panamericana* is that an obligation of a bankrupt to comply with public safety or environmental standards, imposed pursuant to statutory authority, must be honoured by the Trustee using estate assets notwithstanding resulting prejudice to creditors of the bankrupt. The *BIA* amendments [in s. 14.06] deal with the Trustee's personal liability, Trustee's standard of care in relation to environmental issues, Trustee's abandonment of property to avoid liability for environmental conditions, crown priority, and timing of provable claims. It may be that *Panamericana* inspired the concerns that lead [sic] to the amendments. Parliament responded to those concerns as it considered necessary. But in doing so it did not overrule *Panamericana.* In my view the principle articulated and applied in *Panamericana* is still part of the law.

117. The court specifically considered ss. 14.06(8) of the BIA because, in the words of Burrows J. at para. 40, that section "could appear to be directed to the reasoning in *Panamericana*". Justice Burrows then concluded, at para. 42, as follows:

> … I interpret the section as intending only to overcome what would otherwise be the effect of s. 121(1). That section provides that liabilities to which the bankrupt is subject on the day on which he becomes bankrupt, or to which he may become subject before discharge by reason of an obligation existing at the time of the bankruptcy, are provable claims. If that section applied, an environmental claim arising after the date of bankruptcy but before discharge might not be a provable claim. Section 14.06(8) deals only with that timing issue. *It does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it.*
>
> [emphasis added]

118. Section 11.8 of the CCAA, therefore, does not convert the obligations found in the EPA Orders into claims owing by Abitibi to the Minister or the Province.

Issue 2: Parliament has not given this court the discretionary power pursuant to the CCAA to make an order that has the effect of barring or extinguishing a debtor's regulatory obligations or which has the effect of requiring the Crown in right of a province to exercise a provincial statutory power in a certain way

A. Such powers are not within the purposes of the CCAA

119. To carry out the purposes of the CCAA, the court is given a capacious – though not unlimited – discretionary power.

120. That power is exercised through s. 11 of the Act. In the words of Blair J.A. of the Court of Appeal for Ontario in *Re Stelco Inc.* (2005), 75 O.R. (3d) 5, at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while its holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction.

121. At its root, Abitibi's argument is that this court has a discretionary power under s. 11 of the CCAA to extinguish Abitibi's obligations to the Province under the EPA Orders. The means used (such as by defining "Claim" as it did in the CPO) are not important to Abitibi so long as this result is obtained.

122. Abitibi wants this result because it does not believe that it will derive any benefit from complying with the Province's environmental laws. In essence, Abitibi is saying that this court can and should extinguish Abitibi's obligations to comply with the laws of the Province because it is better for Abitibi – and hence for its non-government

stakeholders – to be relieved from the burden of complying with these laws than to comply with them. In this way Abitibi is saying that this court has the statutory discretion under the CCAA to shift the burden of the law from him on whom it is placed to those who the court determines should bear it – the public of the Province, in this case.

123. This court's s. 11 discretion does not extend this far.

124. The s. 11 discretion is designed for and hence is limited to the court's role in supervising the debtor company's restructuring efforts, not to determine social, economic or legislative policy for the country. Were the court to adopt the latter stance it would move from being a neutral referee supervising the debtor company's restructuring process to a participant with a stake in a particular outcome of that process.

125. The Court of Appeal for British Columbia in *Re Skeena Cellulose Inc.* (2003), 43 C.B.R. (4th) 187, at para. 35, accepts that the court's role is limited to supervising the debtor company's restructuring against the backdrop of the law:

> 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.

126. As does the Court of Appeal for Ontario. Again, in the words of Blair J.A. from *Re Stelco, supra*, at para. 44:

> What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. *The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities*. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors." *But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues*. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.
>
> [emphasis added]

127. In other words, it is accepted that the discretion given to a court under s. 11 of the CCAA to grant or withhold a stay of proceedings to set the boundaries of the restructuring does not give the court the power to ignore the general law. Rather, the debtor company's workout activities take place against the backdrop of the general law.

128. Any doubt on this point was laid to rest by the Ontario Superior Court of Justice in *Re Richtree Inc.* (2004), 74 O.R. (3d) 174. In that case, Lax J. held: "[c]ompanies under CCAA protection are not immunized from complying with regulatory regimes". Her Honour went on hold, at para. 18, that even if she had jurisdiction under

the CCAA to interfere with a regulatory regime, she would not do this as to do so would be "an improper and injudicious exercise of the court's discretion under the CCAA".[2]

129. Similarly, in its November 2009 decision in *Re Nortel Networks*, (2009), 59 C.B.R. (5th) 23 at paras. 16 and 31 the Court of Appeal for Ontario confirmed that the Ontario *Employment Standards Act* "continues to apply while a company is subject to a CCAA restructuring". In that case, the Court of Appeal accepted that the lower court was able to stay *temporarily* claims made by *creditors* under that Act. And the Court confirmed that there was no power to extinguish even debt obligations arising under that regulatory scheme.

130. Furthermore, in *Re Metcalfe & Mansfield Alternative Investments II Corp* (2008), 92 O.R. (3d) 513, at para. 51, the Court of Appeal for Ontario accepted that:

> … the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that *this broader public dimension must be weighed in the balance together with the interests of those most directly affected* [internal citations omitted].

