

File Number:

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)**

B E T W E E N:

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

Applicant
(Appellant)

- and -

**ABITIBIBOWATER INC., ABITIBI-CONSOLIDATED INC.,
BOWATER CANADIAN HOLDINGS INC., THE AD HOC COMMITTEE OF
BONDHOLDERS, THE AD HOC COMMITTEE OF SENIOR SECURED
NOTEHOLDERS, and U.S. BANK NATIONAL ASSOCIATION
(INDENTURE TRUSTEE FOR THE SENIOR SECURED NOTEHOLDERS)**

Respondents
(Respondents)

**APPLICATION FOR LEAVE TO APPEAL
OF HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND
AND LABRADOR, APPLICANT**

Pursuant to Subsection 40(1) of the *Supreme Court Act*, and
Rule 25 of the Rules of the Supreme Court of Canada

— VOLUME I OF II —

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TAB 1

File Number:

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)**

B E T W E E N:

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

Applicant
(Appellant)

- and -

**ABITIBIBOWATER INC., ABITIBI-CONSOLIDATED INC.,
BOWATER CANADIAN HOLDINGS INC., THE AD HOC COMMITTEE OF
BONDHOLDERS, THE AD HOC COMMITTEE OF SENIOR SECURED
NOTEHOLDERS, and U.S. BANK NATIONAL ASSOCIATION
(INDENTURE TRUSTEE FOR THE SENIOR SECURED NOTEHOLDERS)**

Respondents
(Respondents)

**NOTICE OF APPLICATION FOR LEAVE TO APPEAL
OF HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF
NEWFOUNDLAND AND LABRADOR, APPLICANT**

Pursuant to Subsection 40(1) of the *Supreme Court Act*, and
Rule 25 of the Rules of the Supreme Court of Canada

TAKE NOTICE that Her Majesty The Queen In Right of the Province of Newfoundland and Labrador (the "**Province**") hereby applies for an order granting the Province leave to appeal to this Court, pursuant to subsection 40(1) of the *Supreme Court Act*, and Rule 25 of the Rules of the Supreme Court of Canada, from the judgment of the Court of Appeal for Québec, Court of Appeal File Number 500-09-020594-107 (500-11-036133-094), made 18 May 2010; or for such further or other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. In this case the courts below held that the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") could be used to relieve AbitibiBowater Inc. and its affiliates (collectively, "**Abitibi**") of its statutory duty to comply with orders ("**EPA Orders**") made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("**EPA**") of the Province of Newfoundland and Labrador ("**Province**") to restore the lands and waters of the Province that had been polluted by Abitibi's century-long industrial activities in the Province.
2. Industrial pollution is one of the scourges of the modern age. Whether through deliberate action or carelessness, environmental contamination is frequently the by-product of industry's quest for profits. From the Sydney tar ponds in Cape Breton to the Cheakamus River derailment in British Columbia and the Gulf of Mexico oil spill, examples of catastrophic industrial pollution can be found across Canada and internationally.
3. In an effort to prevent pollution and to redress its effects, the federal and all provincial governments have enacted environmental protection legislation. At the heart of all this legislation is the "polluter-pay" principle. The "polluter-pay" principle requires that the person who is responsible for pollution be responsible for cleaning it up. The point of this principle is to ensure that governments are not left to clean up pollution caused by industrial activities and that taxpayers are not left footing the bill. This principle has become entrenched in the public policy of Canada and has been endorsed by this Court.
4. Consistent with the "polluter-pay" principle, the EPA Orders required Abitibi to develop and implement a remediation plan to restore property in the Province to its pre-contaminated state. Contrary to this principle and the terms of the EPA, the decisions below shifted the obligation and costs of removing contamination of the lands and waters of the Province from Abitibi and its creditors to the Province and its taxpayers.

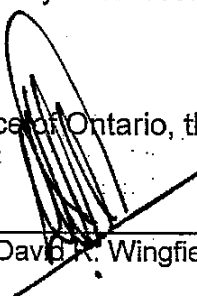
5. This case raises thus raises the following question of public importance: May a debtor's statutory duty to remove environmental contamination be extinguished under the CCAA like a commercial debt?

