

CANADA

COURT OF APPEAL

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

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

**MOTION FOR LEAVE TO APPEAL
PURSUANT TO SECTIONS 13 AND 14 OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36 AND ARTICLES 29, 494 AND 511
OF THE CCP**

MOTION FOR LEAVE TO APPEAL
Pursuant to Sections 13 and 14 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 and Articles 29, 494 and 511 of the CCP

**TO ONE OF THE HONOURABLE JUDGES OF THE COURT OF APPEAL,
SITTING IN AND FOR THE DISTRICT OF MONTRÉAL, HER MAJESTY THE
QUEEN IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND AND LABRADOR
RESPECTFULLY SUBMITS THE FOLLOWING:**

OVERVIEW

1. On 31 March 2010, the Honourable Mr. Justice Clément Gascon, J.S.C. of the Superior Court of the District of Montréal, acting pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**" and "**CCAA Court**"), rendered a judgment in file number 500-11-036133-094. A copy of the judgment is attached to the present Motion as **Exhibit A-1**, and can be found at Tab A-1 of the Supporting Documents Brief ("**Judgment**"). The Judgment dismissed a motion brought by Her Majesty the Queen in Right of the Province of Newfoundland and Labrador ("**Province**") and granted certain relief sought in the Contestation filed by the Debtors ("**Abitibi**" or "**Company**").
2. The Province's motion in effect was for an order declaring that the Claims Procedure Order which the CCAA Court had made on 26 August 2009 ("**CPO**"), attached hereto as **Exhibit A-4**, and can be found at Tab A-4 of the Supporting Documents Brief, did not immunise Abitibi from having to comply with orders ("**EPA Orders**", which were submitted as Exhibit NL-6 at the Motion and are attached hereto at Tab B-3 of the Supporting Documents Brief) that the Minister of Conservation and the Environment of the Province ("**Minister**") had issued against the Company pursuant to the Province's *Environmental Protection Act*, S.N.L 2002, c. E-14.2 ("**EPA**", which was submitted as Exhibit NL-7 at the Motion and which is attached hereto as Tab B-4 of the Supporting Documents Brief) requiring the Company to remediate at its expense polluted property in the Province that is contaminated.
3. The motion focussed on particular provisions of the CPO that purported permanently to bar and extinguish all statutory duties that Abitibi owed as at the date of the Initial Order granted in these proceedings, such as Abitibi's obligations under the EPA Orders to develop and execute remediation plans with respect to contamination on properties located in the Province.

4. At its heart, the motion concerned the Province's constitutional right to enforce its laws (and in particular its environmental law), the Company's obligation to comply with the Province's laws, and the CCAA Court's constitutional obligation to enforce the laws of the Province.
5. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General for the Province of British Columbia (together, "**British Columbia**") intervened on the motion in support of the Province's constitutional submissions.
6. The hearing on the Province's motion lasted three days between 24 and 26 February 2010. The evidence portion of the hearing lasted for approximately one half day. An excerpt of the transcript of the Motion is communicated herewith as Exhibit A-2, and can be found at Tab A-2 of the Supporting Documents Brief.
7. In a truly unprecedented judgment, the CCAA Court completely disregarded and undermined the Province's constitutional right to have its public laws given effect by a provincial superior court vested with jurisdiction under the CCAA and to have those laws complied with by a debtor company. The Judgment does so in these ways:

First, it immunises Abitibi from having to comply with the statutory obligations to which Abitibi is subject under the EPA thereby imposing on the Province the costs of complying with these obligations;

Second, it makes the EPA inapplicable to Abitibi, thereby extinguishing the Province's right to recover from Abitibi any costs the Province would incur were it to fulfil Abitibi's statutory obligations;

Third, it gives Abitibi the right to claim damages in the CCAA Court from the Province arising out of the passage of the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 ("**Abitibi Act**"), even though the act denies Abitibi such a right.
8. It is manifestly obvious from the Judgment that the Motion Judge disagrees – and strongly so – with the policy choices the Legislature of the Province has made for the benefit of the people of the Province in two statutes, and also disagrees with how the Minister has chosen to exercise her discretionary powers under Provincial law in accordance with those policy choices. The Motion Judge was offended by the fact that, pursuant to its laws, the Province both expropriated without compensation property that Abitibi owned in the Province and then ordered Abitibi at its own expense to remove contamination from these and other properties which Abitibi still owns.

9. Having formed the view that the Province's laws are unfair to Abitibi, the CCAA Court has allowed Abitibi to avoid them. This is not something the CCAA Court has any constitutional competence to do.
10. Most fundamentally, the Judgment disregards the modern doctrines of federalism. Federalism doctrine mandates that in the absence of conflicting enactments of the other level of government (and there are none here), a court should not block the application of measures which are taken to be enacted in furtherance of the public interest. The Judgment does just that, however. The Judgment intentionally and expressly blocks the application of important measures taken in furtherance of the public interest of the Province: the EPA and the Abitibi Act.
11. Secondly, the Judgment does not accept that provincial law can affect the bottom line under the CCAA. Contrary to what the Judgment holds, however, provincial legislation operates in the insolvency context, short of an express conflict with federal law, of which there is none here. Thus, the Judgment regards the negative effects of provincial law on Abitibi's restructuring process as something to be avoided by its order, rather than as an unavoidable consequence of the application of provincial law to Abitibi.
12. Finally, the Judgment misinterprets the CCAA itself. The Judgment is based on an idiosyncratic definition of "claim", not the definition prescribed by Parliament in the CCAA itself, and on the CCAA Court's having the discretionary power to improve the debtor's post-restructuring affairs rather than being limited to ensuring that the debtor can put a plan of compromise and arrangement to its creditors for their consideration and vote. These errors are themselves a by-product of the prior constitutional errors because had the CCAA Court correctly considered the Province's constitutional position, it could not have interpreted the CCAA and its own discretionary powers in the way it did in this case.
13. Although the constitutional position was central to the arguments of the Province and of British Columbia, the CCAA Court did not in express terms decide the constitutional issues. Yet, the constitutional position was, and remains, central to the validity of the Court's reasoning and thus had to be addressed, and addressed directly, which the CCAA Court failed to do.
14. The Province therefore requests that this Court grant leave to appeal from the Judgment for the following reasons:
 - a. The CCAA Court lacks the constitutional competence to bar and extinguish duties Abitibi owed the Province under the EPA;

- b. The CCAA Court lacks the constitutional competence to render laws of the Province, and in particular the EPA, inapplicable to Abitibi on the basis that the court disagrees with the purpose and effect of such laws;
- c. The CCAA Court lacks the constitutional competence to subject the exercise of a statutory discretion enjoyed by a minister of a provincial Crown to judicial review, and in particular lacks the constitutional competence to review the exercising by the Minister of her discretionary powers under the EPA, and the CCAA Court exceeded its jurisdiction in doing so in this case;
- d. The CCAA Court lacks the constitutional competence to fetter the statutory discretion enjoyed by a minister of a provincial Crown under that province's own laws, and in particular lacks the constitutional competence to fetter the statutory discretion of the Minister under the EPA, and the CCAA Court exceeded its jurisdiction in doing so in this case;
- e. The CCAA Court lacks the constitutional competence to review the Abitibi Act and to agree to entertain a claim against the Province contrary to that act;
- f. The CCAA Court is constitutionally obligated to apply and enforce constitutionally valid provincial laws, which it failed to do in this case;
- g. The Judgment conflicts with judgments of the Supreme Court of Canada and the courts of other provinces of Canada, requiring appellate consideration to resolve;
- h. Since the purpose and structure of the EPA is substantially the same as the purpose and structure of environmental legislation generally in effect throughout Canada, the jurisdiction asserted in the Judgment has broad national implications requiring appellate consideration; and
- i. Since the Judgment purports to give a judge exercising jurisdiction under a federal law the power to render inapplicable provincial laws of general application when the judge disagrees with the purpose, content or application of those laws, the Judgment has broad national implications requiring appellate consideration.

