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AbitibiBowater Inc., Re

Her Majesty the Queen in right of the province of Newfoundland and Labrador, Petitioner-petitioner, v. AbitibiBowater Inc. and others, Respondents-debtors, and Ernst & Young inc., Impleaded party-Monitor, and Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, indenture trustee for the Senior Secured Noteholders, Impleaded Parties

Cour d'appel du Québec

Chamberland J.C.A.

Heard: 12 may 2010

Judgment: 18 may 2010

Docket: C.A. Qué. Montréal 500-09-020594-107

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Proceedings: refused leave to appeal *AbitibiBowater inc., Re (2010)*, 2010 QCCS 1261 (Que. S.C.)

Counsel: David R. Wingfield, Catherine Powell, for Petitioner-Petitioner

Sean F. Dunphy, Joseph Reynaud, for Respondents-debtors

Robert I. Thornton, Mtre Gilles Paquin, for Ernst & Young Inc.

Fred Myers, Mtre Jean-Yves Simard, for the Ad Hoc Committee of Bondholders

Mtre Vanessa Jodoin, for the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Subject: Insolvency; Environmental

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

Pulp and paper company had carried on industrial activities at several locations in province of Newfoundland and Labrador between 1905 and 2008 — In December 2008, company announced closure of its last remaining mill operation in province — Company experienced financial difficulties and placed itself under protection of Companies' Creditors Arrangement Act (CCAA) — Initial order was extended and claims procedure order (CPO) was issued for purpose of setting up claims procedure for company's creditors — Province, acting pursuant to Environmental Protection Act, issued five ministerial orders requiring company to perform, at its own expense, remediation actions with respect to sites where company had previously carried on its industrial activities — Province brought motion seeking

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declaration that orders were affected by neither CPO nor CCAA proceedings, and company contested motion, asserting that orders were stayed by stay of proceedings issued in initial order — Motion judge held that orders were financial in nature, should be treated as claims in CCAA proceedings and should be subject to compromise — Thus, province's motion was dismissed and company's conclusions were granted, albeit in part — Province brought motion for leave to appeal from judgment — Motion dismissed — Court applied test put forward by jurisprudence, and burden of proof rested on province — However, constitutional issues raised by province were irrelevant regarding true nature of orders — Motion judge had jurisdiction to determine nature of orders without being bound to form in which province had clothed its position — Motion judge did not immunize company from compliance with orders but merely characterized them in context of restructuring process — Motion judge's conclusion that orders were in substance financial in nature was finding of fact, thus unassailable — Appellate courts should be cautious about intervening in CCAA process, especially when restructuring process could be jeopardized — Therefore, appeal contemplated by province had no reasonable chance of success and leave to appeal should be denied.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Land — General principles

Pulp and paper company had carried on industrial activities at several locations in province of Newfoundland and Labrador between 1905 and 2008 — In December 2008, company announced closure of its last remaining mill operation in province — Company experienced financial difficulties and placed itself under protection of Companies' Creditors Arrangement Act (CCAA) — Initial order was extended and claims procedure order (CPO) was issued for purpose of setting up claims procedure for company's creditors — Province, acting pursuant to Environmental Protection Act, issued five ministerial orders requiring company to perform, at its own expense, remediation actions with respect to sites where company had previously carried on its industrial activities — Province brought motion seeking declaration that orders were affected by neither CPO nor CCAA proceedings, and company contested motion, asserting that orders were stayed by stay of proceedings issued in initial order — Motion judge held that orders were financial in nature, should be treated as claims in CCAA proceedings and should be subject to compromise — Thus, province's motion was dismissed and company's conclusions were granted, albeit in part — Province brought motion for leave to appeal from judgment — Motion dismissed — Court applied test put forward by jurisprudence, and burden of proof rested on province — However, constitutional issues raised by province were irrelevant regarding true nature of orders — Motion judge had jurisdiction to determine nature of orders without being bound to form in which province had clothed its position — Motion judge did not immunize company from compliance with orders but merely characterized them in context of restructuring process — Further, motion judge's conclusion that orders were in substance financial in nature was finding of fact, thus unassailable — Furthermore, appellate courts should be cautious about intervening in CCAA process, especially when restructuring process could be jeopardized — Therefore, appeal contemplated by province had no reasonable chance of success and leave to appeal should be denied.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Appels