131. It is difficult to see how a court deriving its powers from the CCAA could conclude – even if it had the power to do this – that the wider public interest is served by immunising the debtor company from society's laws or by extinguishing the debtor company's regulatory obligations to society. Indeed, as the Alberta Court of Appeal underscored in *Panamericana*, at para. 33, the very opposite is true: the duty to comply with the general law is a duty that is owed *to the public*:

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2 To like effect, see *Ivaco Inc.*, *Re.* (2006), 83 O.R. (3d) 108 (C.A.) in which the Court of Appeal for Ontario held, at para. 80, that the court's statutory discretion under the CCAA did not extend to

> [T]he obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all citizens of the community to their fellow citizens.

132. This is especially so in the case of regulation that is designed to protect the environment and human health, as is at issue in this case.

133. As the majority of the Supreme Court of Canada said in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, [2001] 2 S.C.R. 241, at para. 1, *per* L'Heureux-Dubé J.:

> The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment …. This Court has recognized that "[e]veryone is aware that individually and collectively, we are responsible for the preserving the natural environment … environmental protection [has] emerged as a fundamental value in Canadian society.

134. And in *Imperial Oil Ltd. v. Québec*, [2003] 2 S.C.R. 624, at para. 19, the Supreme Court said this in respect of Québec's environmental protection legislation:

> The Québec legislation reflects the growing concern on the part of the legislatures and of society about the safe-guarding of the environment. That concern does not reflect only the collective desire to protect it in the interests of the people who live and work in it, and exploit its resources, today. It may also be evidence of an emerging sense of intergenerational solidarity and acknowledgment of an environmental debt to humanity and to the world of tomorrow.

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transferring a corporate head office.

B. Even the recent amendments to the CCAA do not purport to give the court the power to extinguish regulatory obligations

135. The recent amendments[3] to the CCAA introduced for the first time provisions specifically dealing with regulatory and government bodies and the effect of CCAA proceedings on actions taken by those bodies in respect of the debtor company. Those provisions are found in s. 11.1, and are reproduced in full below:

> 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.
>
> (2) Subject to subsection (3), no order made under section 11.02 [which provides the court with the power to issue a temporary stay of proceedings to preserve the status quo and formulate a restructuring plan] affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.
>
> (3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
>
> > (*a*) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
> >
> > (*b*) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

[3] These amendments came into force on 18 September 2009.

> (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.

136. Given that it is a recent amendment, s. 11.1 is not directly applicable in this case.[4] However, the section is relevant to determining the scope of the court's statutory discretion on this motion. In this section Parliament extended the scope of the court's previous statutory discretion. Since Parliament did not in these amendments give the court the power to bar or extinguish regulatory obligations – only to stay enforcement of them for a very limited time based on exceptional circumstances – it is evident that the court does not have such a power in these proceedings.

137. Subsection 11.1(2) accords perfectly with the distinction discussed above, namely, the distinction between a government body acting as an enforcer of the general law, versus acting as a creditor pursuing a monetary claim owed directly to it by a debtor. In the former case, and consistent with all of the case law, the government is not a creditor pursuing a claim and thus is not affected by the general stay of proceedings imposed by the court under s. 11.02. In the latter case, when the government is acting as a creditor, it is caught by the stay of proceedings just like every other creditor.

[4] The version of the CCAA that is applicable in this case is the version that was in force on 17 April 2009, the date that Abitibi filed for CCAA protection.

138. Subsection 11.1(3) provides an exception to this general rule. It allows the court, on application by the debtor company and on notice to all affected stakeholders, to make an order staying any steps taken by a government body to enforce the general law, provided that the court concludes: **(1)** that the debtor company would be unable to present a viable restructuring plan without such an order; and **(2)** that such an order is not contrary to the public interest.

139. Four points are key in relation to ss. 11.1(3) for the purpose of the within motion.

140. First, and most importantly, the most that ss. 11.1(3) allows the court to do is to issue a *temporary* stay of proceedings prohibiting any steps to force a debtor company to comply with the general law. Subsection 11.1(3) does not contemplate what Abitibi is asking this court to do, namely, *permanently* to extinguish Abitibi's duties and obligations under the general law.

141. Second, ss. 11.1(3) actually *restricts* the court's power in comparison to what courts formerly did. Earlier cases such as *Re Air Canada* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.) and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.) saw the CCAA court issue temporary stays of proceedings against non-creditor regulatory bodies. The new amendments make it clear that the general stay of proceedings is presumed *not* to apply to regulatory bodies, and that the court can only issue a stay in relation to regulatory bodies if the debtor company establishes that it cannot restructure without such a stay, and that a stay is not contrary to the public interest.

142. Third, Abitibi has not presented any evidence establishing that it cannot restructure without a temporary stay of proceedings being issued against regulatory bodies. In fact, Abitibi has done the very opposite. At the outset of these proceedings Abitibi consented to an amendment to the Initial Order (included as part of the 14 May 2009 First Stay Extension Order) that explicitly confirmed that the stay of proceedings in this case:

> … cannot be 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.

143. Fourth, the terms of the new Act make it imposible to conclude that Parliament has concluded that it is in the public interest to allow a debtor company under the CCAA to shed all responsibility to comply with its duties and obligations under the general law.

Issue 3: In any event, Parliament does not have the constitutional competence to extinguish regulatory obligations imposed by provincial law or to require the Crown in right of a province to exercise a provincial statutory power in a certain way and therefore this court cannot purport to exercise such power

A. Overview of the Province's constitutional position

144. This court's jurisdiction under the CCAA is ultimately determined by Parliament's jurisdiction over bankruptcy and insolvency pursuant to ss. 91(21) of *The Constitution Act, 1867*, 30 & 31 Victoria, c. 2 (U.K.). Given that Parliament could not pass a law with the purpose or effect of eliminating an insolvent company's obligation to comply with the general law, nor to direct how a provincial officer should exercise his or her provincial statutory discretion, it follows that this court cannot make an order with such purpose or effect. The CPO purports to do just that and is *ultra vires* to this extent.

