CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. : 500-09-020594-107
(S.C. #500-11-036133-094)

COURT OF APPEAL

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

ABITIBIBOWATER INC. et al.

Debtors

and

ERNST & YOUNG INC.

Monitor

and

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

Petitioner

MEMORANDUM OF ARGUMENT OF THE DEBTORS ON THE PETITIONER'S MOTION FOR LEAVE TO APPEAL

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All capitalized terms not otherwise defined herein shall have the meaning ascribed thereto in the judgment of the Honourable Mr. Justice Clément Gascon, J.S.C. (the "**Supervising Judge**") dated March 31, 2010 (the "**Judgment**"), which is filed in this Court as Exhibit A-1 to the Petitioner's *Motion for Leave to Appeal*.

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

This Memorandum of Argument adopts the review of the evidence, the position of the parties and the findings of fact contained in the Judgment of the Supervising Judge.

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OVERVIEW

1. Despite the best efforts of the Province of Newfoundland and Labrador (the "**Province**" or "**Newfoundland**") to mask its intentions and clothe with haughty constitutional principles a tawdry vendetta against the Debtors (collectively or singularly as the context requires, "**Abitibi**"), this application for leave to appeal raises no issues which satisfy the well-known criteria for granting leave to appeal under the CCAA.

2. In a carefully considered judgment, the Honourable Justice Clément Gascon, acting as Supervising Judge in these CCAA proceedings (and considering the *second* unsuccessful application by the Province to disrupt these CCAA proceedings) carefully reviewed and considered all of the facts and surrounding circumstances, and issued a detailed and exhaustive ruling which was well within the authorities and jurisprudence governing this case. Not only were the assessments undertaken by him fully justified under existing law, but they also conformed entirely to the newly-enacted provisions of the amendments to the CCAA which, while not applicable directly to this case, will apply to future cases commenced after September 18, 2009.

3. It is rare that an application for leave to appeal can be dismissed by referring to a single line from the judgment appealed from. This is such a case. The Supervising Judge found that "*in the Court's opinion, based on the evidence filed in the record, the EPA Orders are in substance financial or monetary in nature*".[1] This conclusive finding of fact - which cannot be challenged in appellate proceedings except on the narrowest of grounds (which do not exist here) - definitively fixes the true character of the dispute before the Court as being in pith and substance relating to a monetary claim against an insolvent company. The compromise of monetary claims is at the very core of the undisputed bankruptcy and insolvency jurisdiction underpinning the CCAA. The Province itself agreed "*that if the EPA Orders are financial or monetary in nature as opposed to pure regulatory orders, they then fall within the meaning of claim under the CCAA and provable or contingent claim under the BIA. A claims process such as the one ordered in this restructuring can therefore cover them*".[2]

4. All of the grounds raised by the Province in seeking leave to appeal directly or indirectly challenge this single factual finding of the Court - a finding which is not open to be challenged in this fashion and which the cases are unanimous in saying cannot be one of the few permissible grounds for leave to appeal which is to be sparingly granted.

5. It is worth noting that this conclusive finding of fact was reached at the end of a three day hearing (itself following an earlier one day hearing on a related motion filed by the Province) with both written and oral evidence, after considering, among other factors, (i) the true nature and impact of the EPA Orders; (ii) the factual context of their issuance and content; (iii) the Province's behaviour prior and after their issuance; and (iv) the end result of the Province's position.[3] It is precisely because judgments of

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[1] Judgment, para. 130.
[2] Judgment, para. 126.
[3] Judgment, para. 133.

this sort are called upon to be made by a presiding CCAA Judge in the context of "real time" litigation and having regard to the competing interests of stakeholders that the CCAA prescribes that appeals are only available with leave and our courts have evolved jurisprudence carefully circumscribing the rare circumstances in which leave may be granted.

6. In making his narrow factual findings, the Supervising Judge correctly pierced through the elaborate disguise fashioned by the Province in this case, seeking as they were to dress their confiscatory wolf in environmental sheep's clothing. The Court was not required to be blind to the context in which the EPA Orders were issued – a context which included the virtual eviction of Abitibi from the Province, the confiscation of substantial assets with value in the hundreds of millions of dollars without any compensation of any sort, the transparent attempt to use the provisions of the Province's *Environmental Protection Act*, S.N.L. 2008, c. A-1.01 (the "**EPA**") to achieve collateral economic goals by creating "offsets" from the massive NAFTA claim which followed these unprecedented acts of confiscation, and the focused vendetta directed by the Province for its own improper purposes.

7. The simple fact is that the Province sought to disguise the EPA Orders as ordinary course regulatory orders made perfectly independently of any context under its EPA and to blind the Court to the context in which they were issued. Whatever the merits or lack thereof of the EPA Orders may be, the central fact is that they relate exclusively to pre-existing conditions arising from prior actions in lands in respect of which the Debtors have no continuing interest by a Province in which the Debtors have no continuing operations or material assets.

8. The Province argued for the untenable position that it alone held the unfettered right to decide when to cut the thread holding the Sword of Damocles over the restructuring by converting its allegedly regulatory order into a monetary one and that it could, if it chose, wait until after the restructuring was complete in order to make that conversion. The Supervising Judge's Judgment simply followed the well-worn path of countless prior judgments by examining the true nature of the thing and not being bound to the form in which an interested party chose to clothe it. Having found, as a finding of fact, that the EPA Orders were monetary in their true nature based on all of the facts of THIS case, there is simply no appealable issue.