6. Three specific issues are raised:

- (i) The decision conflicts with judgments of other provinces that have considered the application of provincial environmental law to federal bankruptcy and insolvency law. Resolving this conflict and ensuring consistency across the country in the application of federal bankruptcy and insolvency legislation is a matter of public importance.
- (ii) The case raises a policy issue under federal bankruptcy and insolvency law over the question of who should bear the costs of compliance with environmental law (and by necessary implication, other regulatory laws) by a company attempting to restructure: the company's creditors or the public at large?
- (iii) The case raises an issue about the limits of the CCAA Court's power: whether the CCAA provides a court with the statutory authority to remove all hurdles under provincial law that impair a debtor company's ability successfully to restructure under the CCAA?

Dated at the City of Toronto, in the Province of Ontario, this 13th day of August 2010.

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NOTICE TO THE RESPONDENTS: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.

TAB 2

File Number:

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)**

BETWEEN:

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

Applicant
(Appellant)

- and -

**ABITIBIBOWATER INC., ABITIBI-CONSOLIDATED INC.,
BOWATER CANADIAN HOLDINGS INC., THE AD HOC COMMITTEE OF
BONDHOLDERS, THE AD HOC COMMITTEE OF SENIOR SECURED
NOTEHOLDERS, and U.S. BANK NATIONAL ASSOCIATION
(INDENTURE TRUSTEE FOR THE SENIOR SECURED NOTEHOLDERS)**

Respondents
(Respondents)

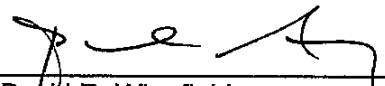
**CERTIFICATE OF HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND AND LABRADOR,
APPLICANT**

Pursuant to Subsection 40(1) of the *Supreme Court Act*, and
Rule 25 of the Rules of the Supreme Court of Canada

I, **DAVID R. WINGFIELD**, solicitor for the Applicant, hereby certify that
there is no sealing order or ban on the publication of evidence or the names or identity
of a party or witness in this case.

Dated in the City of Toronto, in the Province of Ontario, this 13th day of August 2010.

SIGNED BY:


for David R. Wingfield
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TAB 3

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: MARCH 31, 2010

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

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

And

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
AND THE ATTORNEY GENERAL OF BRITISH COLUMBIA**

Intervening parties

**JUDGMENT ON AMENDED MOTION FOR A DECLARATION REGARDING ORDERS
ISSUED PURSUANT TO THE ENVIRONMENTAL PROTECTION ACT (#445)**

INTRODUCTION

[1] This judgment deals with the impact of potential environmental obligations of a debtor company upon its restructuring process under the CCAA¹.

[2] On 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.

[3] Therefore, when such orders merely command taking steps to comply with statutory duties for the protection of the environment, the Province submits that the resulting obligations imposed upon Abitibi are not subject to compromise under the Act.

[4] On the other hand, Abitibi considers that when these orders concern pre-filing liabilities and obligations, and remain in substance financial or monetary in nature, they are subject to both the stay of proceedings and the claims process contemplated by the CCAA.

[5] For Abitibi, to rule otherwise would grant a kind of super-priority status to a regulatory body for pre-filing claims, since the liabilities arising therefrom would then remain unaffected by the restructuring process. That would in turn significantly challenge its ability to successfully emerge from the present CCAA proceedings.

[6] Whatever the outcome is, the likely consequences for all stakeholders involved are serious. The potential environmental obligations at issue may entail expending huge sums of money in remediation costs: at minimum, tens of millions of dollars, quite probably, well over 100, perhaps; much higher than that.

[7] As stated by the Monitor², amounts of that magnitude are likely to be material to the estate of Abitibi and to impact on its ability to effect a viable plan of arrangement.

[8] For an understanding of the context, it is necessary, before analysing each side's arguments, to review the motion at issue, the positions of the parties involved, and the applicable factual background and legal framework.

THE MOTION AT ISSUE

[9] On April 17, 2009, the Court issued an initial order (the "**Initial Order**") pursuant to the CCAA with respect to Abitibi. The initial stay of proceedings was first extended to September 4, 2009, then, to December 15, 2009, afterwards, to March 15, 2010, and more recently, to June 18, 2010.

¹ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

² See, Monitor's 34th Report, dated February 19, 2010.

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[10] During the complex restructuring process undertaken as a result, the Court notably issued a First Stay Extension Order, on May 14, 2009, and a Claims Procedure Order, on August 26, 2009.