15. Based on the foregoing, it is clear that the EPA Motion and the Judgment raise serious constitutional and other legal issues which are of the utmost importance, not only to the Province, but to the practice generally, as they raise fundamental issues about the right of provinces to have their public laws enforced by a court deriving its jurisdiction and its powers from the CCAA. As such, leave to appeal the Judgment ought to be granted.

BACKGROUND TO THE MOTION

16. Abitibi is attempting to restructure its affairs by negotiating a plan of compromise and arrangement with its creditors pursuant to the CCAA. Since Abitibi's head office is located in Montréal, the restructuring process is being supervised by the Superior Court of this Province sitting as the CCAA Court.
17. As part of the restructuring process, the CCAA Court issued the CPO. Amongst other things, the CPO defines "claim" to include any breach of a statutory duty that arose before the date Abitibi was granted the Initial Order under the CCAA, being 17 April 2009. The CPO purports to bar and extinguish all such statutory duties unless the public body to whom the duty is owed has reduced Abitibi's obligations under the applicable statute to a debt and the public body has in a timely way filed a claim for payment of that debt, for the purpose of evaluation and compromise, along with the claims of Abitibi's unsecured creditors.
18. The EPA, in common with environmental protection laws in force across Canada generally, is based on the "polluter pay" principle. Based on this principle, the EPA permits the Minister to impose all the direct and indirect costs of remediating contaminated land on the person responsible for the contamination as defined in the legislation, so that the public of the Province will not have to incur this expense. Excerpts from the environmental protection legislation from the provinces of Ontario, British Columbia, Alberta, Saskatchewan, and Nova Scotia are communicated *en liasse* as Exhibit A-5, and can be found at Tab A-5 of the Supporting Documents Brief.
19. Section 99 of the EPA permits the Minister to issue broad orders against the person responsible for contamination under the act, *inter alia*, requiring that person to submit remediation plans for the approval of the Minister and to perform *at that person's own expense* remediation work that the Minister orders that person to perform. The Minister may impose these costs on the person responsible without regard to whether the lands are owned by the public or by a private third party. The Minister may impose these costs on the person responsible without regard to whether that person was the direct and immediate cause of the contamination. The Minister may impose these

costs on the person responsible without regard to whether that person owns the property that person has to clean up. The Minister may impose these costs on the person responsible without regard to whether that person will economically benefit from cleaning up the property.

20. An order made under s. 99 of the EPA remains in effect until the Minister revokes it under s. 101 of the act.
21. Where the person responsible does not comply with an order made under s. 99 of the EPA, the Minister may take whatever action the Minister considers necessary to carry out the terms of the order. All the reasonable costs incurred by the Minister in carrying out the terms of the order are recoverable from the person against whom the s. 99 order was made as a statutory debt to the Province.
22. It is only when a person has obligations pursuant to an order made under s. 99 of the act, and without lawful excuse fails to comply with the terms of that order, that the Minister is able to fulfil the order and to recover the costs of having done so as a statutory debt under s. 102 of the act.
23. Abitibi conducted large scale and intensive industrial activities throughout the Province since 1905. At various time over this century, Abitibi was engaged in mining, processing, wood harvesting, pulp and paper production and related activities, such as transportation and storage of goods, materials and energy.
24. In late 2008 Abitibi shut down its remaining industrial activities in the Province. In December of that year the Province passed the Abitibi Act pursuant to which much of the property that Abitibi formerly owned in the Province was expropriated for the public's benefit without payment of compensation to Abitibi. In April 2009, Abitibi and its foreign affiliates announced that they were insolvent and would attempt to restructure their affairs under the relevant national statutes, the CCAA in the case of Abitibi.
25. After Abitibi commenced its restructuring efforts it refused to provide the Minister with evidence that it was going to comply with the EPA and remediate properties the sites on which it had conducted its industrial activities ("**Abitibi Sites**") in the Province and which were contaminated. Abitibi failed to do this despite having promised the Minister that it would remediate the Abitibi Sites and despite having in its possession various environmental assessments and remediation plans, which it refused to share with the Minister, to do this very thing.

26. Abitibi provided the Province with evasions and half truths about its intentions to clean up the Abitibi Sites. Accordingly, the Province, through its counsel, retained a leading firm of environmental consulting engineers, Conestoga Rover & Associates ("**CRA**"), to perform an environmental assessment with respect to the Abitibi Sites. A copy of the reports prepared by CRA was submitted as Exhibit NL-5 at the Motion, and is attached hereto at Tab B-2 of the Supporting Documents Brief.
27. The assessments revealed contamination on all of the Abitibi Sites. Some of these properties were extremely contaminated, including with heavy metals. As a result of this information, the Minister issued five orders against Abitibi under s. 99 of the EPA ("**EPA Orders**").
28. The EPA Orders require Abitibi, *inter alia*, to submit for approval a detailed remediation plan for the Abitibi Sites, to complete site remediation by 15 January 2011 or some other date as agreed with the Province's Department of Environment and Conservation, and to close all landfills and lagoons *et cetera* associated with each site by 15 January 2011.
29. Abitibi must remedy the contamination related to the Abitibi Sites because it is a person responsible under the EPA (s.2(x)). Abitibi is a person responsible because it either currently owns or formerly did own the sites, did own or operate an undertaking on one or more of the sites, did handle or have care, management or control of a substance or thing on one or more of the sites, or was a previous owner of a substance or thing that is found on one or more of the sites. For example:
 - a. Abitibi was part of the Co-Tenancy that conducted mining operations at Buchans. Abitibi expressly accepted responsibility for the remediation of that site – the most heavily polluted of the Abitibi Sites, and the location of both a mine and a town – both as a signatory to a Compliance Schedule between the Province, the Federal government and the Co-Tenancy, and in an Action Plan filed on Abitibi's behalf by its environmental consultants, AMEC. The Action Plan was filed after Abitibi ceased its operations at Buchans. In that document, Abitibi undertook to remediate the environmental contamination at the Buchans site, without qualification. The Co-Tenancy Agreement, Compliance Schedule, and Action Plan were submitted as Exhibits NL-8, NL-9, and NL-10, respectively, at the Motion, and are attached hereto at Tabs B-5, B-6, and B-7 of the Supporting Documents Brief.