9. While invited by Abitibi to make broader findings regarding the motives of the Province, the Supervising Judge prudently restricted his judgment to the narrow circumstances before him, correctly finding that it was "*not necessary to discuss the Province's and the Intervening Parties' other arguments on the lack of statutory jurisdiction or constitutional authority for the court to include non-monetary obligations in the definition of 'Claim' found in the Claims Procedure Order. As the Court concludes that the Province's EPA Orders are indeed claims because of their obvious financial and monetary nature, the determination of these other questions will have to wait another day, if not another restructuring. Declaratory judgments and questions of statutory jurisdiction or constitutional*

authority should not be issued or decided in a factual vacuum. As shown here, the facts involved are normally critical in assessing such matters".[4]

10. While the conclusive nature of the findings of fact regarding the true nature of the EPA Orders made in this case are fatal to this application for leave to appeal, this Court can also have reference, as did the Supervising Judge, to the impact of the position advanced by the Province on the restructuring efforts of Abitibi. The evidence was clear that the EPA Orders advanced by the Province, if found to survive the CCAA process uncompromised, would be fatal to a restructuring of Abitibi.

11. While Abitibi claimed the EPA Orders were and are exaggerated by a biased administration, the evidence was that the Province would be seeking to cause the expenditure of well in excess of $100 million by an insolvent company to improve the value of assets confiscated by the Province (and thus adding no value to creditors).[5] At worst, this would result in a failed restructuring with a full liquidation of Abitibi in a bankruptcy (where the claims based on the EPA Orders would have no priority since they affect assets Abitibi no longer owns). At best, this would entail a complete, costly, time-consuming and high-risk revision of Abitibi's restructuring plans at the 11th hour when it is in the final stages of completing its Plan to be presented at a meeting of its creditors in order to transfer its operating assets to a new entity for the benefit of its creditors.

12. Thus, even if the Province were correct in its unsustainable assertion that the EPA Orders are not "claims" under the CCAA until it chooses in its unreviewable discretion to "convert" them to monetary claims, the end result would be that in *no event* would the EPA Orders *ever* be complied with regardless of the outcome of its intended appeal. Even a successful appeal could only succeed in entirely defeating the restructuring or in causing Abitibi to entirely re-formulate the restructuring into an asset-based transaction if it could which would leave "old" Abitibi behind. An unsuccessful appeal allows Abitibi to complete its restructuring for the benefit of all of its stakeholders as intended by the CCAA without the risk of a "high wire" conversion of the case into a liquidation/asset transfer restructuring. In no case would the resulting successor entity inherit the responsibility for complying with the EPA Orders. In other words, the claims arising out of the EPA Orders will, *as a matter of certainty*, simply never survive the current proceedings *regardless of the fate of Abitibi*.

13. The Province's motion was never intended to secure compliance with the EPA Orders - the EPA Orders were and are a mere smokescreen designed to secure other objects. This simple fact, well understood by the Supervising Judge with his experience from over a year supervising this restructuring, gives rise to obvious questions.

14. Since even a successful appeal by the Province could *never* have allegedly desired result of actual compliance with the abusive EPA Orders issued by the Province[6],

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[4] Judgment, paras. 134-135.
[5] Judgment, paras. 81 and 199.
[6] In this regard, we would be remiss in not bringing to the Court's attention the Supervising Judge's findings regarding the impractical nature of the EPA Orders, impracticality which leads to the natural inference that

what possible interest can be served by the continuation of a clearly futile proceeding? Abitibi submits to this Court as it did to the Court below that the Province can only be seeking to use the EPA Orders as "bargaining chips" to securing the true goal of this proceeding: to hinder, defeat or delay Abitibi's restructuring efforts in any way it can devise with a view to exerting the maximum leverage over Abitibi's $500 million NAFTA claim so as to obtain either an outright abandonment of it or a favourable settlement regardless of the risk to the restructuring process or the impact of their reckless actions on the thousands of other stakeholders relying upon Abitibi and its continued survival.

15. This Court is not obliged to allow its process to be abused in so transparent a fashion, particularly in the context of a case which satisfies none of the established criteria for leave to appeal.

I. CONTEXT

1. <u>Abitibi's Insolvency Proceedings</u>

16. The restructuring of Abitibi's debt load is a cross-border undertaking affecting tens of thousands of stakeholders, including employees, pensioners, creditors and governments authorities. As noted in the Judgment, as of March 31, 2010, over 480 entries had been recorded in the court record, with the Superior Court of Quebec, Commercial Division (the "**Bankruptcy Court**") having rendered in excess of 55 different judgments and orders (Judgment, para. 300).

17. Justice Gascon, as Supervising Judge, has been presiding over this restructuring for over one year and has issued the quasi-totality of the judgments and orders in connection with Abitibi's proceedings under the CCAA (the "**CCAA Proceedings**"). His lengthy experience has given him invaluable, hands-on experience with all the circumstances surrounding the restructuring and context of any motions brought before him. He was ideally situated to understand the full context of the Province's motion.

18. On May 4, 2010, Abitibi filed its Plan of Reorganization and Compromise (the "**Plan**") in conjunction with a similar Plan filed by its affiliates in proceedings in the United States under Chapter 11 of the U.S. *Bankruptcy Code* (the "**Chapter 11 Proceedings**") with a view to conforming to a timetable for a rapid exit from the CCAA Proceedings and Chapter 11 Proceedings by the end of September, 2010.