[11] The First Stay Extension Order included, at the request of the Attorney General for Canada, the following amendment to the Initial Order:

10.1. ORDERS that the aforementioned stay cannot be interpreted as to restrict or prevent Her Majesty the Queen, or her agents, from exercising powers, rights or duties in relation to matters involving public health, safety, security, public order or the environment against the Petitioners, the Partnerships, the Property, the Directors or others, providing that any financial or monetary fines or orders shall be stayed.

[12] As for the Claims Procedure Order, its purpose was to set up a claims procedure for Abitibi's creditors. Paragraph 3(t) thereof defined "Claim". That definition was similar, if not identical, to that used in the vast majority of similar orders issued in CCAA proceedings over the recent years:

"Claim" means any right or claim of any Person against one or more of the Canadian Petitioners or Partnerships in connection with any indebtedness, liability or obligation of any kind whatsoever of one or more of the Canadian Petitioners or Partnerships, whether reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including without limitation any claim arising from or caused by the repudiation by a Canadian Petitioner or Partnership of any contract, lease or other agreement, whether written or oral, the commission of a tort (intentional or unintentional), any breach of duty (legal, statutory, equitable, fiduciary or otherwise), any right of ownership or title to property, employment, contract, a trust or deemed trust, howsoever created, any claim made or asserted against any one or more of the Canadian Petitioners or Partnerships through any affiliate, or any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any grievance, matter, action, cause or chose in action, whether existing at present or commenced in the future, based in whole or in part on facts which existed on the Canadian Filing Date, together with any other claims of any kind that, if unsecured, would constitute a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3; provided that "Claim" shall not include any Excluded Claim.

[13] Paragraph 15 stated in turn that unless otherwise ordered by the Court, any creditor who did not deliver a proof of claim in accordance with paragraphs 10, 12 and 13 of the Claims Procedure Order would be forever barred from asserting such against Abitibi. Accordingly, such a claim would be extinguished for good, with no entitlement to vote on, or receive any distribution from, any plan.

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[14] On November 12, 2009, the Province, through its Minister of Environment and Conservation (the "Minister"), issued five (5) Ministerial Orders (the "EPA Orders")³ against Abitibi pursuant to s. 99 of its *Environmental Protection Act* (the "EPA")⁴.

[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..

[16] On the day of issuance of the EPA Orders, the Province served the Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act (the "EPA Motion") that is the object of this judgment.

[17] In the EPA Motion, the Province asserts that the First Stay Extension Order does not prevent the federal or provincial governments from exercising their powers, rights or duties in relation to public health, safety, security, public order or the environment, save for the financial or monetary fines or orders issued by these governments that remain stayed as a result of the Initial Order.

[18] This notwithstanding, the Province maintains that it is possible to interpret the Claims Procedure Order in such a manner that renders it inconsistent with the First Stay Extension Order. For instance, according to the Province, whereas the First Stay Extension Order permits it to issue non-monetary orders requiring Abitibi to comply with statutory environmental obligations, the Claims Procedure Order appears to bar, extinguish or otherwise affect the enforceability of such orders.

[19] To avoid this result, the Province, by the EPA Motion, seeks a declaration:

- (a) that the Claims Procedure Order shall not bar, extinguish or affect the enforceability of orders made against the Debtors, the Property or the Directors (all as defined in the Initial Order) by the federal or provincial governments pursuant to their exercise of powers, rights or duties in relation to matters involving public health, safety, security, public order or

³ Exhibit NL-6.

⁴ S.N.L. 2002, c. E-14.2.

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the environment, provided that any financial or monetary fines or orders may be affected by the Claims Procedure Order; and

- (b) that the EPA Orders are not barred or extinguished and their enforceability is not affected by the Claims Procedure Order, in particular, by paragraphs 3(t) and 15 thereof.

THE POSITIONS OF THE PARTIES

1) The Province⁵

[20] For the Province, the EPA Orders are in relation to the environment. They are not financial or monetary fines or orders and cannot be qualified as "claims" under the CCAA. They simply require Abitibi to take steps to comply with its statutory obligations for the protection of the environment.

[21] In this respect, the Province relies on some decisions⁶ that have ruled that similar non-monetary statutory obligations, being public duties owed to the community in general, are not "claims provable" under the BIA since the enforcing authority does not act as a "creditor" of the person owing the duty.