- b. Abitibi, or its predecessors, owned and operated a pulp and paper mill at Grand Falls-Windsor. As a result of the Abitibi Act, Abitibi is a previous owner of the site and of the contaminants.
 - c. Abitibi is the current owner of the Stephenville site, on which a pulp and paper mill was operated.
 - d. Similarly, Abitibi is the current owner of the Botwood site, which was the location of Abitibi's shipping operations, is the current owner of some of the logging camps sites and a previous owner of the other logging camp sites.
- 30. Abitibi's obligations to remedy environmental contamination on the Abitibi Sites, therefore, are the result of the application of the EPA, as well as the Compliance Schedule and various Certificates of Approval issued with respect to many of the sties, which encapsulate both provincial and federal statutory obligations.
- 31. Abitibi does not dispute that the Abitibi Sites are heavily contaminated, nor does it quarrel with the fact that at least some of this contamination is the result of its operations in the Province. Abitibi's objection lies in the price tag for eliminating the contaminants from the environment – over \$100 million according to the evidence presented by Abitibi at the motion – and of its perceived inability to comply with the EPA Orders.
- 32. Yet, Abitibi's own witness confirmed at the hearing of the Province's motion that:
 - a. Abitibi possessed sophisticated human resources dedicated to environmental compliance and experienced in environmental remediation in the Province;
 - b. Abitibi took its environmental obligations seriously and, therefore, by the time the EPA Orders were issued, it was or should have been in a position to comply with a substantial portion of the orders; and
 - c. Abitibi and the Province had previously benefitted from a co-operative relationship, and there was no reason to think that Abitibi could not get extensions and other allowances it needed to comply with the EPA Orders, since it had always been able to do so in the past.

33. At the hearing, the witness for the Province confirmed that it was willing to enter into discussion with Abitibi to work out how best to achieve the goals of the EPA Orders. An affidavit sworn by Donna Ballard in support of the Province's Motion, which supports this proposition, is attached hereto at Tab B-1 of the Supporting Documents Brief. However, Abitibi has rejected the possibility of such discussions. Abitibi just does not want to comply with the EPA Orders, now or in the future.
34. The CPO which Abitibi obtained from the CCAA Court has the effect of barring and extinguishing Abitibi's duty to comply with the EPA Orders. As a consequence of the terms of the CPO, the only power that is left open to the Minister under the EPA is the power found under s. 102 of EPA to spend the Province's own money on fulfilling Abitibi's obligations and then to claim as a creditor against the Company for the costs so incurred. But the Minister wants Abitibi to remediate lands that Abitibi is responsible under the EPA for remediating. That is why the Minister issued the EPA Orders in the first place.
35. The gravamen of the Province's motion was that the CCAA Court lacks the statutory power and, ultimately, the constitutional competence to make an order that bars and extinguishes Abitibi's obligation to comply with the EPA Orders and thereby to leave to the Minister only the residual power available to her under s. 102 of the EPA to cause the Province to spend its money fulfilling Abitibi's statutory obligations. For this reason, the Province argued that the CCAA Court is required to ensure that any plan of compromise and arrangement that Abitibi puts forth for court approval makes provision for compliance with the EPA Orders.
36. Although there was evidence that the costs that Abitibi estimates it might have to incur to fulfil its remediation obligations in the Province might be "material" to Abitibi's ability successfully to restructure, there was *no* evidence that Abitibi would be unable to agree a remediation plan with the Province and incorporate the terms of the remediation plan into its plan of compromise and arrangement under the CCAA. Nor was there any evidence that Abitibi's creditors would vote against a plan that makes provision for environmental remediation.
37. Moreover, the CCAA Court was not provided with any evidence of Abitibi's projected future cash flows from its restructured business operations to enable the court to make a informed evaluation about the degree to which the remediation costs are, in fact, "material" to anything Abitibi wishes to do. The complete absence of evidence from Abitibi on this point, and the complete lack of detail in the Monitor's report, is strongly suggestive of the

fact that post-restructuring Abitibi will be able to fulfil its environmental obligations to the Province.

38. Indeed, it is obvious that Abitibi can include environmental remediation activities in its going forward business model because, in accordance with the evidence of Abitibi's witness at the motion, the company intends to fulfil its environmental obligations in other provinces. Consequently, Abitibi will have to make provision for environmental remediation costs in the financial projections it prepares as part of its plan of compromise and arrangement in any event. Abitibi just does not want to do this in respect of property located in the Province.
39. In any event, the cost of the remediation is irrelevant in this case. Abitibi must comply with its statutory obligations, and the CCAA Court does not have the constitutional competence to order otherwise.

THE JUDGMENT

(i) What the CCAA Court Decided

40. The CCAA Court held that the EPA Orders are "financial or monetary" in nature, and thus are "Claims" under the CCAA that can be compromised or extinguished by order of the CCAA Court. The CCAA Court upheld the provisions of the CPO that the Province (and British Columbia) had challenged as being outside the jurisdiction of the CCAA Court to enact and thus determined that Abitibi did not have to comply with the EPA Orders issued by the Minister.
41. Based on this conclusion, the CCAA Court held that the EPA Orders had been issued in violation of the stay of proceedings that was imposed by paragraph 10 of the Court's Initial Order and were not exempted from that stay by operation of paragraph 10.1 of the First Stay Extension Order made on 14 May 2009. The First Stay Order is communicated herewith as Exhibit A-3. Paragraph 10.1 preserved a government's right to enforce statutory obligations with respect to the environment, provided that these obligations are not monetary fines or orders. A copy of the First Stay Extension Order is communicated herewith as Exhibit A-3 and can be found at Tab A-3 of the Supporting Documents Brief.
42. Since the Province's right under s. 102 of the EPA to fulfil Abitibi's obligations and to make the costs of doing so a debt owed by Abitibi depends on Abitibi owing a duty to comply with the EPA Orders in the first place, by holding that EPA Orders are themselves unenforceable against Abitibi the Judgment

means that the Province would not be able to recover any costs it incurred pursuant to s. 102 of the EPA by satisfying Abitibi's obligations under s. 99. This is because the Province's ability to issue and enforce the EPA orders is the basis of Abitibi's *performance* obligation which in turn is the basis of its *payment* obligation should the Province at its expense remediate any sites that are the subject of the EPA Orders.

43. Therefore, although the CCAA Court held open the possibility that the Province could file a claim under the CPO for the costs that the Province might incur in satisfying Abitibi's obligations under the EPA Orders, this is an illusory possibility: whether the Province is asking Abitibi to fulfil the EPA Orders at its own expense or whether the Province fulfils Abitibi's obligations under them at the Province's expense and seeks reimbursement from Abitibi, the CCAA Court has immunised Abitibi from the primary obligation under s. 99 of the EPA upon which both possibilities depend.
44. The *legal* consequence of the CCAA Court's decision, then, is to exempt Abitibi from the obligation to comply with the EPA Orders, to prevent the Minister from exercising her statutory discretion to determine how the EPA and obligations arising under this statute are to be enforced, and to subject the Minister's decision in this regard to judicial review by the CCAA Court.
45. The *economic* consequence of the CCAA Court's decision, then, is to shift the financial burden of Abitibi's obligations under the EPA Orders from Abitibi on to the people of the Province, contrary to what the law of Province provides.

(ii) Why the CCAA Court decided what it did

46. Underlying the Judgment is the CCAA Court's disapproval of the content and purpose of two statutes enacted by the Legislature of the Province under powers given exclusively to the Province by the *Constitution Act, 1867*, and the Court's disapproval of how and why the Minister exercised her discretion under one of these laws.
47. In respect of the EPA and the EPA Orders, the key holdings are found in the following paragraphs of the Judgment:

Despite being framed as "regulatory orders", the EPA Orders have the effect of compelling Abitibi to expend material sums of money to remediate property that it either no longer owns or no longer uses in its business, while having little or no net value to Abitibi and its stakeholders. [para. 129]

[...]