2. <u>Background to the Litigation</u>

19. The Judgment contains an accurate and detailed factual description of the industrial activities of Abitibi in the Province, the expropriation without compensation of Abitibi's assets in the Province under the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 (the "***Abitibi Act***") and the facts surrounding the enactment of the five EPA Orders by the Province (Judgment, paras. 43 to 116).

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the EPA Orders were never intended to be complied with but were always intended to be bargaining chips. See the Judgment, in particular paragraphs 192 and ff.

20. The following paragraphs briefly summarize of the most salient facts which make-up the background to this litigation:

    (i) On December 4, 2008, Abitibi announced the closure of its last remaining mill operation in the Province located at Grand Falls-Windsor effective March, 2009. Following this mill closure, Abitibi would have retained valuable hydroelectric facilities, hydroelectric rights, lands and other assets in the Province;

    (ii) Twelve days later, on December 16, 2008, the Province introduced and passed within a single day the *Abitibi Act* which had the effect, *inter alia*, of confiscating with immediate effect and with no compensation whatsoever substantially all of the assets of Abitibi in the Province, taking away from Abitibi a very important portfolio of rights in freehold or quasi-freeholds acquired and paid for over almost a century, canceling all water and hydroelectric agreements between the Province and Abitibi, canceling legal proceedings instituted by Abitibi against the Province and depriving Abitibi of access to the Province's courts for redress in respect of the foregoing;

    (iii) Among the assets confiscated by the *Abitibi Act* were certain hydroelectric facilities (including facilities not providing power to the Grand Falls mill) which were only partially owned by Abitibi and subject to third party debt obligations. The substantial interests of such third parties were similarly confiscated in the retaliatory and arbitrary sweep of the *Abitibi Act*;

    (iv) In April, 2009, AbitibiBowater Inc., Abitibi's Delaware-incorporated parent company (headquartered in Montreal), filed a *Notice of Intent to Submit a Claim to Arbitration* under Chapter 11 of NAFTA in respect of its losses. Following unsuccessful negotiations between the Province and Abitibi, a Notice of Arbitration under Chapter 11 of NAFTA claiming damages from the Province in excess of $500 million was filed on February 25, 2010;

    (v) On August 26, 2009, the Bankruptcy Court issued a Claims Procedure Order (the "**CPO**"), in which the holders of Claims and Subsequent Claims (as said defined in the CPO) against Abitibi were ordered to file their Proofs of Claim with the Monitor by the November 13, 2009 claims bar date (the "**Claims Bar Date**") failing which their claims would forever be barred;

    (vi) The Province never contested the CPO, nor did it lodge any appeal within the prescribed period although its motion collaterally attacked the CPO by alleging that its definition of claim (which, we repeat, the Province did not oppose at the time) was too broad. While the Judgment rejected the Province's opposition to the CPO's definition of "claim", the Judgment also reserved the Province's right to request an extension of the Claims Bar Date in order to file its claim. Despite this, as of the date hereof, the Province has yet to seek leave to file a Proof of Claim with the Monitor, nor does it seem to intend to do so;

(vii) On October 16, 2009, the Province filed its *Motion for a Declaration that the Petitioner is Entitled to Access the Electronic Data Rooms Created by the Debtors* (the "**Data Room Motion**"). The Data Room Motion was dismissed with costs by the Supervising Judge in reasons released on November 9, 2009 and the Province did not appeal that ruling. As noted in the Judgment, the Province claimed to be a creditor of Abitibi in the Data Room Motion yet it adopted the precise opposite position a few weeks later in the context of the EPA Motion (Judgment, paras. 214-216).

(viii) On November 12, 2009, three days after the dismissal of the Data Room Motion, the Province issued the EPA Orders against Abitibi requiring it to submit detailed Remediation Action Plans for approval by January 15, 2010 and to complete the approved site remediation actions by January 15, 2011. The Province, by failing to apply to the Bankruptcy Court in order to obtain a lifting of the stay of proceedings pronounced in the Initial Order *prior* to the issuance of the EPA Orders, issued the EPA Orders in full violation of the stay;

(ix) That same day, the Province served its *Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act* (the "**EPA Motion**") which is the object of the Judgment from which leave to appeal is being sought before this Court;

(x) On January 11, 2010, Abitibi appealed the EPA Orders to the Minister and on February 8, 2010 the Minister dismissed these appeals. The deadline of January 15, 2010 for Abitibi to file its Remediation Action Plans has not been abided by;

(xi) On April 27, 2010, the Bankruptcy Court authorized the Debtors to transfer the properties of Botwood and Stephenville (two properties targeted by the EPA Orders but which had not been expropriated by the Province) to an inactive subsidiary of Abitibi and in respect of which the Court authorized the appointment of a Receiver under the BIA with the power and resources to manage and sell these properties. As a result of this, Abitibi has no continuing ownership interest in any of the lands which were the object of the EPA Orders.

21. The hearing on the EPA Motion lasted three days between February 24 and 26, 2010. The Supervising Judge, in addition to hearing the testimonies of two live witnesses (Ms. Alice Minville for Abitibi and Ms. Donna Ballard for the Province) examined documentary evidence supplied by both sides, including the voluminous reports prepared by Conestoga-Rovers & Associates (the "**CRA Reports**") which were being relied upon by the Province as a justification for the EPA Orders.