Papetière avait poursuivi des activités industrielles en plusieurs endroits de la province de Terre-Neuve-et-Labrador entre 1905 et 2008 — En décembre 2008, la papetière a annoncé la fermeture de sa dernière usine encore en exploitation dans la province — Papetière a connu des difficultés financières et s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). — Ordonnance initiale a été prolongée et une ordonnance portant sur la procédure relative aux réclamations (OPPR) a été émise dans le but de mettre en place une procédure relative aux réclamations des créanciers de la papetière — Province, agissant sous le régime de la Environmental Protection Act, a émis cinq arrêtés ministériels exigeant de la papetière qu'elle exécute, à ses propres frais, la remise en état des endroits où la papetière avait auparavant poursuivi ses activités industrielles — Province a déposé une requête visant à faire déclarer que les arrêtés n'étaient visés ni par la OPPR ni par les procédures relatives à la LACC, et la papetière a contesté la requête en faisant valoir que l'exécution des arrêtés était suspendue en raison de la suspension des procédures ordonnée dans l'ordonnance initiale — Juge de la requête a statué que la nature des arrêtés était d'ordre financier, que les arrêtés devraient être traités comme des réclamations dans le cadre des procédures de restructuration et devraient être assujettis à un compromis — Ainsi, la requête de la province a été rejetée et les con-

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clusions recherchées par la papetière ont été accueillies, quoiqu'en partie — Province a déposé une requête pour permission d'appeler à l'encontre du jugement — Requête rejetée — Tribunal a appliqué le test mis de l'avant par la jurisprudence, et le fardeau de la preuve appartenait à la province — Toutefois, les questions constitutionnelles soulevées par la province étaient sans pertinence en regard de la véritable nature des arrêtés — Juge de la requête avait la compétence pour déterminer la nature des arrêtés sans se sentir limité par la description qu'en faisait la province dans son argumentaire — Juge de la requête n'a pas permis à la papetière de se libérer de ses obligations découlant des arrêtés mais a tout simplement placé ces arrêtés dans le contexte d'un processus de restructuration — Conclusion du juge de la requête à l'effet que la nature des arrêtés était d'ordre financier constituait une conclusion de fait, et à ce titre elle était inattaquable — Tribunaux d'appels devraient faire preuve de prudence avant d'intervenir dans le cadre d'un processus de restructuration, surtout lorsque ce processus pourrait être mis en péril — Par conséquent, l'appel envisagé par la province n'avait aucune chance raisonnable de succès et la permission d'appeler ne devrait pas être accordée.

Droit de l'environnement --- Protection accordée par la loi à l'environnement — Autorisations, permis et ordonnances — Terrain — Principes généraux

Papetière avait poursuivi des activités industrielles en plusieurs endroits de la province de Terre-Neuve-et-Labrador entre 1905 et 2008 — En décembre 2008, la papetière a annoncé la fermeture de sa dernière usine encore en exploitation dans la province — Papetière a connu des difficultés financières et s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Ordonnance initiale a été prolongée et une ordonnance portant sur la procédure relative aux réclamations (OPPR) a été émise dans le but de mettre en place une procédure relative aux réclamations des créanciers de la papetière — Province, agissant sous le régime de la *Environmental Protection Act*, a émis cinq arrêtés ministériels exigeant de la papetière qu'elle exécute, à ses propres frais, la remise en état des endroits où la papetière avait auparavant poursuivi ses activités industrielles — Province a déposé une requête visant à faire déclarer que les arrêtés n'étaient visés ni par la OPPR ni par les procédures relatives à la LACC, et la papetière a contesté la requête en faisant valoir que l'exécution des arrêtés était suspendue en raison de la suspension des procédures ordonnée dans l'ordonnance initiale — Juge de la requête a statué que la nature des arrêtés était d'ordre financier, que les arrêtés devaient être traités comme des réclamations dans le cadre des procédures de restructuration et devaient être assujettis à un compromis — Ainsi, la requête de la province a été rejetée et les conclusions recherchées par la papetière ont été accueillies, quoiqu'en partie — Province a déposé une requête pour permission d'appeler à l'encontre du jugement — Requête rejetée — Tribunal a appliqué le test mis de l'avant par la jurisprudence, et le fardeau de la preuve appartenait à la province — Toutefois, les questions constitutionnelles soulevées par la province étaient sans pertinence en regard de la véritable nature des arrêtés — Juge de la requête avait la compétence pour déterminer la nature des arrêtés sans se sentir limité par la description qu'en faisait la province dans son argumentaire — Juge de la requête n'a pas permis à la papetière de se libérer de ses obligations découlant des arrêtés mais a tout simplement placé ces arrêtés dans le contexte d'un processus de restructuration — Conclusion du juge de la requête à l'effet que la nature des arrêtés était d'ordre financier constituait une conclusion de fait, et à ce titre elle était inattaquable — Tribunaux d'appels devraient faire preuve de prudence avant d'intervenir dans le cadre d'un processus de restructuration, surtout lorsque ce processus pourrait être mis en péril — Par conséquent, l'appel envisagé par la province n'avait aucune chance raisonnable de succès et la permission d'appeler ne devrait pas être accordée.