This is quite far from the situation of the detached regulator or public enforcer issuing order [sic] for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. [para. 175]

[...]

In all fairness, a regulator can hardly pretend to realistically order that a "person responsible" carry out actions upon properties that it no longer owns. This order would be unenforceable for obvious reasons. In such situations, non-compliance can only be compensated through money damages. [para. 202]

48. Expressed in general terms, the passages quoted above demonstrate that CCAA Court is of the opinion that: (i) the public purse should be used to clean up pollution on properties that are no longer owned by the person responsible or which are not currently being used by that person for industrial activities; (ii) the person responsible should not have to bear the costs of remediating polluted land unless that person will benefit from incurring those costs; (iii) the person responsible should not have to remediate contamination caused by its past industrial activities in the Province; and (iv) the person responsible should not have to bear the burden of cleaning up property that is owned by the public.
49. The EPA, however, is designed to permit the Minister to issue orders doing exactly what the CCAA Court objects to in this case: to compel Abitibi (the person responsible under the act) to spend its money to remove contamination on property that it no longer owns or no longer uses in its business, to spend its money for a purpose that will have no value to Abitibi and its non-government stakeholders, and to spend its money on a purpose that will be of benefit to the public of the Province.
50. Therefore, as the passages from the Judgment quoted above demonstrate, at the core of the Judgment is a disagreement over environmental policy. The policy adopted by the Legislature of the Province is to ensure that responsible persons should have to incur the costs of cleaning up contaminated land without regard to whether the person presently owns the land or will benefit from having restored the land to its pre-contaminated state and that this is done so that the public does not have to bear this expense. The policy which the Motion Judge prefers is one where an

industrial enterprise is exempted from the responsibility of cleaning up contamination unless the enterprise owns and is currently using the polluted lands in its industrial activities and will financially benefit from the costs of cleaning up those lands. With respect to the Motion Judge, this is not his call to make.

51. The other statute of which the CCAA Court strongly disapproved is the Abitibi Act. The Court disagreed with the Abitibi Act both because of what the act does and also because of how the EPA Orders relate to property that was the subject of the Abitibi Act.
52. Through the Abitibi Act the Province expropriated without the payment of compensation much (but not all) of the property that Abitibi had owned in the Province. The act precludes any action or proceeding from being brought or continued against the Crown based on a cause of action arising from or incidental to the operation of the act. Furthermore, the act preserved Abitibi's obligations under any environmental agreements or undertakings it had made with the Province.
53. The CCAA Court did not like the fact that the Province would expropriate Abitibi's property without compensation and then order Abitibi to clean up the property at its own expense. This is what the court said about this fact:

In essence, the EPA Orders seek to require Abitibi to incur costs for the primary purpose of improving the value of lands, the bulk of which have been confiscated (and much of the remainder of which was surrendered to the public years ago). Put otherwise, Abitibi is expected to spend money to increase the value of properties for the benefit of those who took them from it. [para. 167]

This is, at a minimum, rather awkward. The expression "having your cake and eating it too" comes to mind. Some would go as far as to say that it is preposterous. [para. 168]

54. Indeed, in paragraphs 203 and 204 of the Judgment, the CCAA Court went so far as to hold that one of the EPA Orders, which require Abitibi to prepare a plan for the demolition and remediation of a paper mill on property that the Province had expropriated, was "as unenforceable as it is unjustifiable".
55. The Abitibi Act does not in any way alter the provisions of the EPA. Moreover, the Abitibi Act expressly preserves Abitibi's contractual remediation obligations to the Province. Therefore, the Motion Judge here is again disagreeing with the policy of the Legislature of the Province. The

Legislature determined that it was in the public interest to expropriate without compensation some of Abitibi's properties in the Province and to do this without changing in any way Abitibi's existing obligations to remove contamination from those properties. The policy the Motion Judge prefers is one where Abitibi is relieved of its environmental obligations once its property is expropriated. Again, this is not a call for the Motion Judge to make.

56. Finally, the CCAA Court held that, notwithstanding the fact that the Abitibi Act immunises the Crown from all proceedings based on a cause of action arising from or incidental to the operation of the act, the CCAA Court would entertain (and therefore presumably accept) a claim by Abitibi against the Province for damages arising out of the act in response to any claim the Province would be forced to file:

While the Abitibi Act denies Abitibi the right to use the Province's courts to that end, the Province cannot, however, prevent Abitibi to raise the counter-claim argument in front of the CCAA Court. [para. 189]

57. Once again this represents a disagreement over public policy. The Motion Judge disagrees with the policy choice made by the Legislature of the Province that Abitibi would not be able to sue the Crown for any damages arising out of the passage of the Abitibi Act. And, once again, this is not the Motion Judge's call to make.
58. It is clear from the analysis contained in the Judgment that in order to permit Abitibi to avoid its obligations under EPA and to ameliorate the effects of the Abitibi Act, that the CCAA Court concluded that it had the statutory power – and by necessary implication, the constitutional competence – to stay and permanently to bar and to extinguish Abitibi's obligations under the EPA Orders and to give Abitibi permission to bring an action against the Province arising out of the passage of the Abitibi Act, should the Province file a money claim.
59. The CCAA Court did this by characterising the EPA Orders as "financial or monetary" in nature.
60. The pivotal passage in the Judgment in this regard is paragraph 126 where the Court – wrongly – states that:

Both the Province and the HMQBC agree 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.

61. As is evident from other passages in the Judgment, the CCAA Court got the position of the Province backward in this paragraph. The Province's position was that so long as the Province was not a creditor of Abitibi, by reason of demanding that Abitibi pay money to the Province, then the EPA Orders could not be compromised as part of the CPO or other claims management process under the CCAA.

62. Indeed, at the very outset of the Judgment, in paragraph 2, the CCAA Court correctly summarises the Province's position in this regard:

*On the one hand, Her Majesty the Queen in Right of the Province of Newfoundland and Labrador (the "**Province**") contends that ministerial orders issued in relation to environmental matters are not "claims" under the CCAA when they do not require the Debtors ("Abitibi") to make payments to the Province. (emphasis added)*

63. In the next section of this motion the Province will identify those controlling legal principles that supported that Province's position in this respect (and which the CCAA Court failed to apply). For now, it is sufficient merely to observe that the requirement that a claim be made by a "creditor" is found in the *Bankruptcy and Insolvency Act's* definition of "Claim Provable in Bankruptcy". This definition is incorporated into the CCAA. The *Bankruptcy and Insolvency Act's* definition of claim is "any claim or liability provable in proceedings under this Act by a creditor".
64. The phraseology "financial or monetary", on the other hand, was first adopted by the CCAA Court in the First Stay Extension order, which amended the stay of proceedings in the Initial Order. Since the Province's position is that the CCAA Court's statutory jurisdiction is limited to the definition of "Claim" under the CCAA, the meaning of "financial or monetary" used in the CCAA Court's orders was dependent, not on the so-called "nature" of an order or obligation, but rather on whether the government in demanding compliance with a statutory duty was seeking payment of a debt. Anything less than this would not do.
65. Once the CCAA Court asked itself the wrong question – from both a statutory and ultimately constitutional perspective ("Are the EPA Orders in substance financial or monetary in nature?") – it spent the balance of the Judgment attempting to justify why the EPA Orders could be characterised as "financial or monetary".