II. THE JUDGMENT A QUO

1. <u>The Bankruptcy Court's Findings</u>

22. The reasons of the Supervising Judge are 306 paragraphs long. In addition to accurately describing the issues submitted for adjudication, the Judgment makes

numerous and detailed references to the evidence that was presented before the Bankruptcy Court.

23. The essence of the Supervising Judge's reasoning is summarized at paragraphs 127 to 139 of the Judgment. The Judgment's conclusion is that the EPA Orders are in their pith and substance financial or monetary in nature and thus, are not exempted from the Stay of Proceedings or from the CPO. The monetary consequences of the EPA Orders must be treated as claims and are subject to compromise. The Judgment relies on the written and oral evidence to conclude that "*there is no basis in fact or in law to grant the conclusions sought in the EPA Motion. This would have the effect of giving the Province a preference over other creditors which is simply unacceptable.*" (Judgment, para. 132).

24. In paragraphs 160 and following of the Judgment, the Supervising Judge carefully and scrupulously considered all of the evidence before him in determining the true nature of the EPA Orders, concluding that "*although presented as injunctive orders, the facts demonstrate that the practical, intended and inescapable result of the EPA Orders was the creation of monetary claims. Money is, clearly, the only remedy in this case. In fact, given the lack of assets or activities of Abitibi in the Province, the EPA Orders can, in all likelihood, only be enforced by action taken outside NL*"(Judgment, at para. 161).

25. The Province's *Motion for Leave to Appeal* (the "**Province's Motion**") grossly distorts the evidentiary record. Paragraph 34 of the Province's Motion maintains the assertion that the Province intended for Abitibi to remediate the lands itself, an assertion which flies in the face of directly contrary findings made by the Supervising Judge (i.e. "[...] *Between the suggestion that the Province is merely seeking compliance with the EPA and the inference that it is rather looking to ascertain a monetary value and financial benefit through the execution in nature of its EPA Orders, the Court prefers the latter view based on the evidence as a whole*" - Judgment, para. 176). It is not open to an appellant in a leave application to simply ignore binding findings of fact without satisfying the heavy burden placed on appellants seeking to overturn such findings of a Supervising Judge. There can be no question of the appellant having satisfied the burden in this case.

2. Standard of Review on Appeal

26. The issue of determining whether Newfoundland is a "creditor" with a "claim" that can be compromised in a CCAA plan of arrangement involves the application of a legal standard to a set of facts and may therefore be characterized as a question of mixed fact and law. In this context, unless there is a "prima facie error with respect to a readily extricable legal principle", the conclusion of the Supervising Judge on this issue should not be overturned absent a "palpable and overriding error" in connection with his interpretation of the facts.

- *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, **TAB 1**, at para. 36;
- *Re: Canadian Airlines Corp.*, [2000] 19 C.B.R. (4th) 33 ("***Canadian Airlines***"), **TAB 2**, at paras. 28-29;

- *Uniforêt inc. (Arrangement relative à)*, J.E. 2003-1595 (C.A.) ("***Uniforêt***"), leave to appeal to S.C.C. refused (S.C. 2004-02-19), **TAB 3**, at para. 18;
- *Dans l'affaire du plan d'arrangement de Société industrielle de décolletage et d'outillage (S.I.D.O.) ltée*, EYB 2010-170465 (C.A.) ("***S.I.D.O.***"), **TAB 4**, at para. 31.

27. A Supervising Judge in a CCAA matter has an ongoing management process similar to that of a judge making orders during a trial. In addition to applying the above standard for appeal review, an appellate court should therefore exercise its powers sparingly upon scrutinizing a leave application under the CCAA.

    - *Pacific National Lease Holding Corp.*, Re, 1992 CarswellBC 524 (B.C.C.A.) ("***Pacific National***"), **TAB 5**, at paras. 29 and 30;
    - *Papiers Gaspesia inc. (Arrangement relative à)*, J.E. 2005-75 (C.A.) ("***Papiers Gaspésia***"), **TAB 6**, para. 5;
    - *S.I.D.O., op. cit.*, **TAB 4**, at para. 14.

28. As in the *S.I.D.O.* case, the Motion for Leave ignores many of the important factual findings of the Supervising Judge and does not present a serious contestation of those which it purports to demonstrate as being "untrue".

    - *S.I.D.O. op. cit.*, **TAB 4**, at para. 16:

      > *"La requête pour permission d'appeler ignore par ailleurs largement et ne conteste pas véritablement certaines déterminations factuelles du juge de première instance, qui sont pourtant cruciales au débat".*

29. The Petitioners submit that the Supervising Judge did not commit a "palpable and overriding error" in connection with his interpretation of the facts. This Court should therefore carefully weigh the evidence in determining whether to grant leave to appeal.

III. TEST FOR LEAVE TO APPEAL

1. Nature of the Test

30. There is no appeal as of right from decisions made under the CCAA. Section 13 of the CCAA requires a would-be appellant to seek leave to appeal as a condition precedent to an appeal being allowed to proceed. The cases have found that the leave requirement stems from a clear intention of Parliament to restrict appeal rights having regard to the nature and object of CCAA proceedings.