Cases considered by *Jacques Chamberland J.C.A.*:

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — followed

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Statutes considered:

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Abitibi-Consolidated Rights and Assets Act, S.N. 2008, c. A-1.01

Generally — referred to

Code de procédure civile, L.R.Q., c. C-25

art. 95 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 13 — pursuant to

s. 14 — pursuant to

Environmental Protection Act, S.N. 2002, c. E-14.2

Generally — referred to

s. 99 — considered

s. 102(2) — considered

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612

Chapter 11 — referred to

MOTION by province, seeking leave to appeal from judgment reported at *AbitibiBowater inc., Re* (2010), 2010 QCCS 1261, 2010 CarswellQue 2812 (Que. S.C.), dismissing province's motion seeking declaration that environmental orders were not affected by process under Companies' Creditors Arrangement Act.

Jacques Chamberland J.C.A.:

1 I am seized, as a judge in chambers, of a motion by petitioner Her Majesty the Queen in the Right of the Province of Newfoundland and Labrador (the « Province ») for leave to appeal from a judgment rendered by Gascon J. of the Quebec Superior Court, on March 31, 2010, under the *Companies' Creditors Arrangement Act* (R.S. Canada, 1985, c. C-36, as amended) (the « CCAA »).^[FNI]

2 The respondents (« Abitibi ») form one of the world's largest publicly traded pulp and paper manufacturers.

3 From approximately 1905 to the end of 2008, it carried on extensive industrial activities at several locations in the province of Newfoundland and Labrador: mining and processing of minerals, at Buchans; pulp and paper operations, at Grand Falls-Windsor and Stephenville; shipping and storing, at Botwood; and logging camps at many different locations across the province.

4 On December 4, 2008, Abitibi announced the closure of its last remaining mill operation in the province, that located at Grand Falls-Windsor; the mill closure was scheduled to be effective March 2009.

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5 On December 16, 2008, the Province introduced and passed the *Abitibi-Consolidated Rights and Assets Act* (S.N.L. 2008, c. C-A-1.01) (the « *Abitibi Act* »), the purpose of which was, as summarized by the judge of first instance (at par. 54), a) to seize with immediate effect substantially all of the assets, property and undertakings of Abitibi in the province, b) to cancel substantially all outstanding water and hydroelectric contracts and agreements between Abitibi and the Province, c) to cancel pending legal proceedings of Abitibi against the Province in respect of water rights, d) to deny Abitibi any compensation for the seized assets and, finally, e) to deny Abitibi access to the courts to seek redress.^[FN2]

6 In April 2009, Abitibi filed a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement (« NAFTA ») for the losses allegedly arising from this confiscation effected by the Province.^[FN3]

7 Abitibi also filed for protection under the CCAA.

8 On April 17, 2009, the Quebec Superior Court issued an initial order (the « Initial Order ») pursuant to the CCAA with respect to Abitibi. The initial stay of proceedings has been extended a few times since, and more recently to June 18, 2010.

9 During the restructuring process undertaken as a result, a First Stay Extension Order was issued on May 14, 2009 and a Claims Procedure Order (the « CPO ») on August 26, 2009, the purpose of the CPO being to set up a claims procedure for Abitibi's creditors.