66. In attempting to characterise the orders this way, the CCAA Court engaged in a deeply flawed legal and factual analysis. The Court's analysis in this respect is driven by the Motion Judge's antipathy to the Province's vigorous and unapologetic assertion of its rights under its own laws for the benefit of the people of the Province, and not by a fair reading of the evidence.
67. Indeed, the explanation the Motion Judge gave in the Judgment for concluding that the EPA Orders are "financial or monetary" demonstrates that his conclusion is based on nothing more than his disagreement with the fact that the EPA applies to Abitibi even in respect of properties that Abitibi does not own, whether through abandonment or expropriation.

In this case, the true character of the EPA Orders must be assessed in the context of the assets of Abitibi having been expropriated by the Province and Abitibi no longer being in control of the bulk of the property that gave rise to the remediation orders. [para. 162]

The monetary nature of the orders is indeed highlighted by the fact that they relate, for the most part, to properties that the Province has confiscated under the Abitibi Act or that Abitibi has otherwise surrendered possession or control of years ago. [para. 163]

68. The uncontradicted evidence of the Province was that the Minister had issued the EPA Orders because the Province wanted Abitibi to spend its money on environmental remediation so that the Province would not have to spend the public's money on these activities.
69. The CCAA Court found that the primary purpose of the EPA Orders was to improve the value of the lands that would be remediated, however. But there was no evidence that that was the purpose. Indeed, there was no evidence that complying with the remediation orders would improve the value of the lands at all, beyond the enhancement that might flow from the absence of contamination. And such enhancement is entirely appropriate since the lands should not be contaminated in the first place.
70. Having found that the primary purpose of the EPA Orders was to improve the value of the lands, the CCAA Court then contradicted itself by finding that the purpose of the EPA Orders was to avoid being sued by Abitibi in the CCAA Court over the Abitibi Act or to lay the groundwork for a monetary claim that would offset Abitibi's NAFTA claim against the Government of Canada. No evidence was led in support of these contentions. Furthermore, there is no

reason to believe that Canada will lose an arbitration under NAFTA or that the Province will have to pay if Canada does.

71. Another motive attributed to the Province by the CCAA Court was that the Province wants to avoid creating a debt obligation because it does not want to be dragged into a law suit in the CCAA Court over the Abitibi Act. However, this so-called motive depends on the logically prior possibility that the CCAA Court would unlawfully permit Abitibi to avoid the Abitibi Act's Crown immunity provisions in the first place – a fact that was unknown until the Judgment.
72. Another erroneous conclusion is derived from the fact that the Province accepted in previous proceedings (the data room motion) the self-evident proposition that it is a creditor for money that it has spent in respect of Abitibi's obligations and was a stakeholder (not a creditor) in respect of other of Abitibi's obligations, including environmental obligations. The CCAA Court held that the Province's position in the data room motion was contradictory to its position in the EPA Motion. A copy of the Judgment rendered with respect to the data room motion is communicated herewith as Exhibit A-6, and can be found at Tab A-6 of the Supporting Documents Brief.
73. In addition to being untrue, this finding is undermined by the Court's own ruling on the data room motion. On that motion, the CCAA Court held that the Province was not a creditor in respect of money that the Province had in fact spent on various Abitibi-related matters, and was not a creditor in respect of money the Province had not spent on environmental activities. Remarkably, however, in the Judgment the Court decided that the Province is a creditor for money it has not spent and does not want to spend for environmental remediation.
74. The most egregious error of fact of all, however, is the CCAA Court's conclusion that the Minister issued the EPA Orders in the expectation that they would not be complied with and thus that the Province would be forced to fulfil Abitibi's EPA obligations at a later date and would claim as a creditor then.
75. This is an egregious error of fact because the Minister's so-called motive arises, if at all, only if Abitibi is relieved of the obligation of complying with the EPA Orders in the first place. If the Province is right and Abitibi has to comply with those orders, then Abitibi will have to make provision for compliance with them in its plan of compromise and arrangement.

76. It is only if Abitibi is relieved from compliance with the EPA Orders by the CCAA Court that the Province is put in the position of having to fulfil Abitibi's obligations and thereby to create a debt under s. 102 of the EPA. Thus, the CCAA Court's factual conclusion is driven by its own order, not by the Province's actions.

LEAVE TO APPEAL IS WARRANTED

77. The Judgment constitutes such an egregious excess of jurisdiction and raises such important issues of constitutional law that leave to appeal ought to be granted.
78. In this case, the Motion Judge went where no CCAA Court has gone before: into the heart of provincial jurisdiction for the express purpose of nullifying the laws of the Province for the benefit of an insolvent company and its creditors. This fact alone warrants leave to be granted since, if the Province's legal submissions are correct, the CPO and the Judgment are nullities for having been made in excess of any constitutionally effective jurisdiction.
79. But there is another, and equally important constitutional reason for granting leave to appeal. It is a reason derived from the structure of Canada's court system.
80. Unlike most federations, Canada does not have one set of courts for the laws of the Dominion and another set of courts for the laws of the provinces. Rather, through the network of provincially constituted courts and federally appointed judges, all of the laws of Canada are given effect. Under a federal insolvency statute, like the CCAA in this case, one provincial superior court is given what is in effect a national jurisdiction over the debtor's affairs. For this reason, provinces, like the Province in this case, may have to go to the courts of other provinces to have their rights under their own laws enforced when the subject of those laws is bankrupt or insolvent. This system only works when the court with supervisory jurisdiction, the Québec Superior Court in this case, upholds the laws of other provinces as required by the Constitution. Where, as here, that does not occur, the legitimacy of vesting so much national power in the courts of one province is seriously undermined.
81. That is precisely what has happened in this case. The Québec Superior Court is refusing to give effect to the public laws of another province because a judge of this court does not think that the laws are fair to the company whose affairs he is supervising. Although the Province is constitutionally

entitled to have her laws given effect by the Québec Superior Court under the CCAA, the Province's constitutional jurisdiction can be upheld only if this Court grants leave to appeal the Judgment.

82. Quite apart from the constitutional issues, the test for leave is met in this case.
83. As is demonstrated below, the issues raised on appeal are of great importance to the parties and to the practice generally. In light of the serious constitutional, legal and factual errors made by the CCAA Court, the appeal has obvious merit.
84. Lastly, there is no reason to believe that an appeal, especially an expedited appeal, which is requested in this motion, would hinder the conduct of the proceedings in the CCAA Court.

Grounds of Appeal

85. When confronted with a federal insolvency statute, like the CCAA, provincial jurisdiction is guarded by three levels of protection. The first and most general level consists of the principles of federalism that govern the interplay of federal and provincial jurisdiction generally and which require that enactments of both levels of government are to be given effect unless it is impossible to do so. The second level consists of the specific constitutional limits on federal insolvency law, which provides that provincial legislation continues to operate in the insolvency context. The third level consists of the language of the federal bankruptcy or insolvency statute itself, which limits the exercise of any judicial power under the statute to its terms.
86. In this case, the EPA and the Abitibi Act were guarded by all three levels of protection. Yet, without reasoned consideration, the Motion Judge casually disregarded each of these protections and thereby without constitutional justification made provincial law inapplicable to Abitibi.