145. Even if Parliament (and thus this court) had such jurisdiction pursuant to ss. 91(21) of the Constitution, the doctrine of interjurisdictional immunity would operate in favour of the Province in this instance. The EPA Orders lie at the core of several heads of exclusive provincial jurisdiction under s. 92 of the Constitution. The elimination of the duties and obligations created by provincial law that underlie the EPA Orders would impermissibly intrude upon the core of this jurisdiction, and effectively preclude the Province from legislating in these areas. As a result, the CPO is inapplicable to the extent that it purports to extinguish duties and obligations created under provincial law.

146. Finally, the doctrines of "ancillary effects" and "federal paramountcy" are not engaged in this case, and thus cannot be used by Abitibi to justify the result it seeks. Ancillary effects is not engaged because the purported ancillary effect is anything but

ancillary. On the contrary, it is a complete intrusion into the provincial sphere in a manner that conflicts with the legislative scheme established by the CCAA. Paramountcy is not engaged because the impugned provisions of the CPO are not a valid federal enactment and thus there is no conflict between federal and provincial legislation.

B. The proper interpretive approach to federalism issues

147. The Supreme Court of Canada has repeatedly confirmed in unequivocal terms that Canadian constitutional doctrine is based on the principle of "co-operative federalism". For example, in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 22, the court said:

> The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

148. It is a core principle of the doctrine of co-operative federalism ("the dominant tide" in the words of the Supreme Court) that enactments by both levels of government are to be interpreted in such a way as to avoid conflict wherever possible. As explained by the court in *Canadian Western Bank*, at para. 37:

> … a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest.

149. A corollary of this principle of judicial restraint is the presumption of constitutionality. That presumption embodies the idea that a legislature is presumed to have enacted legislation that does not exceed its constitutional powers. As a result, enactments should be interpreted, wherever possible, so as to bring them within the authority of the legislature that enacted them. This may involve reading down the enactment so that it does not transgress constitutional limits.

> *Cushing v. Dupuy* (1880), L.R. 5 App. Cas. 409 at para. 8
>
> Peter W. Hogg, *Constitutional Law of Canada*, 5th Ed. (Toronto: Thompson Carswell, 2007) at paras. 15.5(i), 15.7
>
> *Husky Oil Operations Ltd. v. Canada (Minister of National Revenue – M.N.R.*, [1995] 3 S.C.R. 453 at para. 81
>
> *R. v. Jabour*, [1982] 2 S.C.R. 307 at 356

150. A law that is alleged to apply to a matter outside the jurisdiction of the enacting legislature may be attacked in three different ways: **(1)** an attack on the *validity* of the law; **(2)** an attack on the *applicability* of the law; or **(3)** an attack on the *operability* of the law. These three methods are discussed below.

> Peter W. Hogg, *Constitutional Law of Canada*, *supra*, at para. 15.8(a)

(i) Validity: pith and substance, double aspect and ancillary effects

151. A law may be invalid because it relates to a subject matter that is outside the jurisdiction of the enacting legislature. Similarly, an order may be invalid because it falls outside the jurisdiction of the court as conferred by the applicable federal or provincial legislation.

Tolofson v. Jensen, [1994] 3 S.C.R. 1022 at 1065

152. The question of validity involves a two-step analysis. First, the court must characterise the impugned enactment (be it legislation or a court order made pursuant to legislation) to determine its "pith and substance". This involves identifying the "matter" to which it essentially relates. In other words, the court's first inquiry is into the true nature of the enactment in question to identify its dominant characteristic.

Canadian Western Bank, *supra*, at paras. 25-27

Peter W. Hogg, *Constitutional Law of Canada*, *supr*a, at para. 15.8(a)

153. Second, once the pith and substance has been determined, the court must then determine whether that matter falls under a federal head of power under s. 91 of the Constitution, or a provincial head of power under s. 92. If the matter does not fall under an applicable head of power, the impugned legislation or enactment is *ultra vires*.

Canadian Western Bank, *supra*, at paras. 25-27

Chatterjee v. Ontario (Attorney General), [2009] 1 S.C.R. 624 at paras. 16, 24

154. The double aspect doctrine recognises that some matters may be impossible to classify under only one head of power. In one aspect they may fall under provincial jurisdiction, but in another aspect and for another purpose fall under federal jurisdiction. Where a matter has a double aspect, federal and provincial legislation in relation to the matter may coexist so long as there is no operational conflict that would trigger federal paramountcy.

Canadian Western Bank, *supra*, at para. 30

155. When an enactment in pith and substance falls under a head of federal jurisdiction, it may have an ancillary effect upon areas of provincial jurisdiction. And the same is true in reverse: a valid provincial enactment may have an ancillary effect of areas of federal jurisdiction. It is not the possibility that an enactment may "affect" a matter outside the legislature's jurisdiction that determines its validity, but rather whether it is "in relation" to (i.e., in pith and substance) a matter outside of the legislature's jurisdiction.

Canadian Western Bank, *supra*, at paras. 28, 30

Carnation Company Ltd. v. Quebec Agricultural Marketing Board, [1968] S.C.R. 238 at 252

(ii) Applicability and operability: interjurisdictional immunity and paramountcy

156. In some situations where there is a potential double aspect, one level of government must be protected against intrusion by the other level. The doctrines of interjurisdictional immunity and paramountcy are used to do this.