10 On June 12, 2009, the Province asked Abitibi to provide certain reports for the Abitibi sites, including environmental site assessment reports. On June 18, 2009, Abitibi replied that the request would remain under consideration in light of the *Abitibi Act*, the Initial Order issued under the CCAA and another pending ministerial order concerning the Buchans site. In July 2009, the Province's attorneys retained the services of environmental consultants to undertake environmental site assessments at the sites. On September 3, 2009, Abitibi and the Province entered into an agreement whereby the former would provide access to the sites to the environmental consultants for the purpose of conducting the assessments envisaged, subject to a number of conditions.

11 On October 16, 2009, the Province filed a Motion for a Declaration that the Petitioner is entitled to Access the Electronic Data Rooms Created by the Debtors (the « Data Room Motion »), the result of which is summarized by the judge of first instance in the judgment *a quo*:

[72] In that motion, the Province alleged that it needed to access the electronic data rooms of Abitibi to properly assess its financial status and make informed decisions in the restructuring. It maintained that it had a duty to inform itself of the present and future potential ability of Abitibi to cover the Province's claims.

[73] In particular, the Province argued that Abitibi was responsible towards it for alleged environmental contamination from the mine located in Buchans. Relying on numerous media reports that it then filed in the record, the Province claimed that because of Abitibi's economic activities, the latter had exposed itself to many environmental obligations, the precise extent of which remained unclear.

[74] The Province notably alleged that it had incurred significant costs in that regard. It added, furthermore, that agreements had been entered into for the Province's environmental consultants to have access to the sites for the purpose of determining the full nature and extent of Abitibi's environmental obligations.

[75] On November 9, 2009, the Court dismissed the Data Room Motion with costs. The Province did not appeal that ruling.

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[76] The Court notably concluded that the Province had not yet provided reasonable and convincing evidence in support of its alleged status of potential creditor for environmental problems resulting from Abitibi's economic activities.

[77] The Court emphasized that the Province wanted access to the electronic data rooms not to enhance the restructuring process, but to assess the extent of Abitibi's present and future ability to cover its undetermined and potential environmental claims that had yet to be filed in the claims process:

[88] Lastly, the alleged legitimate public interest relied upon by the Province is not in furtherance of the purposes of the *CCAA*. It is, to the contrary, in furtherance of the Province's own interest of determining the real value of its potential claims that are yet to be established.

[89] Put otherwise, the Province wants to have access to the electronic data rooms to better evaluate whether Abitibi's pockets will, one day, be deep enough.

12 In November 2009, the Province's environmental consultants issued the reports setting out the results of their environmental site assessment reports.[FN4]

13 On November 12, 2009, the Minister of Environment and Conservation of the Province, acting pursuant to *The Environmental Protection Act*, S.N.L. 2002, C-E-14.2, section 99 (the « *EPA* »), issued five Ministerial Orders against Abitibi (the « *EPA Orders* »), which the judge of first instance summarizes as follows:

[15] The *EPA Orders* were in relation to five (5) sites located in Newfoundland and Labrador («NL ») where Abitibi had carried on industrial activities at different times between 1905 and 2008. In essence, they purported to order Abitibi to perform, at its own expense, the following:

- a) the submission for approval by the Province, by January 15, 2010, of a detailed Remediation Action Plan for all sites identified as allegedly having exceedances greater than the applicable limits;
- b) the completion of the approved site remediation actions by January 15, 2011, or by another date as may be agreed upon with the Province's Department of Environment and Conservation («ENVC »); and
- c) the closure of all landfills and lagoons/impoundments associated with each site by January 15, 2011.

14 On the very same day, the Province served the Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act (the « *EPA Motion* »), the conclusions of which read as follows in its amended version of February 15, 2010:

GRANT this amended motion for a declaration regarding orders issued pursuant to the *Environmental Protection Act*, S.N.L. 2002, chap. E-14.02.

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

DECLARE that, for greater certainty, that the orders issued by the Minister against Abitibi on 12 November 2009

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pursuant to s. 99 of the EPA are not barred or extinguished and their enforceability is not otherwise affected by the Claims Procedure Order and, in particular, but without limiting the generality of the foregoing, by paragraphs 3(1) and 15 of that order.