    - CCAA, Section 13 (see **Schedule A**);
    - *S.I.D.O., op. cit.*, **TAB 4**, at para. 9;
    - *Algoma Steel Inc. (Re)*, [2001] O.J. No. 1943 (Ont. C.A.), **TAB 7**, at para. 8.

31. In order to obtain leave, the Province must show that there are serious and arguable grounds that are of real significance to the parties. In determining whether this test is met, an appellate court must consider four factors which were set forth by the Alberta Court of Appeal in *Canadian Airlines* as follows:

   - *Canadian Airlines, op. cit.*, **TAB 2**, at para. 7:

     "7 *Subsumed in the general criterion are four applicable elements* [...]:

     (1) whether the point on appeal is of significance to the practice;

     (2) whether the point raised is of significance to the action itself;

     (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and

     (4) whether the appeal will unduly hinder the progress of the action."

32. The Quebec Court of Appeal has consistently applied the same criteria in ruling upon several motions for leave to appeal in CCAA matters.

   - *Uniforêt, op. cit.*, **TAB 3**, at para. 12;
   - *Papiers Gaspesia, op. cit.*, **TAB 6**, at para. 4;
   - *Syndicat des employées et employés de CFAP-TV (TQS-Québec), section locale 3946 du Syndicat canadien de la fonction publique c. TQS inc.*, J.E. 2008-1578 (C.A.) ("*TQS*"), as per Rayle J.C.A., **TAB 8**, at para. 21;
   - *S.I.D.O., op. cit.*, **TAB 4**, at para. 9.

33. The burden rests on the party applying for leave to demonstrate that the cumulative criteria set forth in *Canadian Airlines* are met. An appellate court may reject such a motion even if the legal issues raised by the appeal are of some interest to the practice, in circumstances where the criteria for obtaining leave to appeal are not <u>all</u> met.

   - *Papiers Gaspésia, op. cit.*, **TAB 6**, paras. 5, 8 and 17.

34. Applying the test to the case at bar, Abitibi submits that the issues raised by the Province's appeal are of no significance to the practice, that the appeal is not *prima facie* meritorious and finally, that granting leave in this case could have the nefarious effect of jeopardizing the entire restructuring.

2. <u>The Appeal is of no Significance to the Practice</u>

35. The issues raised by the Province, both on the issue of the CCAA Court's jurisdiction and on the interpretation of the case law, are of no significance to the practice.

   (a) *The CCAA Court's Jurisdiction*

36. The CCAA Court has jurisdiction "*to subject 'claims' to a claims process and to determine who Abitibi's 'creditors' might be in that regard*" (Judgment, para. 128). The Province does not dispute this essential premise; rather the Province disputes whether the EPA Orders were properly found - on the facts and in the context of this case - to be truly financial or monetary in nature. The likelihood of similar facts and context arising in subsequent CCAA proceedings is, one should hope, slim. This case is, and it is to be hoped remains, a unique instance in Canadian history of confiscation without compensation combined with a single-minded abuse of constitutional power. The treatment in a claims process of claims arising from such a context raises no matters of general interest to the practice under CCAA restructurings. The Claims Procedure Orders were "plain vanilla" orders with numerous antecedents routinely applied without incident in contemporary and prior restructurings.

37. There is nothing new or unusual in the analysis brought by the Supervising Judge to the task of analyzing what a "claim" is under the CCAA. Rather than involving a convoluted constitutional debate, a proper legal analysis of the situation at hand begins and ends with a few uncontestable premises that have been reaffirmed in amendments to the CCAA and to the BIA:

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

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

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

38. The assertion that the Claims Procedure Order exceeds the jurisdiction granted by the CCAA simply cannot hold water under the CCAA or under the Amended CCAA which, if anything, confirms the broad and remedial intentions of the Act. Clearly the Province "might" file a claim in respect of the matters raised in the EPA Orders - as such, the claim that they "might" file, not the one they did NOT file - is open to be compromised on the plain and unambiguous reading of s. 12 of the CCAA. Further, as noted above, the Claims Procedure Order is cannot be the proper object of an appeal since the time for seeking leave to appeal that August 26, 2009 Order has long since expired without objection or appeal having been taken by the Province. There are no issues of general interest to the practice raised here.

(b) The Facts and the Amendments to the Law Have Overtaken the Province's Interpretation of the Case Law

39. The Judgment notes that the Province's argument rests primarily on the distinction made in the *Panamericana* case between a situation "*where the government insists that the person fulfill his or her statutory duties or obligations from his own resources*" and one where the government avails itself of a debt-creating provision, such as the one found in the Province's EPA, to perform the remedial work, thereby creating a "*debt to the Crown*" and becoming a creditor (Judgment, para. 249 and ff.).

- *Panamericana de Biennes Y Servicios (Receiver of) v. Northern Badger Oil & Gas Ltd.*, [1989] A.J. No. 1229 (ABQB); [1991] A.J. No. 575 (AB C.A.); motion for leave to appeal to SCC refused [1991] S.C.C.A. No. 497 ("***Panamericana***"), **TAB 9**.

40. The *Panamericana* decision is also cited in the Province's Motion in support of the position that an interpretation of "claim" under the CCAA "*cannot be interpreted to immunise Abitibi from compliance with the EPA Orders or to avoid the Abitibi Act*" (Province's Motion, paras. 124 and ff.). However, the Judgment correctly distinguishes *Panamericana* and the cases which have followed it on the basis of the facts at hand.