157. Interjurisdictional immunity protects against an intrusion by one level of government into the core of another level of government's area of exclusive jurisdiction. In these cases, the impugned enactment is rendered inapplicable to the other head of power, usually by reading down the enactment so that it does not conflict with the core of the other level of government's jurisdiction.

Canadian Western Bank, *supra*, at para. 33

British Columbia (Attorney General) v. Lafarge Canada Inc., [2007] 2 S.C.R. 86 at para. 41

Peter W. Hogg, *Constitutional Law of Canada*, *supra*, at para. 15.8

158. The doctrine of paramountcy operates where a valid provincial enactment conflicts with valid federal enactment. A conflict will be found to exist only where compliance with one enactment entails defiance of the other, or where the provincial legislation frustrates the federal purpose. In the case of such conflict, the provincial legislation is rendered inoperative to the extent of the conflict.

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161 at 191

(iii) The scope of the federal insolvency power and its interaction with provincial law

159. Bankruptcy and insolvency falls under Parliament's jurisdiction pursuant to ss. 91(21) of the Constitution. The two most important pieces of federal legislation in this area are the BIA and the CCAA. The object of the BIA is to ensure a fair distribution of a bankrupt's estate amongst the creditors. The object of the CCAA is to provide a court supervised process that provides an insolvent company the opportunity to negotiate a plan of compromise or arrangement with its creditors. The core of the federal insolvency power is thus to permit a national legal regime for the liquidation of bankrupt estates or the restructuring of insolvent companies.

Robinson v. Countrywide Factors Ltd., [1978] 1 S.C.R. 753 at para. 119

Coopers & Lybrand Ltd. v. Bank of Montreal (1996), 142 D.L.R. (4th) 100 (Nfld. C.A.) at para. 63

Re Stelco, *supra*

Re Lehndorff General Partner Ltd. (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.) at para. 5

Re Eagle River International Ltd. (sub nom Sam Lévy & Associés Inc. v. Azco Mining Inc.), [2001] 3 S.C.R. 978 at para. 25

160. Federal insolvency law is dependent upon provincial property and civil rights legislation for its operation. This was recognised, for instance, by both the majority (implicitly) and the dissent (explicitly) in *Husky Oil*, *supra*, which is the leading case in Canada on the interplay between federal jurisdiction over bankruptcy and insolvency and provincial jurisdiction over property and civil rights. Not only did the court confirm that provincial law continues to operate in the bankruptcy or insolvency context, it did so in explicit reference to *Panamericana* and provincial regulatory law. In the words of Iacobucci J., at para. 146:

> [*Panamericana*] thus echoes the proposition that provincial laws of general application continue to apply in bankruptcy even though they may incidentally alter the amount of proceeds available in the bankrupt's estate for distribution.

161. Given that provincial law continues to apply during insolvency, provincial law inevitably ends up affecting the "bottom line" (i.e., who gets how much money). Indeed, without provincial law, there is no "bottom line". This fact is recognised in the passage from *Husky* cited above, as well numerous other parts of the decision (by both the majority and the dissent):

> It is trite to observe that the *Bankruptcy Act* is contingent on the provincial law of property for its operation. The Act is superimposed on those provincial schemes when a debtor declares bankruptcy. As a result, provincial law necessarily affects the "bottom line", but this is contemplated by the *Bankruptcy Act* itself. [*per* Gonthier J.]
>
> [P]rovincial legislation is deeply involved in determining the priority, registration and amount of indebtedness in the bankruptcy process. In fact, the proprietary and contractual rights that are regulated by the bankruptcy process are usually created by virtue of provincial law. [*per* Iacobucci J.]

Husky Oil, *supra*, at paras. 30, 87, 142

Peter W. Hogg, *Constitutional Law of Canada*, *supra*, at para. 25.6(a)

Re Giffen, [1998] 1 S.C.R. 91 at para. 64

162. Federal bankruptcy and insolvency legislation does not "occupy the field" in relation to all matters touching on insolvency. To the contrary, Parliament intended that provincial legislation would operate in the insolvency context, short of an actual conflict. In the words of Beetz J. in *Robinson v. Countrywide Factors Ltd*., *supra*, at paras. 86 *et seq*:

> When the exclusive power to make laws in relation to bankruptcy and insolvency was bestowed upon Parliament, *it was not intended to remove from the general legal systems which regulated property and civil rights a cardinal concept essential to the coherence of those systems*. The main purpose was to give Parliament exclusive jurisdiction over the establishment by statute of a particular system regulating the distribution of a debtor's assets. However, given the nature of general legal systems, the primary jurisdiction of Parliament cannot easily be exercised together with its incidental powers without some degree of overlap in which case federal law prevails. On the other hand, provincial jurisdiction over property and civil rights should not be measured by the ultimate reach of the federal power over

> bankruptcy and insolvency any more than provincial competence in relation to the administration of justice can be determined by every conceivable and potential use of the criminal law power.
>
> [emphasis added]

163. Any doubt on this point was laid to rest by the Supreme Court in *Canadian Western Bank, supra,* where Binnie J. stated at para. 74 "[t]he Court has never given any indication that it intended … to reverse its previous decisions and adopt the "occupied the field" test it had clearly rejected in *O'Grady* in 1960".[5]

164. Accordingly, so long as the doctrine of paramountcy is not triggered, federal insolvency proceedings cannot be used to subvert or override provincial legislation relating to property and civil rights.

165. Since, as stated above, the main purpose of the bankruptcy and insolvency power is to give Parliament exclusive jurisdiction over a particular system for regulating the distribution of a bankrupt debtor's assets, and since the main purpose of the CCAA is to maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors of a mutually-beneficial plan of compromise or arrangement, it is not part of Parliament's constitutional mandate to *cure* insolvency nor to *improve* post-restructuring solvency.