EXEMPT, if applicable, the Petitioner from having to serve this motion and from any notice or delay of presentation.

GRANT such further and other relief as this Court deems just and proper.

GRANT the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

THE WHOLE WITHOUT COSTS, save and except in case of contestation.

15 For the Province, the EPA orders are in relation to the environment. They are not financial or monetary fines or orders and cannot qualify as « Claims' » under the CCAA. They simply require Abitibi to take steps to comply with its statutory obligations under the Province's EPA. As such the EPA Orders fall within the ambit of the First Stay Extension Order (par. 10.1) and are neither stayed nor subject to the claims process. In the alternative, if the judge intended for the CPO to nevertheless bar, extinguish or otherwise affect the enforceability of orders like the EPA Orders, he would be acting outside its statutory jurisdiction. In other words, to the extent that the CPO affects the enforceability of the EPA Orders it is constitutionally ineffective.

16 In regard to this alternative constitutional argument the Province served a Notice of Intention pursuant to Article 95 of the *Quebec Code of Civil Procedure* to the Attorney General for Canada and all the other provinces:

[25] In that regard, the Province served a Notice of Intention pursuant to Article 95 C.C.P. to the Attorney Generals for Canada and all the other provinces, indicating that it was hereby seeking a declaration that:

(1) a court vested with jurisdiction over a company pursuant to the CCAA does not possess the constitutional competence to exercise a statutory or discretionary power to bar or extinguish liabilities, obligations or duties owed to a province arising out of laws enacted by its legislature pursuant to s. 92 of the *Constitution Act, 1867*, save and except to the extent that the liability, obligation or duty is a « claim provable » within the meaning of s. 2 of the BIA;

(2) a court vested with jurisdiction over a company pursuant to the CCAA does not possess the constitutional competence to exercise a statutory or discretionary power to fetter the discretion of a Minister of a provincial Crown under a law validly enacted by that province; and

(3) the Quebec Superior Court does not have the constitutional competence to exercise a statutory or discretionary power under the CCAA to bar the enforcement of or to extinguish the non-monetary EPA Orders issued by the Province or to fetter the discretion of the Minister under the EPA.^[FN5]

17 As a result of this Notice of Intention, the Province of British-Columbia intervened to support the EPA Motion; the other Attorneys General did not.

18 The EPA Motion was contested by Abitibi, which not only asked for its dismissal but also sought itself a declaration confirming that:

(a) the EPA Orders are stayed by the stay of proceedings issued in the Initial Order and are not subject to the

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narrow exception provided at paragraph 10.1 of the First Stay Extension Order; and

(b) the Province's filing of any claim based in whole or in part on the EPA Orders is now barred by paragraph 15 of the Claims Procedure Order, such that no extension of the Claims Bar Date should be granted to allow the latter to file a claim on that basis in the claims process.

19 Abitibi's position was supported by key groups of its creditors and by the Impleaded Party (the « Monitor ») who, however, did not express any view on the issue of the extension, if any, of the claims bar date for the benefit of the Province.

20 The Motion was heard by Gascon J. on February 24, 25 and 26, 2010.

21 The judgment *a quo* was rendered on March 31, 2010. It is 312 paragraphs long. The questions to be resolved are identified at par. 125 of the judgment *a quo*:

[125] Based on this review of the motion at issue, the positions of the parties involved, and the applicable factual background and legal framework, the questions to be resolved in this case can be summarized as follows:

a) what is the true nature of the EPA Orders? Are they orders issued in regard of statutory non-monetary obligations of Abitibi or orders that are in substance financial or monetary in nature?

b) if the EPA Orders are orders issued in regard of statutory non-monetary obligations of Abitibi, does the Court have either the statutory jurisdiction or constitutional authority to include them in the definition of « Claim » found in the Claims Procedure Order?

22 Gascon J.'s reasoning is summarized at paragraph 127-139:

[127] Contrary to Abitibi, the Province and the HMQBC did not put much emphasis on the factual context relevant to the questions at issue. With all due respect to their position, the Court considers that this case must, in the end, be decided first and foremost taking into consideration the particular fact pattern in dispute.