[22] As such, the Province argues that the EPA Orders fall within the ambit of paragraph 10.1 of the First Stay Extension Order and are neither stayed nor subject to the claims process. It adds that it could not have been the intention of the Court to issue a Claims Procedure Order with terms that conflict with and undermine the First Stay Extension Order.

[23] In the alternative, if the Court intended for the Claims Procedure Order to nevertheless bar, extinguish or otherwise affect the enforceability of orders like the EPA Orders, the Province considers that the Court acted outside of its statutory jurisdiction.

[24] The Province pleads that these orders are within its constitutional competence. Conversely, the ability to bar, extinguish or otherwise affect their enforceability is not within the constitutional competence of Parliament. Therefore, to the extent that paragraph 15 of the Claims Procedure Order affects this enforceability, it is constitutionally ineffective.

⁵ See, Amended Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act, dated February 15, 2010.

⁶ Notably, *Panamericana de Blennes Y Servicios (Receiver of) v. Northern Badger Oil & Gas Ltd.*, (1991) 81 D.L.R. (4th) 280 (Alta C.A.) ("*Panamericana*"), leave to appeal to the Supreme Court refused; *Strathcona (Country) v. Fantasy Construction Ltd. (Trustee of)*, (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*"); *Canada Trust Co. v. Buloara Corp.*, (1980) 39 C.B.R. (N.S.) 152 (Ont. C.A.) ("*Buloara*"), affirming (1980) 34 C.B. R. (N.S.) 145 (Ont. S.C.).

[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*⁷, 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*⁸;
- (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*⁹.

2) The Intervening Parties¹⁰

[26] As a result of this Notice of Intention, Her Majesty the Queen in right of the Province of British Columbia ("HMQBC") and the Attorney General for British Columbia (the "AGBC") intervened to support the EPA Motion. The other Attorney Generals did not.

[27] From a factual standpoint, the situation in British Columbia ("BC") is, however, quite different than the one prevailing in NL. Even though the Debtors still own properties in that province, HMQBC confirmed that in BC, no orders of any sort are outstanding against Abitibi in terms of environmental obligations.

[28] Nevertheless, HMQBC and the AGBC elected to intervene herein because, similarly to the Province, they are concerned about the definition of "Claim", be it in the Claims Procedure Order or as such definition may be carried forward into Abitibi's proposed plan of arrangement or in any other orders in these proceedings.

[29] HMQBC submits that any such definition is not, as a matter of statutory interpretation, within the meaning of "claim" under the CCAA, nor otherwise contemplated to be subject to compromise or arrangement under that Act. Accordingly,

⁷ 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C., 1985, App. II, n° 5 (the "*Constitution Act, 1867*").

⁸ *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*").

⁹ It is worth noting that the Province never contested the Claims Procedure Order, nor did it lodge any appeal against it. As one of the numerous parties appearing on the Service List, it had been made aware of its existence.

¹⁰ See, Intervention, dated January 12, 2010.

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it would be beyond the jurisdiction of the Court, through any order containing or adopting such a definition, to purportedly capture, compromise, enjoin future proceedings respecting and/or extinguish any statutory non-monetary obligations arising under a provincial or federal enactment.

[30] On the constitutional issue raised by the Province, the AGBC adds that:

- (a) the CCAA should not be interpreted in a manner that would exceed the proper bounds of the ability of Parliament, under s. 91 of the *Constitution Act, 1867*, to make laws on matters of bankruptcy and insolvency. It should not be interpreted so as to impair the operation of a validly enacted provincial legislative scheme and intrude into the provinces' exclusive authority under s. 92 of that Act. It would be contrary to those principles if the CCAA was interpreted to support orders based on or including the definition of "Claim" used in the Claims Procedure Order. The CCAA, and the definition of "claim" in that Act, are properly interpreted not to include statutory non-monetary obligations of Abitibi under any provincial enactment;
- (b) In CCAA proceedings, the Court's jurisdiction to rule provincial enactments inapplicable or inoperative is predicated on the application of doctrines of constitutional law. It would be contrary to these doctrines for the Court (i) to give effect to a law or purpose of Parliament that is not within or necessarily incidental to the powers granted under s. 91(21) of the *Constitution Act, 1867*, or (ii) to apply the CCAA to impair the operation of provincial legislative schemes enacted pursuant to the powers granted to provinces under s. 92 of the Act. Hence, it would be beyond the Court's jurisdiction to render any provincial enactment creating statutory non-monetary obligations constitutionally inapplicable to or inoperative in respect of Abitibi through any order approving the definition of "Claim" used in the Claims Procedure Order; and
- (c) It is beyond the ability of Parliament to make laws on or necessarily incidental to matters of bankruptcy and insolvency empowering a court in proceedings under the CCAA to effectively engage in a judicial review of the exercise of statutory powers under provincial enactments. It is therefore beyond the jurisdiction of the Court to make orders or declarations affecting or enjoining, other than temporarily, any regulatory body proceedings or decisions relating to statutory non-monetary obligations of Abitibi.