166. Amongst other things, and again as stated above, this means that the federal power does not extend to permitting an insolvent company to shed obligations it owes under provincial regulatory regimes simply because it is financially beneficial to

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[5] Therefore, when courts now use the language of "occupying the field" in connection with the application of federal bankruptcy and insolvency law they do so erroneously.

the company and its creditors that the company be relieved of the associated economic burden of those regimes after it emerges from its restructuring process.

Re Richtree Inc., *supra*, at paras. 10, 18

Re Hover, [2005] 7 W.W.R. 14 (Alta. C.A.) at paras. 46-47, 52

Crystalline Investments Ltd. v. Domgroup Ltd., [2004] 1 S.C.R. 60 at para. 43

Re Giffen, *supra*

TCT Logistics Inc., *supra*

C. The Claims Procedure Order is *ultra vires* to the extent that it bars and extinguishes Abitibi's regulatory obligations

167. The Province is challenging the constitutional validity of the CPO *only to the extent that it purports to bar or extinguish Abitibi's statutory duties or obligations to comply with Provincial law for the public benefit*. As such, the court must first determine the pith and substance of the CPO in this narrow sense, and then determine whether that matter falls under Parliament's jurisdiction over bankruptcy and insolvency.

168. Identifying the pith and substance of an impugned enactment requires consideration of both its purpose and its effect. When considering possible effects, the court should look beyond the "four corners" of the impugned enactment, the CPO in this case.

Chatterjee, *supra*, at para. 19

Canadian Western Bank, *supra*, at paras. 25-27

169. The *purpose* of the CPO, to the extent that it purports to eliminate duties and obligations owed by Abitibi under provincial law, is to do just that: eliminate Abitibi's duty and obligation to comply with those provincial laws affecting it on the day it made its filing under the CCAA. The CPO defines "Claim" so as to include all liabilities, obligations and breaches of duty, and then provides that any "creditor" (defined as a person asserting a claim) who does not deliver a proof of claim is forever barred from asserting that claim.

170. The *effect* of the CPO, again only to the extent that it purports to eliminate duties and obligations owed by Abitibi under provincial law, is to bar not only claims as defined under the BIA and CCAA, but also all duties, liabilities and obligations owed by Abitibi for the public benefit – in other words, completely and forever to extinguish all regulatory duties and obligations owed by Abitibi under provincial law that were in effect at the date of its CCAA filing.

171. As such, in purpose and in effect, and thus in pith and substance, the CPO (to the extent that it is challenged on this motion) is directed at extinguishing provincial regulatory law.

172. The extinguishment of provincial regulatory law falls outside of Parliament's jurisdiction over bankruptcy and insolvency. As described above, the federal insolvency power is concerned with the creation and regulation of a legal process that allows insolvent companies to attempt to restructure. The federal insolvency power is not a guarantee that every insolvent company will be able to restructure successfully, and certainly does not provide for the complete and permanent

extinguishment of all regulatory duties and obligations created under provincial law to achieve this result.

173. The situation in this case is essentially the reverse of *Husky Oil*. In that case the Supreme Court held that while provincial law can affect the bottom line in an insolvency, provinces cannot pass legislation with idiosyncratic features (such as statutory trusts or deemed set-offs) that have the effect of altering the priorities scheme established by the BIA. By the same token, in this case federal law cannot be used to create an idiosyncratic definition of "claim" that is then used to subvert provincial regulatory schemes that do not involve debtor-creditor relationships.

174. The CPO is thus *ultra vires* to the extent that it purports to eliminate duties and obligations owed by Abitibi under provincial law.

175. The CPO is also *ultra vires* in another respect. The CPO effectively dictates to the Province how it is to use the EPA. The CPO requires the minister to use the s. 102 powers contained in the EPA (which the minister has chosen not to use) as a prerequisite to being able to use the EPA in respect of Abitibi. Put differently, and more bluntly, the CPO says, in effect: "Province, if you want to use the EPA against Abitibi you may do so only to the extent that you fulfil Abitibi's obligations yourself; otherwise Province, sorry, you are out of luck."

176. Fettering the discretion of a provincial Crown by dictating how she should act in relation to a provincial regulatory regime is plainly beyond the limits of the federal insolvency power. The CPO is therefore *ultra vires* to this extent.

D. In the alternative, interjurisdictional immunity protects the EPA Orders

177. In the event the court concludes that the CPO (to the narrow extent that it is challenged on this motion) is *intra vires*, the order is still inapplicable to the EPA Orders on the basis of interjurisdictional immunity. In short: **(1)** the EPA and the EPA Orders are *intra vires* the Province; and **(2)** if the impugned provisions of the CPO are upheld as being valid under the federal Bankruptcy and Insolvency power, these provisions would nevertheless impermissibly intrude upon the core of provincial jurisdiction and effectively preclude the Province from legislating in this area and thus would be inapplicable to that extent. Both of these points are considered below.

(i) The EPA and EPA Orders are intra vires the Province

178. The EPA is a provincial law of general application, the purpose of which is to prohibit environmental contamination within the Province, and to facilitate the remediation of contaminated sites located within the Province. The pith and substance of the EPA is therefore the protection of the environment within the Province.

179. The "environment" is not an explicit head of power under the Constitution, and has been held to be a matter of overlapping federal and provincial jurisdiction. This is because in some respects, such as air and water pollution, environmental concerns transcend provincial boundaries. However, the regulation of the environment within the territorial limits of a province is clearly a matter within exclusive provincial jurisdiction.