[128] To that end, nobody truly contests that in facilitating the conclusion of an arrangement under the CCAA, the Court has jurisdiction to subject « claims » to a claims process and to determine who Abitibi's « creditors » might be in that regard. In doing so, the Court can certainly seek to uncover the true nature of the EPA Orders. Their proper characterization is within the jurisdiction of the Court.

[129] 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.

[130] In the Court's opinion, based on the evidence filed in the record, the EPA Orders are in substance financial or monetary in nature. Consequently, they are not exempted from the First Stay Extension Order or the Claims Procedure Order.

[131] As a result, the monetary consequences of these orders should be treated as claims in these CCAA proceedings. Such claims shall be subject to compromise and the Province, if it asks and is allowed to file a late proof of claim in this respect, 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.

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[132] There is, accordingly, 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.

[133] To reach this conclusion, the Court relies on many considerations, including:

- The provisions of the *CCAA*;
- The true nature and impact of the EPA Orders;
- The factual context of their issuance and their content;
- The Province's behavior prior and after their issuance;
- The EPA and the applicable case law; and
- The end result of the Province's position.

[134] In view of this conclusion, it is 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 statutory non-monetary obligations in the definition of « Claim » found in the Claims Procedure Order.

[135] 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.

[136] This finding entails the dismissal of the Intervention of HMQBC and the AGBC as well.

[137] Abitibi remains in ownership and occupation of the relevant properties it still possesses in BC. No orders of any sort and no notice of non-compliance are outstanding in regard of any environmental obligations of Abitibi in that province. Simply put, there are no pending issue to resolve between Abitibi and the Intervening Parties.

[138] This being so, the conclusions sought by Abitibi in its Amended Contestation will be granted, albeit only in part. The Court considers that it is premature to immediately rule that the Province is barred from filing any late claim in the claims process as a result of the EPA Orders. This issue will be addressed, if need to, if and when such a request is in fact presented.

[139] The Court's explanations follow.

23 The conclusions of the judgment read as follows:

[307] **DISMISSES** the Amended Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act of the Petitioner, Her Majesty the Queen in Right of the Province of Newfoundland and Labrador (the « Province »);

[308] **DISMISSES** the Intervention of the Intervening Parties, Her Majesty the Queen in right of the Province of British Columbia (the "HMQBC") and the Attorney General for British Columbia (the "AGBC");

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[309] **DECLARES** that the orders issued against the Debtors by the Minister of Environment and Conservation of the Province on November 12, 2009, pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, chap. E-14.02, (the « **EPA Orders** »), are stayed under paragraph 10 of the Initial Order issued by the Court on April 17, 2009, and are not subject to the exception found at paragraph 10.1 of that Initial Order;

[310] **DECLARES** that the Province's filing of any claim based on the EPA Orders is subject to the Claims Procedure Order issued by the Court on August 26, 2009, including the claims process detailed therein;

[311] **RESERVES** to the Province its right, if any, to request an extension of the Claims Bar Date (as defined in the Claims Procedure Order) in that regard and to the Debtors their right, if any, to contest any such extension request;

[312] **WITH COSTS** against the Province in favor of the Debtors, but **WITHOUT COSTS** against the HMQBC and the AGBC.

24 A summary presentation of the Province's grounds of appeal, going by chapter titles only, would read as follows:

1. The judge of first instance disregarded the principles of federalism.

i) He was required to give effect to the *EPA* and the *Abitibi Act* but failed to do so;

ii) The Minister of Environment and Conservation, and not the judge acting pursuant to the CCAA, has the exclusive jurisdiction to decide how the *EPA* is to be applied to Abitibi;

iii) The Legislature of the Province, and not the judge acting pursuant to the CCAA, has the exclusive jurisdiction to determine property and civil rights in the Province.

2. Provincial legislation operates in the insolvency context.

3. The CCAA cannot be interpreted to give a judge acting pursuant to the CCAA the power to immunise Abitibi from compliance with the EPA Orders or to avoid the *Abitibi Act*.

i) The judge acting pursuant to the CCAA cannot define « claim » however he or she wishes;

ii) The judge acting pursuant to the CCAA does not have the discretionary power to ensure a successful restructuring regardless of the law.

25 There is no appeal as of right from decisions made under the CCAA; leave to appeal is a condition precedent to an appeal being allowed to proceed (s. 13 CCAA).