3) Abitibi¹¹

[31] Abitibi contests the EPA Motion and concludes that it should be dismissed entirely. Moreover, it seeks itself a declaration confirming that:

¹¹ See, Amended Contestation, dated January 20, 2010.

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

[32] Abitibi takes the position that the EPA Orders are in pith and substance financial or monetary in nature. They were thus issued in violation of both the Initial Order and First Stay Extension Order. As the EPA Orders are not exempted from the stay of proceedings, Abitibi says that there is no basis to grant the conclusions of the EPA Motion that, in effect, would give the Province a preference over the other creditors.

[33] Abitibi pleads that the EPA Orders primarily concern assets that are no longer in its power, possession or control.

[34] Three of the five EPA Orders relate to assets which, on December 16, 2008, have been unilaterally expropriated without compensation by the Province pursuant to its *Abitibi-Consolidated Rights and Assets Act*¹². That being so, in respect of these assets, it is the Province that bears the primary environmental responsibility as the "person responsible" under its own legislation.

[35] For Abitibi, the EPA Orders are, consequently, nothing more than a thinly disguised demand for money, in effect asking it to improve the value of the confiscated property for the benefit of its "illegitimate" new owner, the Province.

[36] Abitibi adds that by suddenly issuing the EPA Orders, the Province displayed a total lack of impartiality and was in a situation of conflict of interest, as the EPA Orders were clearly designed to enhance the property value of lands confiscated from Abitibi and now allegedly owned by the Province.

[37] With respect to the two other sites at issue, Abitibi contends that it ceased conducting any active business on these lands well prior to the commencement of the CCAA proceedings. As such, the two EPA Orders pertaining to these assets are fundamentally monetary in nature as well: they seek to compel Abitibi to expend material sums of money for assets not used in its business and with no net value.

[38] As a matter of fact, Abitibi submits that these assets are in the process of being disposed of, failing which they will be placed in the hands of a receiver prior to Abitibi's emergence from these CCAA proceedings. During the hearing of the EPA Motion, Abitibi indeed served a specific Motion in that regard¹³.

¹² S.N.L. 2008, c. A-1.01 (the "*Abitibi Act*").

¹³ See, Motion for the Issuance of an Order Authorizing the Sale of Non-core Properties, dated February 25, 2010.

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[39] In short, Abitibi argues that it either is, or will shortly be, nothing else than a former owner or occupier in respect of all of the assets that are the subject matter of the EPA Orders.

[40] That being so, Abitibi suggests that, by their true nature, the EPA Orders are financial or monetary orders. Their real intended effect is to require millions of dollars of expenditures of creditor money for the improvement of lands confiscated by the Province or which will shortly be placed in the hands of a receiver.

[41] In light of the bad faith displayed by the Province in issuing the "tactical" EPA Orders, as well as its unlawful and confiscatory actions in relation to the *Abitibi Act*, Abitibi states that the Court should not grant the Province any extension of the Claims Bar Date. Rather, by failing to file a claim in due course, the Province deliberately and knowingly chose to ignore the Claims Bar Date established by the Claims Procedure Order. As a result, Abitibi concludes that all the Province's claims in that regard are now barred.

[42] Key groups of creditors of Abitibi support its position herein. They include the Term Lenders, the Senior Secured Noteholders and the Ad Hoc Committee of the Bondholders. The Monitor also supports the position of Abitibi for the dismissal of the EPA Motion. The Monitor does not express any view, however, on the issue of the extension, if any, of the Claims Bar Date for the benefit of the Province.