> *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at para. 93
>
> *R. v. Canadian Pacific Ltd*. (1993), 13 O.R. (3d) 389 (C.A.) at para. 12; affirmed [1995] 2 S.C.R. 1028

Interprovincial Co-operative Ltd. v. R., [1975] 1 S.C.R. 477 at para. 31

Dale Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" *(1973)*, 23 University of Toronto L.J. 54 at 55

180. The EPA falls within a number of heads of power over which the Province has exclusive jurisdiction under s. 92 of the Constitution, including:

- section 92(5): The Management and Sale of the Public Lands Belonging to the Province and of the Timber and Wood thereon;
- section 92(13): Property and Civil Rights in the Province;
- section 92(15): The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated this Section; and
- section 92(16): Generally all Matters of a merely local or private Nature in the Province.

R. v. Lake Ontario Cement Ltd., [1973] 2 O.R. 247 (H.C.J.) at para. 16

R. v. Young (1974), 1 O.R. (2d) 564 (C.A.)

Murray Rankin, "Environmental Regulation and the Changing Constitutional Landscape" in Geoffrey Thompson et al. eds., *Environmental Law and Business in Canada* (Aurora: Canada Law Book, 1993) at 32-35

181. The EPA embodies the polluter-pay principle of environmental protection. As the Supreme Court of Canada has recognised in *Imperial Oil*, *supra*, paras. 23-24, this principle is firmly entrenched in environmental law in Canada:

> To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of

> pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.

182. The EPA Orders are expressly authorised by the EPA: they require that Abitibi remediate a number of contaminated sites. The EPA Orders are thus in pith and substance related to environmental protection under provincial heads of power and are functionally integrated to the overall regulatory regime embodied in the EPA.

183. The mere fact that Abitibi will need to spend money in order to do comply with the EPA Orders does not change their pith and substance into something else, as Abitibi suggests. Virtually all regulatory orders require some form of expenditure. That fact does not change their dominant purpose.

(ii) If upheld, the impugned provisions of the CPO would intrude on the core of the Province's jurisdiction in relation to environmental protection in the Province

184. The doctrine of interjurisdictional immunity applies where an enactment of one level of government intrudes on the core of the power of the other level of government. The "core" of the power that must be so affected in order for the doctrine to apply is the "basic, minimum and unassailable content" of the power. In other words, it is the "minimum content necessary to make the power effective for the purpose for which it was conferred".

Canadian Western Bank, *supra*, at paras. 48-50

185. Not every intrusion on the core of the power of another level of government will attract the doctrine of interjurisdictional immunity. In order for the doctrine to apply, the level effect must be such as to "impair" the core of the power.

Canadian Western Bank, *supra*

186. While most frequently used to protect federal jurisdiction, the doctrine is reciprocal and applies to protect both provincial heads of power as well.

Canadian Western Bank, *supra*, at para. 35

PHS Community Services Society v. Canada (Attorney General), 2010 B.C.C.A. 15 at paras. 170, 176

Peter W. Hogg, *Constitutional Law of Canada*, *supra*, at para. 15.8(f)

187. The Supreme Court of Canada has recognised that a statutory regime (such as that embodied in the EPA) which allows a provincial minister to issue an order against whomever is responsible for pollution represents one of the most important enforcement tools available to a province for addressing environmental contamination.

Imperial Oil, *supra*, at para. 25

188. Given the centrality of environmental compliance orders to provincial regulation and management of the environment, it would be difficult to imagine anything more at the core of provincial jurisdiction over those heads of provincial power than the ability of a province to require the polluter to clean up the pollution be caused.

189. By purporting to extinguish Abitibi's duties and obligations that underlie the EPA Orders, the CPO impairs that which makes the Province's constitutional jurisdiction effective for the purpose for which it was conferred.

190. As a result, the doctrine of interjurisdictional immunity will act so as to protect the Province's jurisdiction by rendering the CPO inapplicable to the extent that it purports to eliminate duties and obligations owed by Abitibi under provincial law.

191. The situation here is akin to that in *PHS Community Services Society v. Canada*, *supra*, where Huddart J.A. for the majority of the British Columbia Court of Appeal concluded that interjurisdictional immunity applied to protect provincial jurisdiction over health care from federal incursion through the exercise of the criminal law power, and made the following observation, at para. 162:

> If 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, to the extent that its use of the criminal law power can be justified by the potential for harm to public health or safety. That is just the sort of intrusion into a provincial domain that constituted an impermissible intrusion into the federal domain in *Bell Canada (1988)*.

192. Similarly, if the CCAA Court, in exercising a statutory power or discretion granted to it by Parliament, can extinguish duties or obligations owed to the public by a debtor company that are created by provincial law (such as the EPA Orders), that means that Parliament has an effective veto over all aspects of provincial regulatory jurisdiction.

193. Finally, the doctrine of interjurisdictional immunity is also applicable in a second respect. As noted above, the CPO impermissibly interferes with the Minister's ability to act as she sees fit in regards to the remedial options available to her under the EPA in respect of Abitibi. The CPO effectively eliminates the Minister's ability to rely upon s. 99 of the EPA (i.e., issue a compliance order requiring Abitibi to perform the necessary remediation) and instead forces the Minister to use s. 102 of the EPA (i.e., have the Province perform the remedial work itself and then claim reimbursement from Abitibi, which will be subject to compromise).

194. Neither the CCAA, nor the federal insolvency power, permit a court to fetter the discretion of a provincial Crown under its own laws. The Minister's ability to select from amongst a range a remedial options available to her under a *provincial* regulatory regime, created by *provincial* law, in regards to matters exclusively within *provincial* jurisdiction, is integral to the core of provincial regulatory jurisdiction. The doctrine of interjurisdictional immunity is thus triggered to protect exclusive provincial jurisdiction to this extent.