I - The CCAA Court disregarded the principles of federalism

(i) The CCAA Court was required to give effect to the EPA and the Abitibi Act but failed to do so

87. The leading case on the principles of federalism is *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3. Writing for the majority, Binnie and LeBel JJ. restated the main constitutional doctrines and the interplay between them so as to facilitate the achievements of the objectives of Canada's federal

structure. The judgment began with the observation at paragraph 24 that "the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this court has called "co-operative federalism"".

88. For the purposes of this application for leave to appeal and the appeal, should leave be granted, three principles described in *Canadian Western Bank* are of particular significance.
89. The first principle is that where possible courts must favour the ordinary application of statutes enacted by both the federal and provincial governments. As explained by Binnie and LeBel JJ. at para. 37:

The "dominant tide" finds its principled underpinning in the concern that 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.

[emphasis in original]

90. Secondly, when a federal statute can be interpreted so as not to interfere with a provincial statute, that interpretation must be used. As explained by Binnie and LeBel JJ. at para. 75:

An incompatible federal legislative intent must be established by the party relying on it, and the courts must never lose sight of the fundamental rule of constitutional interpretation that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes".

[emphasis added]

91. The third principle is a corollary one of the second one: that the doctrine of "occupying the field", whereby the enactment of federal legislation on a matter precludes the provinces from legislating in respect of the same matter, is not part of modern federalism doctrine. As explained by Binnie and LeBel JJ.:

The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject. As this Court recently stated, "to impute to Parliament such an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since O'Grady".

92. Based on these principles, the CCAA Court is *constitutionally prohibited* from blocking the application of either the EPA (and hence the EPA Orders) and the Abitibi Act, unless there is a conflicting provision in the CCAA. There is no such conflicting provision and the Motion Judge did not say that there was. Indeed, the Motion Judge's refusal to consider the Province's constitutional arguments must be taken as a tacit acceptance that there was no such conflict because if there were the CCAA Court would have had to have considered constitutional doctrine to resolve such a conflict, which the Court did not do.
93. Accordingly, the CCAA Court in this case did the opposite of what federalism doctrine requires: instead of upholding the EPA and the Abitibi Act, the Judgment blocked their application under a purported use of a federal power.

(ii) The Minister, and not the CCAA Court, has the exclusive jurisdiction to decide how the EPA is to be applied to Abitibi

94. The seminal case in Canada on the powers of a minister to enforce provincial environmental legislation is *Imperial Oil v. Québec*, [2003] 2 S.C.R. 624, a case that was appealed to the Supreme Court of Canada from this Court. The Supreme Court upheld the validity of orders issued by Québec's Minister of the Environment that were essentially the same as the EPA Orders in this case and that were issued for substantially the same reasons. Notwithstanding that *Imperial Oil* is the controlling authority on this topic, and notwithstanding that extensive reference was made to this case on the EPA Motion, the Motion Judge inexplicably failed to consider the case or the principles it articulates.
95. In *Imperial Oil*, the Minister of the Environment of this province was sued by owners of residential properties that had been constructed on contaminated property. The minister had supervised the decontamination of that property and had, negligently as it appeared, approved the property for residential development. In response to the law suit, the minister issued an order requiring Imperial Oil, within three months and at its own expense, to prepare

a site characterisation study which would include appropriate decontamination measures. Imperial Oil had not owned or occupied the property for twenty years.

96. Like Abitibi in this case, Imperial Oil refused to fulfil the terms of the order and argued that the minister's interpretation of the Québec environmental legislation was unreasonable in the circumstances and that in issuing the order the minister was biased and indeed was abusing or misusing his discretionary powers under the act. The alleged bias arose because the Province would derive a benefit from the issuance of the order: if Imperial Oil remediated the site Québec would avoid the liability and costs of doing so. This is the same argument that Abitibi made and the CCAA Court accepted in respect of the Minister's decision to issue the EPA Orders – that the Minister's economic interest led to her to misuse or abuse her statutory powers when issuing the EPA Orders.
97. The Superior Court set aside the order against Imperial Oil. The court held that the minister had given the legislation an unreasonable interpretation because the minister had underestimated the financial consequences of the obligation he had imposed on Imperial Oil and that the minister was in a flagrant conflict of interest because of his personal interest and thus did not act impartially. This Court, however, reversed the Superior Court. This Court held that the financial consequences of the order were not a relevant criterion at the time the order was issued. On the issue of bias, this Court held that, although the minister was biased by reason of the economic consequences of the legal action that had been taken or threatened against the minister and which had prompted the order, this was a permissible bias on the grounds of necessity.
98. The Supreme Court of Canada, unanimously, dismissed the further appeal from this Court. The Supreme Court disagreed with this Court, however, on the question of bias. The Supreme Court held that in issuing orders under the *Environmental Quality Act*, the minister was exercising a political role and one that was not susceptible of being reviewed on the grounds that the state would benefit from the order the minister made, and thus that there was no bias at all.
99. The Supreme Court accepted at paragraph 25 that the procedure which authorises the minister to issue an order against whoever is responsible for the pollution under the terms of the act of this province, "represents one of the most important enforcement tools available in Québec's environmental legislation". The same principles apply to the Minister under the EPA.

100. Given what the Motion Judge said in the Judgment, the Supreme Court's analysis on the issue of bias is worth considering at some length:

In his management of the Marina file, the Minister made a decision that especially targeted Imperial. That decision may impose substantial expenses on the parties which the Minister considers to be the authors of the pollution of the site in question. [para. 32]

[...]

In this case, as was discussed above, the Minister used a discretionary political power for the purposes of the application of [the Québec legislation]. A contamination problem had to be dealt with, and he had to choose the solution he considered to be the most appropriate. That choice fell within the discretion assigned to him by the Act. He had to choose among doing nothing, carrying out the necessary investigations and work and then trying to recover the cost from the persons responsible for the contamination of the site, and going directly to those persons and trying to compel them to take the necessary action at their own expense. The Minister was not performing an adjudicative function in which he was acting as a sort of judge. On the contrary, he was performing his functions of management and application of environmental protection legislation. 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 the public some money. [para. 39]

101. It is obvious from this judgment, then, that the power to issue the EPA Orders in order to compel Abitibi to clean up the Province's environment is a core function of the Province's Minister under the EPA. It is equally obvious

that under the laws of the Province the Minister was entitled to make her decision based on her view of what was in the interests of the public of the Province, which she did.

102. The Judgment, however, subjects the Minister's decision to issue the EPA Orders to judicial review by the CCAA Court and effectively to reversal by the Court based on a finding that the Province would economically benefit from the Minister's decision to issue the EPA Orders.
103. Accordingly, Motion Judge substituted his judgment for that of the Minister about how best to deal with the serious environmental contamination in the Province and for which Abitibi is responsible under the EPA. It is clear that in substituting his judgment for that of the Minister, the Motion Judge used very different principles to the "polluter pay" principle found in the EPA. And it is clear that in substituting his judgment for that of the Minister, the Motion Judge is trying to achieve the opposite goals to those which the Minister has tried to achieve under the EPA: to make the public not the responsible person, to bear the costs of cleaning up the Province's contaminated environment. Yet, the things the CCAA Court found objectionable about the Minister's decision are the very things the Supreme Court of Canada held were effectively immune from judicial review.