- Judgment, para. 257:

> "*[257] The present situation is unique. It bears no similarity with the facts in any of these decisions. In none of them did the regulator stand to directly benefit financially from the orders issued. Here, to borrow from the wording used in these cases, the Province has even taken steps to make itself a creditor. Indeed, it can reasonably be inferred from the fact pattern at issue that it is, in truth, seeking to recover a benefit for itself, if not simply money.*"

41. In addition, the core of the *Panamericana* argument is that a *receiver*, having determined to operate the business, cannot shirk its duty to follow a regulatory (or government) order arising from that very operation under general law. This narrow view, which is the ratio of the case, was relatively uncontroversial (although recent amendments have effectively overruled it by placing limits on a receiver's obligations and thereby closing that back door to priority).

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

43. The *Panamericana* reasoning has been overtaken by amendments to the *BIA* and to the *CCAA*. Parliament has carefully weighed the place of environmental remediation claims in the context of insolvency and has struck a deliberate and considered balance with three consecutive sets of revisions and refinements (in 1992, 1997 and 2009):

    (i) Prior to the 1992 amendments to the BIA, cases involving significant environmental contamination discouraged trustees and receivers from taking appointments. No specific legislation prevented trustees from being held personally responsible with respect to potential environmental damages;

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

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

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

    - the Crown has a lien against the contaminated property or contiguous property for the costs of remedying any environmental condition or damage (s. 14.06(7)) (see **Schedule D**). The Crown lien is exclusively attached to the contaminated property and other contiguous real property of the debtor that is related to the activity that caused the contamination. In other words, *the lien does not give the Crown any priority over the rest of the creditors on the other assets of the debtor*. In that regard, the Crown remains an ordinary unsecured creditor; and

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

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

(iv) In addition, subsections 11.8(8) and (9) of the CCAA (see **Schedule D**) now specifically deal with Crown claims for environmental remediation costs:

> ***Priority of claims***
>
> *(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company **<u>is secured by a charge on the real property and on any other real property of the company that is contiguous thereto</u>** and that is related to the activity that caused the environmental condition or environmental damage, and the charge*
>
> *(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and*
>
> *(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.*
>
> ***Claim for clean-up costs***
>
> *(9) A **<u>claim</u>** against a debtor company **<u>for costs of remedying any environmental condition</u>** or environmental damage affecting real property of the company **<u>shall be a claim under this Act</u>**, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.*

44. In light of the above, there can be no room to claim that Parliament intended to open the door to artificial arguments that the timing of the "monetization" of claims can be artfully manipulated to defeat the manifest intent of Parliament.

45. Abitibi submits that these amendments have substantially altered the way in which courts must approach environmental contamination situations in an insolvency context. In fact, in *General Chemical*, the Ontario Court of Appeal relied on these amendments in declining to follow *Panamericana*:

- *General Chemical Canada Ltd.*, Re, 2006 CarswellOnt 4675; aff. in *General Chemical Canada Ltd.*, Re, 2007 CarswellOnt 5497 (Ont. C.A.); leave to appeal to the Supreme Court of Canada refused at 2008 CarswellOnt 879, ("***General Chemical***"), **TAB 10**, at paras. 45 and ff.:

> *"[45] In this court, the MOE repeats its arguments below and raises, as it did there, the case of* Panamericana De Bienes Y Servicios (Receiver of) v. Northern Badger Oil and Gas Ltd. *1991 CanLII*

> *2698 (AB C.A.), (1991), 81 D.L.R. (4th) 280 (Alta. C.A.). In that case, the court found that provincial environmental legislation concerning oilwell clean up costs did not conflict with the scheme of distribution under the* BIA, *and had to be complied with even though that reduced the amounts otherwise available for distribution in the bankruptcy.*
>
> *[46] **I agree with the motion judge that the reasoning in that case 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 **s. 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**."*

46. Similarly, the Court of Appeal, in the decision *Canada (Deputy Attorney General) v. Temple City Housing Inc.*, denied the application for leave to appeal on the basis that the issue raised by the appeal was of no significance to the *CCAA* practice because legislation have been amended:

   - *Canada (Deputy Attorney General) v. Temple City Housing Inc.*, 2008 ABCA 1, **TAB 11**, at para. 13:

> *"13 The applicant is unable to meet the test for leave. The point which the applicant seeks to appeal will not be of significance to CCAA practice because the legislation has been amended. Bill C-12, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, 39th Parliament, 2d Session, 2007, received Royal Assent on December 14, 2007. The amendments to the CCAA include specific authority to grant super-priority to DIP financing such as the loan in this case. This provision has not yet been proclaimed in force. However, once it has been proclaimed in force, the issue of the CCAA judge's inherent jurisdiction to order such priorities will not be an issue in future CCAA proceedings. [...] I conclude therefore that this particular appeal would not be of significance to the practice. "*

47. Abitibi submits that in light of the above, the appeal is of no significance to the practice since the issues raised by the Province (a) present no real constitutional issue and (b) have been resolved by amendments to the BIA and the CCAA and by the case law.

3. The Appeal is Not *Prima Facie* Meritorious

48. A CCAA Court is well-founded in seeking to determine what a case is "truly about" in order to assess whether its ruling will serve to further the broad remedial purposes of the CCAA. In so doing, CCAA Courts sometimes issue decisions which, though they may conflict with provincial laws, serve to further the broad purposes of the CCAA.