THE FACTUAL BACKGROUND¹⁴

[43] The factual background relevant to the debate revolves around three issues: the industrial activities of Abitibi in NL, the enactment of the *Abitibi Act* and the EPA Orders.

1) Abitibi's Industrial Activities in NL

[44] Abitibi is one of the world's largest publicly traded pulp and paper manufacturers. It produces a wide range of newsprint and commercial printing papers, market pulp and wood products. It owns interests in or operates pulp and paper facilities, wood products facilities and recycling facilities located in Canada, the United States, the United Kingdom and South Korea.

[45] From approximately 1905 to the end of 2008, it carried on extensive industrial activities in NL. These activities extended from mining and processing minerals, to cutting and milling timber, to making wood pulp and paper products, to shipping and storing materials, and to related activities.

[46] These activities were carried on at several locations in NL (the "Abitibi Sites"):

¹⁴ The Province, the Intervening Parties and Abitibi agree that the record is properly constituted of 1) the written proceedings filed by each one, all duly supported by affidavits, 2) Exhibits NL-1 to NL-16 and D-1 to D-6, 3) the Monitor's 34th Report of February 19, 2010, and 4) the viva voce testimonies of two witnesses, Mrs. Ballard for the Province and Mrs. Minville for Abitibi.

- (i) mining and processing of minerals: at Buchans;
- (ii) pulp and paper operations: at Grand Falls-Windsor and Stephenville;
- (iii) shipping and storing: at Botwood; and
- (iv) logging camps: at many different locations across NL.

[47] According to the Province, Abitibi's industrial activities resulted in the release of substances into the environment in amounts, concentrations and at rates which have caused and could continue to cause an adverse effect both on and adjacent to the Abitibi Sites. As far as the Province is concerned, by the spring of 2009, Abitibi had not fulfilled all of its obligations under the *EPA* with respect to these Abitibi Sites.

[48] Conversely, for Abitibi, merely in the fifteen years prior to the end of 2008, it had spent approximately \$138.5 million in environmental compliance or remediation efforts in NL. These investments in assessments, environmental compliance or remediation activities have been, with rare exceptions, made on its own initiative, without the requirement or necessity of ministerial action. Abitibi considers it has been proactive in its efforts to ensure that its operations were fully in compliance with prevailing environmental requirements in NL.

[49] For example, Abitibi's investments in environmental compliance, assessment and remediation over the past decade included the following:

- (a) environmental assessments and clean-ups (at woodland camps, Stephenville, Botwood and Grand Falls);
- (b) decommissioning and clean-up activities (at Stephenville);
- (c) mill effluent treatment plant improvements related to discharge requirements (at Stephenville and Grand Falls);
- (d) mill air emissions control improvements related to discharge requirements (at Stephenville and Grand Falls); and
- (e) activities related to environmental sustainability including land donations (at Botwood and woodlands), the Exploits River Salmon Diversion Program, reforestation and forest improvements.

[50] Abitibi believes it has always placed a high value upon its environmental compliance efforts in areas where it has carried on business. It emphasizes that it has made concerted efforts to anticipate environmental issues rather than merely react to orders. This includes environmental site assessment work and remediation work at many of the Abitibi Sites.

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[51] Abitibi adds that during all those years of industrial activities, it founded and built communities, roads, schools and hospitals. By way of example, the town of Grand Falls-Windsor was founded and originally owned by one of its predecessors.

2) The *Abitibi Act*

[52] Notwithstanding this long history of industrial activities, since December 2008, Abitibi has had no material active operations in NL, save for the orderly closure of its Grand Falls mill.

[53] Effectively, on December 4, 2008, Abitibi announced the closure of its last remaining mill operation in NL, located at Grand Falls-Windsor. Following this mill closure scheduled to be effective March 2009, Abitibi would have normally retained valuable hydroelectric facilities, hydroelectric rights, lands and other assets in NL.

[54] However, despite this, on December 16, 2008, twelve days after this announcement, the Province introduced and passed within a single day the *Abitibi Act*. Pursuant to this Act, the Province purported:

- a) to seize with immediate effect substantially all of the assets, property and undertakings of Abitibi in NL;
- 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 seeking the return of several hundreds of thousands of dollars in unlawfully assessed payments in respect of water rights;
- d) to deny Abitibi any compensation for the seized assets; and
- e) to deny Abitibi access to the Province's courts to seek redress.