(iii) *The Legislature of the Province, and not the CCAA Court, has the exclusive jurisdiction to determine property and civil rights in the Province*

104. The Province has affected Abitibi's civil rights in a number of ways under the EPA and the Abitibi Act. The Province expropriated Abitibi's property without compensation; the Province made itself immune from liability to Abitibi from the consequences of the Abitibi Act; and the Province imposed a statutory duty on Abitibi to spend its money on environmental remediation in the Province.
105. The seminal case that underlies the Province's decision to expropriate Abitibi's property and not pay compensation is *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40.
106. In *Authorson*, the Federal government expropriated without compensation the pensions and allowances of disabled veterans which the government was administering. Parliament also eliminated any liability of the Crown for actions taken before the government began paying interest on these pensions. The Ontario Superior Court held that the Government was a

fiduciary of the veterans and was obliged to pay interest on their money. The Court of Appeal for Ontario affirmed this decision.

107. The Supreme Court of Canada unanimously allowed the appeal from the Court of Appeal for Ontario and set aside the judgments in the courts below. In doing so the Supreme Court re-stated some basic principles of Canada's Parliamentary democracy which the Ontario courts had failed to apply.
108. At paragraph 39, the Supreme Court re-affirmed the principle that legislative decision-making is not subject to any known duty of fairness. The Court confirmed that legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries they can do as they see fit. As stated by the Court "the wisdom and value of legislative decisions are subject only to review by the electorate".
109. The Supreme Court also re-affirmed the principle that the Legislature may take away any person's property rights without compensation. In support of this proposition, at paragraph 53, the Court quoted the well-known passage from Riddell J:

In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights, which I am far from finding, the Legislature had the power to take them away. The prohibition, "Thou shalt not steal", has no legal force upon the sovereign body. And there would be no necessity for compensation to be given.

110. These principles, which were cited to the Motion Judge, should have been the end of the CCAA Court's inquiry into Abitibi Act (and, for that matter, an end to any inquiry into the purposes of the EPA itself), but they were not. Despite objection from the Province's counsel, the CCAA Court received evidence about the Abitibi Act. Then, in the Judgment, the Motion Judge went ahead and expressed his views about the act and his views about the fairness of ordering Abitibi to remediate property that, in the wisdom of the Legislature, the Province had expropriated from Abitibi without paying any compensation.
111. The seminal case that underlies the Province's right to affect Abitibi's civil rights in the Province is *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473.

112. In *Imperial Tobacco*, the Supreme Court upheld provincial laws that created a special cause of action against tobacco companies for health costs associated with tobacco products and in so doing shifted the normal burdens of proof and other normal procedural rights to make it practically impossible for tobacco companies successfully to defend litigation arising out of this cause of action. The tobacco companies challenged the legislation on the grounds that it provided special advantages to the government, was retrospective, targeted them and prevented them from receiving a fair trial.
113. The Supreme Court, again unanimously, rejected all these challenges to the legislation. In rejecting such challenges, the Supreme Court again re-stated the core principles of parliamentary democracy under which Canada is governed. At paragraph 66, the Court held that "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box". And in paragraph 73, the Court accepted that there is no principle of constitutional or other law that "requires that legislation be general in character and devoid of special advantages for the government".
114. A concrete application of the principle that law relating to civil rights confirm a provincial legislature, not the CCAA Court, determines civil rights in the province is found in *GMAC v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123. In this case, the Supreme Court held that a judge whose powers were derived from a federal insolvency statute had no jurisdiction to immunise a federal insolvency officer (a receiver in this case) from liability under provincial law. Importantly, at paragraph 50, the Court criticised the use by bankruptcy courts of "boilerplate immunizations" and the attempt by the insolvency bar and court to permit insolvent companies to interfere with or shed provincial law obligations that are "an inconvenience to the bankruptcy process".
115. The above principles, none of which the Motion Judge considered, reveal that the Judgment is based on principles that are the opposite of those which underlie our constitutional democracy. The Provincial enactments which affect Abitibi's civil rights in ways with which CCAA Court disagrees – the EPA and Abitibi Act – are within the legislative competence of the Province to enact. These enactments are reviewable only by the public of the Province at the ballot box. The wisdom or fairness of these enactments are not reviewable by any superior court, and certainly not a superior court of another province purportedly exercising a federal power.

II - Provincial legislation operates in the insolvency context

116. The premiss of the CCAA Court's reasoning is that provincial law which incidentally affects the bottom line of Abitibi's CCAA restructuring may be disregarded. The CCAA Court held that the Province was "gaming" the CCAA and seeking to obtain a "super-priority" by enforcing the EPA in a way that would force Abitibi to satisfy the Province's environmental laws before Abitibi pays its creditors.
117. Federal bankruptcy and insolvency legislation does not "occupy the field" in relation to all matters touching on insolvency. To the contrary, provincial legislation operates in the insolvency context, short of an express conflict with federal law. 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]

118. Any doubt on this point was laid to rest by the Supreme Court in *Canadian Western Bank*, *supra*, where Binnie J. stated at paragraph 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".
119. 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 Operations Ltd. v.*

Canada (Minister of National Revenue – MNR), [1995] 3 S.C.R. 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.

120. Not only did the Supreme Court confirm that provincial law continues to operate in the bankruptcy or insolvency context, it did so in explicit reference to provincial laws of general application, like the EPA. In the words of Iacobucci J., at para. 146:

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.

[emphasis added]

121. 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". Sometimes, such as in *Re Giffen*, [1998] 1 S.C.R. 91, provincial law improves the bottom for creditors under federal insolvency law. At other times, such with the EPA Orders here or the cases to be discussed below, provincial law makes the bottom line for creditors worse.
122. 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. at para. 30]

[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. at para. 142]

123. These principles reveal that contrary to what the Judgment provides, federal law does not extend to permitting an insolvent company such as Abitibi to shed obligations it owes under a provincial statute simply because it is financially beneficial to the company and its creditors that the company be relieved of the associated economic burden of the statutory obligations.

III - The CCAA cannot be interpreted to give the CCAA Court the power to immunise Abitibi from compliance with the EPA Orders or to avoid the Abitibi Act

(i) The CCAA Court cannot define "Claim" however it wishes

124. 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".
125. Section 2 of the BIA defines "claim provable" as "any claim or liability provable in proceedings under this Act by a *creditor*" [emphasis added].
126. 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...".
127. The definition of "Claim" in the CPO and the definition used in the Judgment 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.
128. 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. 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.

129. The Judgment does not seek to justify the definition of "claim" used in the CPO. Instead, the Judgment substitutes another definition for the definition of Claim. The Judgment substitutes the definition "financial or monetary obligation" for "claim or liability provable by a creditor".
130. The CCAA Court used its idiosyncratic definition in order to immunise Abitibi from having to comply with the EPA Orders. In other words, the CCAA Court does precisely what it is forbidden under federalism doctrine from doing: interpreting a federal statute to block the application of provincial law.
131. The CCAA Court rejects without comment controlling legal authority that confirms that the EPA Orders may not be compromised under federal insolvency law.
132. For many years it has been accepted in Canada that debtors cannot avoid complying with statutory obligations just because the costs they will incur in doing so will come out of their creditors' pockets. Courts across Canada have all accepted that statutory obligations *are not unsecured claims*: they are obligations to comply with the law for the public benefit.
133. The controlling case law began thirty years ago in the Court of Appeal for Ontario. In *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) the Court of Appeal 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 statutory obligations.
134. In that case the statutory 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.
135. 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.