195. As the Supreme Court of Canada confirmed in *Imperial Oil*, *supra*, the decision of a provincial minister to exercise one of many remedial options available to the minister under a provincial regulatory regime is a political decision to be exercised in reference to the minister's determination of what is in the public interest (which can include, amongst other things, saving public money):

> … I am of the view that the Minister was merely defending, in the context of this case, the inseparable interests of the public and the state in the protection of the environment. [para. 37]

> In this case, as was discussed above, the Minister used a discretionary political power for the purposes of the application of s. 31.42 *Québec Environmental Quality Act*. A contamination problem had to be dealt with, and he had to choose the solution that he considered to be the most appropriate. That choice fell within the discretion assigned to him by the Act. … The Minister was performing a mainly political role which involved his authority, and his duty, to choose the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the environmental protection legislation. [para. 38]
>
> […]
>
> … The only interests the Minister was representing were the public interest in protecting the environment and the interest of the State, which is responsible for preserving the environment. In the circumstances of this case, it would be difficult to separate those interests. In exercising his discretion, the Minister could properly consider a solution that might save some public money. … [para. 39]

Issue 4: Reply to specific arguments Abitibi is expected to make

196. On either of the two grounds set out above, **(1)** the limits of the federal insolvency power; or **(2)** the doctrine of interjurisdictional immunity, this court should declare the CPO, to the extent that it purports to eliminate duties and obligations owed by Abitibi under provincial law, either *ultra vires* or inapplicable.

197. Neither ancillary effects, nor federal paramountcy, are relevant to the foregoing analysis. However, the Province expects that Abitibi will, erroneously, attempt to rely upon either or both of these doctrines. The explanation for why neither doctrine has any application in this case is set out below.

A. The doctrine of ancillary effects has no application here

198. In order to determine whether a purported ancillary effect is constitutionally permissible, the court typically must consider three questions:

> (1) What is the extent of the intrusion of the impugned enactment by one level of government relative to the jurisdiction of the other level of government?
>
> (2) Is the enactment part of a valid legislative scheme?
>
> (3) If so, is the enactment sufficiently integrated into that legislative scheme?

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture), [2002] 2 S.C.R. 146 at para. 58

City National Leasing Ltd. v. General Motors of Canada Ltd., [1989] 1 S.C.R. 641 at paras. 34, 49

199. The Supreme Court has repeatedly confirmed, however, that this ancillary effects test is not always necessary to resolve division of powers issues.

200. For instance, in *National City Leasing*, *supra*, the seminal authority on the ancillary effects doctrine, Dickson C.J.C., at para. 47, stated:

> … I note that in certain cases it may be possible to dispense with some of the aforementioned steps [i.e., the three part test set out above] if a clear answer to one of them will be dispositive of the issue. For example, if the provision in question has no relation to the regulatory scheme then the question of its validity may be quickly answered on that ground alone. The approach taken in a number of past cases is more easily understood if this possibility is recognized.

201. Similarly, and more recently, Binnie J. writing for the court in *Canadian Western Bank*, at para. 31, stated the same thing:

> When problems resulting from incidental effects arise, it may often be possible to resolve them by a firm application of the pith and substance analysis. The scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power. The usual interpretation techniques of constitutional interpretation, such as reading down, may then play a useful role in determining on a case-by-case basis what falls exclusively to a given level of government. In this manner, the courts incrementally define the scope of the relevant heads of power. The flexible nature of the pith and substance analysis makes it perfectly suited to the modern views of federalism in our constitutional jurisprudence.

202. This principle applies in this instance. A "firm application of the pith and substance analysis", as demonstrated above, illustrates that the CPO (to the extent that it purports to extinguish duties and obligations owed by Abitibi under provincial law) is *ultra vires*. Therefore, there is no need to consider ancillary effects.

203. Nonetheless, even if the court were to consider ancillary effects, the result would be the same.

204. In order to justify the CPO (to the extent it is challenged on this motion) Abitibi would have to demonstrate, using the three part test set out above, that the impugned ancillary effect (i.e., the extinguishment of all regulatory obligations created under provincial law) is: **(1)** minimally intrusive; **(2)** part of the overall legislative scheme created by the CCAA; and **(3)** sufficiently integrated to that scheme. None of these conditions can be met.

205. First, the level of intrusion on provincial jurisdiction is extreme: the CPO effectively sterilises all provincial regulatory powers in relation to Abitibi to the extent those powers were effective under provincial law at the date of Abitibi's initial filing.

206. Second, the extinguishment of provincial regulatory obligations is not a part of the legislative scheme created by the CCAA. The claims process, and Abitibi's CCAA proceedings as a whole, can unfold without the extinguishment of provincial duties and obligations owed by Abitibi as of its filing date. Abitibi can produce a plan to restructure its debts against the backdrop of its requirement to comply with provincial regulatory law, and Abitibi's creditors can vote on whether they wish to participate in that plan or not.

207. Third, given that the extinguishment of provincial regulatory law forms no part of the legislative scheme created by the CCAA, it is impossible to show that the CPO (to the extent that it is challenged on this motion) is sufficiently integrated to that scheme.[6]

B. The doctrine of paramountcy has no application here

208. The inapplicability of federal paramountcy in this case is easy to state: The existence of a constitutionally valid federal enactment is a prerequisite to the operation of the doctrine of paramountcy. There is no valid federal enactment in this case (for all of the reasons set out above). In other words, the court cannot perform a type of constitutional "pulling itself up by its bootstraps" by making an unconstitutional

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[6] Given the level of intrusion into the provincial sphere in this case, Abitibi would have to show that the CPO (to the extent that it is challenged on this motion) was "truly necessary" or "integral" to the legislative scheme created by the CCAA. *City National Leasing Ltd.*, *supra*, at paras. 46, 69.

order and then using the doctrine of paramountcy to attempt to make that order constitutionally effective.