[55] Amongst the assets so confiscated were certain hydroelectric facilities only partially owned by Abitibi and subject to third party debt obligations. The substantial interests of such third parties were similarly expropriated in the sweep of the *Abitibi Act*.

[56] Without surprise, the *Abitibi Act* was strongly criticized and denounced by Abitibi. To put it mildly, the relationships between the Province and Abitibi have apparently been quite difficult since then.

[57] For its part, the Province considers the *Abitibi Act* to be constitutional, even though it is retrospective, targeted and confiscatory in nature¹⁶. In contrast, Abitibi views the enactment as contrary to fundamental principles of the *Canadian Charter of*

¹⁶ To that end, it refers notably to *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, at 503-504.

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Rights and Freedoms and the *Canadian Bill of Rights*, as well as being unconstitutional. It considers it to be punitive, confiscatory in nature and repugnant to public policy¹⁸.

[58] While the Province argues that the potential claims of Abitibi against it as a result of the *Abitibi Act* are without merit, the latter maintains that if the Province ever files any claim in the restructuring process, the Court will have to assess the value of its cross-claims or set-off claims against the Province for this wrongful expropriation.

[59] According to Abitibi, its losses resulting from the enactment of the *Abitibi Act* well exceed \$300 million. The most valuable assets confiscated by the Province include:

- (a) surface rights which the Province had offered to purchase from Abitibi for \$19.3 million in November 2008;
- (b) Abitibi's 51% interest in Star Lake Hydro Partnership, a joint venture with CHI Hydroelectric Company Inc. ("CHI"), which owns and operates the Star Lake Hydroelectric Project. At the time of expropriation, Abitibi had agreed to sell its interest to its partner CHI in a transaction that was days away from closing. In her testimony, Mrs. Minville assessed the value of that interest at some \$60 million;
- (c) Abitibi's 49% interest in the Exploits River Hydro Partnership, a partnership with Central Newfoundland Energy Inc., which operates the Bishop's Falls hydroelectric facility and a part of the Grand Falls hydroelectric facility. Again, in her testimony, Mrs. Minville assessed the value of that other interest at about \$74 million;
- (d) Abitibi's remaining wholly-owned interest in the Grand Falls hydroelectric facilities; and
- (e) Abitibi's wholly-owned interest in the Buchans hydroelectric facility.

[60] Although the Province publicly announced that the *Abitibi Act* did not include the Grand Falls mill then still in operation, a review of the *Abitibi Act* revealed that, whether deliberately or as a result of the haste in which the Act was drafted, the Grand Falls mill site was, in fact, included in the confiscated assets.

[61] Whether due to its haste or by design, the Province did not, however, expropriate certain assets then owned by Abitibi in NL. These consist primarily of the former Botwood shipping terminal site, closed in February 2009, and the Stephenville newsprint mill, idled in October 2005 and closed in December 2005.

¹⁸ Amongst others, it invokes *Reference Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 and *Laane & Baltser v. Estonian S.S. Line*, [1949] S.C.R. 530.

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[62] In April 2009, Abitibi¹⁷ 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 arising from this confiscation effected by the Province. At the hearing, the Court was advised that since the negotiations failed to result in an acceptable amount of compensation, Abitibi officially filed, on February 25, 2010, a Notice of Arbitration under Chapter 11 of NAFTA to pursue its claim for redress.

[63] In her testimony, Mrs. Ballard confirmed that the Province had not paid so far any compensation to Abitibi as a result of these expropriations.

[64] According to Abitibi, its claim for compensation under NAFTA includes almost no material amounts in respect of any of the assets that are the subject of the EPA Orders. The only incidences of overlap are the claims for the confiscated surface rights and the Grand Falls mill site.

3) The EPA Orders

1) the sequence of events

[65] Meanwhile, on June 12, 2009, the Province asked Abitibi to provide certain reports for the Abitibi Sites, including environmental site assessment ("ESA") reports¹⁸.

[66] On June 18, 2009, Abitibi replied that the Province's request would remain under consideration in light of (a) the *Abitibi Act*, (b) the Initial Order issued by the Court and (c) another pending ministerial order concerning Buchans¹⁹.

[67] In this letter, Abitibi's Counsel noted that efforts to comply with Abitibi's obligations under the *EPA* were, in any event, ongoing. In a subsequent letter dated August 14, 2009, Abitibi again acknowledged its ongoing environmental obligations pursuant to the *EPA*²⁰.