136. 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. 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".
137. The court, at paragraph 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.
138. 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.
139. 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.

140. 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.

141. In *Re Lamford Forest Products* (1991), 10 C.B.R. (3d) 137 (B.C.S.C.) at paragraph 26, the British Columbia Supreme Court also accepted 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".
142. 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". See *Re Shirley*, [1995] 129 D.L.R. (4th) 105 (Ont. Gen. Div.) (this is now the Ontario Superior Court of Justice) at paragraph 26.
143. The principle underlying these cases is easy to state and easy to apply. All people are subject to the general law, including those who are insolvent, and their creditors. This is also the case with respect to an insolvent person's

stakeholders. Individuals – whether they are solvent or insolvent – do not enjoy an immunity from the law just because it might be expensive or inconvenient for them to comply with it or detrimental to their relations with their creditors. Therefore, neither a debtor, nor a debtor's creditors, nor both of them together, can be heard to ask to be relieved from the burden of the law for their private advantage.

144. The CCAA Court rejects the holdings of these cases and the principles they represent. The court does so on the facile basis that if the Province benefits from having its laws complied with it therefore has a "claim provable" in respect of this benefit. In all the cases that have considered this point however, the people of the relevant province have benefitted from compliance with the law: absent compliance a province would have had to expend its money on the person's obligations, whether the obligation consists of demolishing a building, capping oil wells, or cleaning up the environment.
145. Indeed, based on the holding in *Imperial Oil, supra*, it is difficult to see how the fact the people of the Province might derive a benefit from having its environmental legislation complied permits the CCAA Court to immunise Abitibi from the obligation to comply with that legislation. As stated above, the disposition of this issue is really quite straightforward: no one can claim an immunity from the general law based on their private needs and desires. There is no federal insolvency power that grants such an immunity.

(ii) *The CCAA Court does not have the discretionary power to ensure a successful restructuring regardless of the law*

146. At its irreducible core, the Judgment is based on the premiss that the CCAA Court has a discretionary power to extinguish Abitibi's obligations to the Province under the EPA Orders or to avoid the Abitibi Act if doing so will improve Abitibi's post-restructuring circumstances and thus its ability to develop a plan of compromise and arrangement that of which its creditors will approve. This is revealed quite obviously in the Motion Judge's final remarks. The CCAA Court does not have this power, however.
147. To carry out the purposes of the CCAA, the court is given a capacious – though not unlimited – discretionary power. That power is limited to supervising the debtor's restructuring effects. The power does not extend beyond this point and does not extend to permitting the court to guarantee that restructuring will succeed by improving the debtor's post-restructuring affairs.

148. The court's discretionary 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 it 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.

149. The s. 11 discretion is designed for and hence is limited to the court's role in supervising the debtor company's restructuring efforts. Were the court to do otherwise, it would move as the CCAA Court did in this case, 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.

150. Furthermore, the Court of Appeal for British Columbia in *Re Skeena Cellulose Inc.* (2003), 43 C.B.R. (4th) 187, at paragraph 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.

151. The Court of Appeal for Ontario agrees. 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]

152. In other words, it is accepted by the Courts of Appeal of two provinces 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.
153. The rights that affect the debtor under the CCAA are found under the general laws which the debtor and its creditors and stakeholders would be subject were there no restructuring taking place. This can be contrasted with the situation under the *Bankruptcy and Insolvency Act*, which superimposes on to the debtor's affairs a federally constituted scheme for managing the debtor's assets and liabilities and dividing the debtor's assets amongst the creditors as prescribed by federal law. Under the CCAA, and except for a limited stay of proceedings to give the debtor breathing room, the debtor must formulate its plan of compromise and arrangement against the backdrop of rights and laws that would govern its affairs absent its insolvency.
154. 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 to hold, at paragraph 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".

155. Similarly, in its November 2009 decision in *Re Nortel Networks* (2009), 59 C.B.R. (5th) 23 at paragraphs 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.
156. These principles reveal that the CCAA Court exceeded its statutory mandate and hence the constitutional limits of its jurisdiction by purporting to use a statutory discretion that is designed to give a debtor company "breathing room" in effect to allow the debtor company to avoid its unwanted statutory obligations under provincial law.

IV - Conclusions sought on appeal

157. Province will ask the Court of Appeal to:
 - a. **GRANT** the Province's appeal;
 - b. **SET ASIDE** the Judgment rendered;
 - c. **GRANT** Province's motion;
 - d. **DISMISS** Abitibi's contestation;
 - e. **THE WHOLE** with costs in first instance and on appeal.
158. For these reasons, the Province has an interest in seeking from this Honourable Court leave to appeal from the Judgment.
159. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT:

GRANT the present motion;

AUTHORISE the Province to appeal from the Judgment rendered on 31 March 2010 by the Honourable Justice Clément Gascon, of the Superior Court of the District of Montréal, in the Superior Court, file number 500-11-036133-094, to be heard expeditiously;

THE WHOLE with costs to follow.

Toronto, 20 April 2010

WeirFoulds LLP

WeirFoulds LLP

Attorneys for Her Majesty the Queen in Right of
the Province of Newfoundland and Labrador

NOTICE OF PRESENTATION

TAKE NOTICE that the present *Motion for Leave to Appeal* will be presented for adjudication before one of the Honourable Judges of the Court of Appeal, at the Montréal Court of Appeal at 100, Notre Dame Street East, on 12 May 2010, at 9:30 a.m., or as soon thereafter as counsel may be heard.

DO GOVERN YOURSELVES ACCORDINGLY.

Toronto, 20 April 2010



WeirFoulds LLP

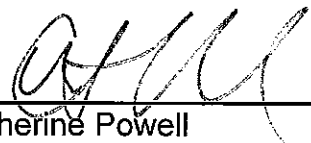
Attorneys for Her Majesty the Queen in Right of
the Province of Newfoundland and Labrador

A F F I D A V I T

I, the undersigned, Catherine Powell, attorney, exercising my profession at Toronto, in the City of Toronto, Province of Ontario, do solemnly declare and affirm:

1. THAT I am one of the attorneys of record of Her Majesty the Queen in Right of the Province of Newfoundland and Labrador;
2. THAT all of the facts alleged in the present Motion are true and correct.

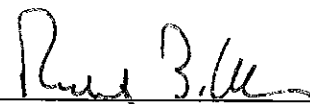
AND I HAVE SIGNED:



Catherine Powell

SOLEMNLY AFFIRMED BEFORE ME

in the City of Toronto, Province of Ontario,
on the 20th day of April 2010.



Commissioner of Oaths for the Province of Ontario

2322267.4

ROBERT B. WARREN

COURT OF APPEAL	
IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF: ABITIBOWATER 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
MOTION FOR LEAVE TO APPEAL	
WEIRFOULDS LLP Barristers & Solicitors Suite 1600, The Exchange Tower, P.O. Box 480, 130 King Street West, Toronto, ON M5X 1J5 Tel: 416-365-1110 Fax: 416-365-1876 <i>Attorneys for Her Majesty the Queen in Right of the Province of Newfoundland and Labrador</i>	