26 This requirement stems from a clear intention of Parliament to restrict appeal rights having regard to the nature and object of CCAA proceedings; an appeal court should be cautious about intervening in the CCAA process. This is not to say that leave will never be granted but it should be so only « sparingly » (*Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), at 272).

27 The test for determining whether leave should be granted was enunciated by Wittman J.A. (as he then was) in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]):

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The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: (. . .) 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.

28 This test was considered and applied by this Court in many instances.

29 The burden rests on the party applying for leave to demonstrate that the cumulative criteria set forth above are met.

30 This is the test I intend to apply here.

31 It is my view that the Province's application raises no issue which satisfies the test for granting leave to appeal under the CCAA.

32 The Province's grounds of appeal are ably couched in constitutional terms (articulated mainly around the power of a judge acting pursuant to the CCAA to « immunise » a company from compliance with orders issued under provincial environmental legislation or to avoid the consequences of provincial expropriation legislation) but, as the judge of first instance noted, these constitutional issues, albeit of undeniable intellectual interest, are of no genuine importance in the face of his conclusion regarding the true nature of the EPA Orders.

33 The judgment *a quo* does not « immunise » Abitibi from compliance with the EPA Orders, it merely characterizes these orders in the context of the restructuring process engaged pursuant to the CCAA.

34 As a matter of fact, Gascon J. declined to grant Abitibi's conclusion seeking, in its Amended Contestation of January 20, 2010, a declaration confirming that the EPA Orders were stayed and that the Province's filing of a claim based on such orders is now barred by the terms of the CPO (par. 15 thereof); on the contrary, he explicitly reserved the Province's right to seek an extension of the claims bar date in order to file a claim and, should its claim be allowed, to participate in the negotiation of, and share in the proceeds from, any plan of arrangement, alongside Abitibi's other unsecured creditors. There is thus no question of relieving Abitibi from its environmental obligations under the Province's relevant legislation.

35 The first question the judge of first instance had to answer was whether the EPA Orders were issued in regard to statutory non-monetary obligations of Abitibi or were in substance financial or monetary in nature. All parties appearing before him agreed that if the EPA Orders were financial or monetary in nature, as opposed to being pure regulatory orders, they then would 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 the Abitibi restructuring would therefore cover them.

36 A judge acting pursuant to the CCAA has jurisdiction to subject « claims » to a precise claims process and to determine who Abitibi's « creditors » might be in that regard. As mentioned above, the Province does not dispute this essential premise; rather it disputes whether the EPA Orders were properly found to be truly financial or monetary in nature.

37 In my view there is no reasonable chance of success to the Province's position in this connection.

38 Gascon J. found, on the facts and in the context of this case, that the EPA Orders were in substance financial or

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monetary in nature. This is essentially a finding of fact reached after considering 1) the true nature and impact of the CCAA (judgment *a quo*, par. 160-183), 2) the factual context of the issuance of the EPA Orders, and their content (par. 184-211), 3) the Province's behaviour prior and after the issuance of the EPA Orders (par. 212-236), 4) the *EPA* and the applicable case law (par. 237-271) and 5) the end result of the Province's position (par. 272-296).

39 I fail to see how this conclusive finding of fact definitively fixing the true character of the dispute as being in pith and substance one which relates to a monetary claim against Abitibi could be successfully challenged in appeal.

40 The Province's position is a) that it alone holds the right to modify the nature of its claim - from one issued in regard of Abitibi's statutory non-monetary obligation into a financial or monetary one - by converting the regulatory order into a monetary one, using the debt-creating provision of the *EPA*,^[FN6] and b) that it can, if it so chooses, postpone that conversion until after the restructuring is completed.

41 This position is, in my opinion, untenable in the context of an insolvent company involved in a restructuring process pursuant to the CCAA; this contention, as Gascon J. observed, boils down to claiming « that a provincial regulator could have the non reviewable right to determine whether obligations it controls or creates will be subject to compromise under the CCAA or whether they will enjoy a superiority beyond the reach of compromise » (judgment *a quo*, par. 273).

42 The judge of first instance, acting pursuant to the CCAA, had jurisdiction to subject all « claims » against Abitibi to a claims process (the « CPO »), to determine who Abitibi's « creditors » might be and, in that context, to determine the nature of the EPA Orders without being bound to the form in which the Province had clothed its position.