PART 3 - RELIEF REQUESTED

209. The Province requests a declaration:

(a) that the Claims Procedure Order shall not bar, extinguish or otherwise affect the enforceability of orders made against the Debtors, the Property or the Directors (all as defined in the Initial Order) or others, by Her Majesty the Queen in Right of the Federal or a provincial government, or her agents, pursuant to her exercise of powers, rights or duties in relation to matters involving public health, safety, security, public order or the environment, provided that any financial or monetary fines or orders may be affected by the Claims Procedure Order; and

(b) for greater certainty, that the orders issued by the Minister against Abitibi on 12 November 2009 pursuant to s. 99 of the EPA are not barred or extinguished and their enforceability is not otherwise affected by the Claims Procedure Order and, in particular, but without limiting the generality of the foregoing, by paragraphs 3(t) and 15 of that order.

THE WHOLE RESPECTFULLY SUBMITTED

Toronto, 15 February 2010

WeirFoulds LLP

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Rizzo v. Rizzo Shoes Ltd., [1998] 1 S.C.R. 27

Re Stelco (2005), 75 O.R. (3d)

Luscar Ltd. v. Smoky River Coal Limited, [1999] 175 D.L.R. (4th) 703 (Alta C.A.)

Jameson House Properties Ltd. (Re), [2009] 11 W.W.R. 425

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Re Lamford Forest Products (1991), 10 C.B.R. (3d) 137 (B.C.S.C.)

Re Shirley, [1995] 129 D.L.R. (4th) 105 (Ont. Gen. Div.)

Strathcona (Country) v. Fantasy Construction Ltd., [2005] 261 D.L.R. (4th) 221 (Alta Q.B.) [Strathcona No. 2]

Re JTI-Macdonald Corp, 2009 CanLii 59159 (Ont. S.C.)

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114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville), [2001] 2 S.C.R. 241

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Re Air Canada (2003), 28 C.B.R. (5th) 52 (Ont. S.C.)

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Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3

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Peter W. Hogg, *Constitutional Law of Canada*, 5th Ed. (Toronto: Thompson Carswell, 2007)

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Chatterjee v. Ontario (Attorney General), [2009] 1 S.C.R. 624

Carnation Company Ltd. v. Quebec Agricultural Marketing Board, [1968] S.C.R. 238

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Re Lehndorff General Partner Ltd. (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.)

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Crystalline Investments Ltd. v. Domgroup Ltd., [2004] 1 S.C.R. 60

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Re Nortel Networks, (2009), 59 C.B.R. (5th) 23

SCHEDULE "B" – LAWS AFFECTED BY THE CPO

A. Ontario

Accessibility for Ontarians with Disabilities Act, 2005, S.O. 2005, c. 11

Aggregate Resources Act, R.S.O. 1990, c. A-8

Building Code Act, 1992, S.O. 1992, c. 23

Crown Forest Sustainability Act, 1994, S.O. 1994, c. 25

Electricity Act, 1998, S.O. 1998, c. 15, Sched. A

Employment Standards Act, 2000, S.O. 2000, c. 41

Environmental Assessment Act, R.S.O. 1990, c. E-18

Environmental Protection Act, R.S.O. 1990, c. E-19

Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4

Forest Fires Prevention Act, R.S.O. 1990, c. F-24

Health Promotion and Protection Act, R.S.O. 1990, c. H-7

Human Rights Code, R.S.O. 1990, c. H-19

Labour Relations Act, 1995, S.O. 1995, c.1, Sched A

Lakes and Rivers Improvement Act, R.S.O. 1990, c. L-3

Occupational Health and Safety Act, R.S.O. 1990, c. O-1

Ontario Water Resources Act, R.S.O. 1990, c. O-40

Pay Equity Act, R.S.O. 1990, c. P-8

Pesticides Act, R.S.O. 1990, c. P-11

Technical Standards and Safety Act, 2000, S.O. 2000, c. 16

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16

B. Québec

Labour Code, R.S.Q. c. C-27

Building Act, R.S.Q. c. B-1.1

Dam Safety Act, R.S.Q. c. S-3.1.01

Pesticides Act, R.S.Q. c. P-9.3

Watercourses Act, R.S.Q. c. R-13

Fire Safety Act, R.S.Q. c. S-3.4

Forest Act, R.S.Q. c. F-4.1

An Act Respecting Occupational Health and Safety, R.S.Q. c. S-2.1

An Act Respecting Labour Standards, R.S.Q. c. N-1.1

An Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q., c. P-39.1

Environmental Quality Act, R.S.Q., c. Q-2

SUPERIOR COURT
(Commercial Division)
DISTRICT OF MONTREAL
No.: 500-11-036133-094

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:
ABITIBIBOWATER INC.
and
ABITIBI-CONSOLIDATED INC.
and
BOWATER CANADIAN HOLDINGS INC.
and
The other Petitioners listed on Schedules "A", "B" and "C"

Debtors

AND
ERNST & YOUNG INC.

Monitor

AND
Her Majesty the Queen in Right of the Province of Newfoundland and Labrador

Petitioner

MEMORANDUM OF ARGUMENT OF THE PETITIONER

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

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