   - *Pacific National, op. cit.*, **TAB 5**, at paras. 24 and 26:

> "24 ***<u>It appears to me that an order which treats creditors alike is in accord with the purpose of the C.C.A.A.</u>*** *Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the C.C.A.A. is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.*
>
> [...]
>
> 26 *This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in Chef Ready Foods Ltd., supra.* ***<u>Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served</u>***."
>
> (Our emphasis)

49. In this case, the Supervising Judge explicitly recognized that the Province was trying to "game the system" in order to avoid the compromise of its unsecured debt. The Province contended for the right to issue unenforceable injunction-like orders in respect of historical, non-continuing operations during the CCAA (and despite the stay of proceedings) all the while maintaining that it alone had the right to "convert" its injunction-like order into a money order and the time and place of its choosing, including after the conclusion of the CCAA process against a restructured Abitibi and its new stakeholders. In effect, the Province contended for the right to keep its claim in its pocket to wait out the bankruptcy process since its claim would of course be entitled to no priority in bankruptcy. This sort of attempted sharp practice does not raise any constitutional issues – it simply required a court prepared to peer through form to the substance of the matter.

   - Judgment, at para. 275:

   > "*The Province's attempt at fashioning a super-priority for the satisfaction of environmental claims by crafting the EPA Orders and "managing" the timing of the creation of the "Crown debt" under s. 102 of the EPA is not only contrary to the principles of the CCAA. It is also unjust vise-à-vis Abitibi's other creditors whose claims are effectively stayed and will be compromised.*"

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

   - *General Chemical* (C.A.), *op. cit.*, **TAB 10**, at para. 46.

51. By preventing the Province from lying in the weeds and choosing the timing of the creation of its monetary to gain an unfair advantage over Abitibi's other creditors, the Judgment effectively treats all creditors of Abitibi alike and furthers the purposes of

the CCAA. In this context, the appeal attempted by the Province cannot be qualified as *prima facie* "meritorious" in the plain ordinary meaning of the words.

- *Canadian Airlines*, op. cit., **TAB 2**, at para. 35.

52. It is well-recognized that a discretionary order made by a CCAA Supervising Judge should not be easily overturned. In this instance, the Supervising Judge had been supervising the CCAA Proceedings since their inception and was in the best position to balance the competing factors at play. In qualifying the Province as a "creditor" of Abitibi with a "contingent claim" falling in the definition of "claim provable in bankruptcy", the Supervising Judge exercised his discretion and this Court should not interfere with his decision.

- *Doman Industries Ltd. (Re)* [2004] B.C.J. No. 1402 (B.C. C.A.), **TAB 12**, at para. 7.

53. In addition, the Province repeatedly and inaccurately states in its proceedings that the rights of the Province are "extinguished" by the Judgment since Abitibi is being completely "immunized" from the EPA or the costs of complying therewith (Province's Motion, paras. 3, 7 and 34).

54. In reality, the Province overlooks that there is a difference between "forever barring" or "extinguishing" claims, and "compromising" them. The Supervising Judge explicitly made this point in the Judgment and reserved the right for the Province to seek an extension of the Claims Bar Date in order to file a claim in accordance with the CPO. Should the Province file such a claim, it would be entitled to sharing in the proceeds from a plan of arrangement alongside Abitibi's other unsecured creditors.

- Judgment, paras. 131 and 290:

> "*[131] As result, the monetary consequences of these orders should be treated as claims in the CCAA proceedings. Such claims shall be subject to compromise and* ***<u>the Province, if it asks and is allowed to file a late proof of claim, shall be entitled to participate in the negotiation of, and to receive its pro-rata distribution under, any plan of arrangement to be filed by Abitibi</u>***."
>
> [...]
>
> "*[290] It shall be noted that,* ***<u>contrary to what the Province often said, claims cannot properly be qualified as "extinguished" upon insolvency</u>****. They are rather called for, determined and ultimately compromised under a plan of arrangement, only after the latter has been voted upon by the creditors and approved by the Court.*"
>
> (Our emphasis)

55. Interestingly, the Province complains that the Judgment was issued despite what it calls the lack of any evidence "*that Abitibi would be unable to agree to a remediation plan with the Province and incorporate the terms of the remediation plan into its plan of compromise or arrangement*" or any evidence "*that Abitibi's creditors would vote against a plan that makes provision for environmental remediation*" (Province's Motion, para. 36).

Having chosen to remain outside of the insolvency process in order to challenge its constitutionality, the Province paradoxically seeks the intervention of this Court on the basis that the evidentiary record fails to demonstrate what the Province seeks to prevent i.e. the Province's participation in the Plan. As Supervising Judge with over a year's experience in the difficulties of securing financing and juggling creditor interests, the Supervising Judge was well-situated to understand what was and was not feasible or practical.

4. Granting Leave Could Jeopardize the Entire Restructuring

56. The fundamental purpose of the CCAA Proceedings is to enable Abitibi to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The impact of granting the Province leave to appeal is a relevant consideration at this stage so as to determine (a) whether the delay caused by such an appeal could jeopardize Abitibi's restructuring efforts; and (b) whether such a delay could have the effect of upsetting the balance between competing stakeholders.

    - *Edgewater Casino Inc. (Re)*, [2009] B.C.J. No. 174 (B.C.C.A.), **TAB 13**, at paras. 21, 22 and 27;
    - *Uniforêt, op. cit.*, **TAB 3**, at para. 20.