43 The compromise of monetary claims is at the very core of the bankruptcy and insolvency jurisdiction underpinning the CCAA. It was made clear in the evidence adduced before the judge of first instance that the EPA Orders advanced by the Province, if found to survive the CCAA process uncompromised, would be fatal to a restructuring of Abitibi.

44 I agree with counsel for Abitibi that there is nothing new or unusual in the analysis brought by the judge of first instance of what a « claim » is under the CCAA: the broad definition of « claim » under the CCAA includes « contingent claims », a legal reality reflected in the definition of « claim » in the CPO which, it is worth noting in passing, was not contested by the Province, either before it was issued, by making representations to the judge of first instance, or after, by lodging an appeal against it, despite the fact that its name appeared on the service list and that it was made aware of its existence (judgment *a quo*, footnote 9).

45 Again I agree with counsel for Abitibi that Gascon J., by dismissing the notion that the Province could choose the timing of the creation of its financial or monetary claim against Abitibi deriving from the EPA Orders, properly prevented it from gaining an unfair advantage over the company's other creditors, the whole in line with the purposes of the CCAA.

46 For these reasons, and without getting into all the details of the reasoning of the judge of first instance, I see no *prima facie* merit to the appeal envisaged by the Province.

47 In the context of an appeal presenting no reasonable chance of success, it becomes obvious that the appeal proceedings would « unduly hinder the progress of the action ». 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. All parties to the CCAA proceedings, except the Province, agree that the appeal would necessarily lengthen the restructuring process and would, according to the Monitor (Plan of Argument of the Monitor, May 10, 2010, par. 10), « hinder the ability of [Abitibi] to successfully restructure ».

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48 A draft of Abitibi's plan of arrangement or compromise was filed on May 4, 2010 with a view, according to its attorneys, to conforming to a timetable for a rapid exit from the CCAA proceedings by the end of September 2010. If leave to appeal was to be granted, the fate of the EPA Orders would in all likelihood remain outstanding at the time of the meeting of creditors and the vote in respect of Abitibi's plan. According to the Monitor, the fact that the matter is not finally determined prior to the vote in respect of the plan will have a material impact on the net value available to Abitibi's creditors and create concerns for the sources of potential exit financing. The restructuring process, concludes the Monitor, will likely become more complicated, including further delays and costs.

49 One final word before concluding. The Province is concerned with the judge of first instance referring to the possibility for Abitibi « to raise the counter-claim argument in front of the CCAA Court »^[FN7] 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.

50 This concern does not justify, in my opinion, granting leave to appeal. First, this statement from the judge of first instance is nowhere to be found in the conclusions of the judgement *a quo*. Second, the statement is only one of the many reasons expressed by the judge of first instance to justify the dismissal of the Province's motion. Third, no doubt this issue will be raised again, and fully debated, if the Province is allowed to file a late claim based on the EPA Orders.

51 The Province's Motion for Leave to Appeal pursuant to Sections 13 and 14 of the CCAA is dismissed, with costs.

Motion dismissed.

^{FN1} Any reference to the CCAA shall refer to the version of the Act applicable to the present proceedings, and not to the « Amended CCAA » in force since the amendments of September 18, 2009.

^{FN2} « According to Abitibi, its losses resulting from the enactment of the *Abitibi Act* will exceed \$300 million » (judgment *a quo*, par. 59).

^{FN3} « (...) Abitibi officially filed, on February 25, 2010, a Notice of Arbitration under chapter 11 of NAFTA to pursue its claim for redress » (judgment *a quo*, par. 62).

^{FN4} « These reports concluded that the Abitibi Sites covered by the assessments (and, in many instances, the property adjacent thereto) suffered from extensive contamination allegedly in excess of applicable standards » (judgment *a quo*, par. 78).

^{FN5} Judgment *a quo*, par. 25.

^{FN6} S. 102(2) of the *EPA* permits the minister to take action to carry out the terms of the order if the person to whom it is directed fails to comply with it; the costs, expenses or charges so incurred are recoverable « as a debt owed to the Crown ».

^{FN7} Judgment *a quo*, par. 189.

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