57. Abitibi submits that the onus is on the Province to provide *prima facie* evidence to the effect that granting leave to appeal will not have any material adverse impact on Abitibi's restructuring. Indeed, the case law has held that the onus is on the applicant to provide at lease some evidence before shifting the onus to the respondent and in this case, the Province has provided no evidence whatsoever.

- *Canadian Airlines, op. cit.*, **TAB 2**, at paras. 44-45 :

> "*44. It was argued before me that an appeal would give rise to an uncertainly of process and a lack of confidence in it; that the creditors, or some of them, may be inclined to withdraw support for the Plan that should otherwise be forthcoming, but for the delay. None of the parties tendered affidavit evidence on this issue.*"
>
> "*45. Nowhere in any of the authorities has the issue of onus in meeting the elements the general criterion been prominent.* ***I am of the view that the onus is on the applicant. That onus would include the applicant producing at lease some evidence on the fourth element to shift the onus to the respondent, even though it involves proving a negative, i.e. that there will not be any material adverse impact as the result of the delay occasioned by an appeal.*** *That evidence is lacking in this case. It is lacking on both sides but the respondents do not have an initial onus in this regard. Therefore, I find that the fourth element has not been established by the applicant.*"
>
> (Our emphasis)

- See also *Gauntlet Energy Corp. (Re)* [2004] A.J. No. 31 (Alb. C.A.), **TAB 14**, at para. 14.

58. On May 4, the Debtors filed drafts of the Plan in the Bankruptcy Court and in the U.S. Bankruptcy Court following several rounds of consultations with their key stakeholders, financial and legal advisors and the Monitor. Abitibi's objective in the coming months is to negotiate with its stakeholders in order to reach a plan of compromise that will enable the company to emerge from these CCAA Proceedings and from the Chapter 11 Proceedings as early as possible, with a view to asking the Court by late June to order a creditor vote on said plan as early as in July or August 2010. This would clearly be endangered if Abitibi faced the threat of a massive contingent liability immune to compromise or requiring a fundamental overhaul of the structure of the Plan to accommodate an asset transaction/liquidation leaving existing legal entities behind.

59. An important contingent claim such as an environmental claim of this magnitude, which has been valued at probably over $100 million (Judgment, para. 6) will, if it remains uncompromised upon emergence from the CCAA process, act as a Sword of Damocles over Abitibi by threatening its continuity post-emergence.

60. The very existence of such a claim could repel needed exit financing and prevent a plan from being adopted unless a potentially risky and costly strategy of devising a liquidation plan were employed. Such a result would defeat the very objectives of the restructuring process and clearly militates in favour of determining and compromising the Province's contingent claims as soon as possible. These are factors which would be well known and understood by the Supervising Judge.

CONCLUDING REMARKS

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

62. Whatever the outcome of this application for leave to appeal, it is also to be hoped that counsel for the moving party will take advantage of this appearance to disassociate their client from the disrespectful comments made regarding the Supervising Judge and the Courts of the Province of Quebec by the Premier of the Province in the Province's Legislature on May 3, 2010.

*****

THE WHOLE RESPECTFULLY SUBMITTED

Montreal, May 10, 2009

Stikeman Elliott

STIKEMAN ELLIOTT LLP
Attorneys for the Petitioners

SCHEDULE A

APPEAL FROM A CCAA ORDER

Sections 13 & 14 of the CCAA
Leave to appeal 13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs. **Court of appeal** 14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated. *Practice* (2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

SCHEDULE B

DEFINITIONS

<table>
<tr><th colspan="2">CCAA and Amended CCAA: "secured creditor" and "unsecured creditor"</th></tr>
<tr><td colspan="2">"secured creditor"
"secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;
"unsecured creditor"
"unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.</td></tr>
<tr><th colspan="2">BIA: " claims provable"</th></tr>
<tr><td colspan="2">"claim provable in bankruptcy", "provable claim" or "claim provable"
"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;
[...]
Claims provable
121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
Contingent and unliquidated claims
(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
[...]</td></tr>
<tr><th>Section 12 of the CCAA</th><th>Section 2(1) and 20 of the Amended CCAA</th></tr>
<tr><td>Definition of "claim"
12. (1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act.
Determination of amount of claim</td><td>"claim"
"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the Bankruptcy and Insolvency Act;
[...]
Determination of amount of claims</td></tr>
</table>

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows: (*a*) the amount of an unsecured claim shall be the amount [...] (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and [...]	20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows: (a) the amount of an unsecured claim is the amount [...] (iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and [...]

SCHEDULE C

JURISDICTION OVER REGULATORY BODIES

Section 11.1 of the Amended CCAA
Meaning of "regulatory body" **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. *Regulatory bodies – order under section 11.02* (2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court. *Exception* (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. *Declaration – enforcement of a payment* (4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

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

SCHEDULE D

TREATMENT OF ENVIRONMENTAL CLAIMS

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

COURT OF APPEAL

N°. 500-09-020594-107
(S.C. #500-11-036133-094)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

ABITIBIBOWATER INC. et al
Debtors

- and -

ERNST & YOUNG INC.
Monitor

-and-

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

BS0350 **File:** 041053-1170

MEMORANDUM OF ARGUMENT OF THE DEBTORS ON THE PETITIONER'S MOTION FOR LEAVE TO APPEAL

ORIGINAL

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