[68] In July 2009, in order to apparently ensure that it had complete and accurate information about the environmental condition of the Abitibi Sites and that Abitibi's obligations to protect the environment would be fulfilled, the Province's attorneys retained the services of environmental consultants, Conestoga-Rovers & Associates ("CRA"), to undertake ESAs at the Abitibi Sites.

[69] CRA was able to begin its assessment work at one of the Abitibi Sites, Buchans, in the latter part of July 2009. However, it needed to obtain access to the remaining Abitibi Sites in order to complete its work. On September 3, 2009, after extensive

¹⁷ Even though headquartered in Montreal, QC, AbitibiBowater inc. is a U.S. corporation formed under the laws of Delaware.

¹⁸ Exhibit NL-1.

¹⁹ Exhibit NL-2.

²⁰ Exhibit NL-3.

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negotiations, Abitibi and the Province entered into an agreement whereby Abitibi would provide access to the Abitibi Sites to CRA for the purpose of conducting the ESAs, subject to a number of conditions²¹.

[70] Again, Abitibi indicated that its position was subject to further consideration in light of (a) the *Abitibi Act* and (b) the Initial Order issued by the Court.

[71] On October 16, 2009, while these exchanges were taking place, 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**").

[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.

[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.

²¹ Exhibit NL-4.

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[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 enough²².

[78] While this Data Room Motion was being debated and ruled upon, CRA issued, in November 2009, the reports setting out the results of its ESAs on each of the Abitibi Sites. 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 standards²³.

II) the orders issued

[79] Accordingly, on November 12, 2009, three days after the dismissal of its Data Room Motion, the Province issued against Abitibi the EPA Orders²⁴ pursuant to s. 99 of the EPA, requiring it to submit detailed Remediation Action Plans for approval by January 15, 2010 and to complete the approved site remediation actions by January 15, 2011.

[80] It is not disputed that the EPA Orders were in respect of liabilities or obligations that existed prior to the commencement of the CCAA proceedings. None of the sites related to any active operations of Abitibi from or after the date of the Initial Order. The orders were all in respect of past matters.

[81] The evidence indicated that a "base case" remediation plan could cost Abitibi in a range of value from the mid-to-high eight figures. A "worst case" to "extreme case" scenario could be several times higher.

[82] The evidence showed as well that the EPA Orders were inappropriate in their sequencing and unrealistic in their scheduling:

- (a) to submit detailed Remediation Action Plans as requested would have required close to a full year to be carried out adequately;
- (b) the closure of all landfills and lagoons or impoundments associated with each site being logically the last task to perform when a remedial action plan is implemented, requiring Abitibi to close these units no later than January 15, 2011 was unrealistic;
- (c) given the magnitude and scope of the work ordered by the Province to be carried out simultaneously at the five locations targeted in the EPA Orders, based on Abitibi's past experiences with such projects in NL, it was doubtful that there existed sufficient resources (engineering firms, specialty providers, laboratories and authorized specialty contractors) to carry out the work within the prescribed one-year time frame.

²² AbitibiBowater Inc. (*Re the Plan of Compromise or Arrangement of*), 2009 QCCS 5482.

²³ Exhibit NL-5.

²⁴ Exhibit NL-6.

[83] On January 11, 2010, Abitibi appealed the EPA Orders to the Minister. On February 8, 2010, the Minister dismissed the appeals²⁶. Of course, the initial deadline of January 15, 2010, for Abitibi to file its Remediation Action Plans was not abided by.

[84] According to Abitibi, the EPA Orders stem from a desire to "throw the book" at Abitibi with a view to seeing what, if anything, may stick for purposes of offsetting Abitibi's well-known compensation claims.

[85] Since the adoption of the *Abitibi Act*, Abitibi considers that the Province has indeed used the full range of its powers, including the misuse of discretionary authority granted under the *EPA*, to wage a campaign of retribution and harassment against it, with the apparent goal of dissuading Abitibi from pursuing its claims for compensation.

[86] For Abitibi, what was dredged up in this process included matters that were, to the Province's knowledge, the responsibility of third parties. Often, they related to situations that had been known for decades. Moreover, with some limited exceptions, the Abitibi Sites at issue are on lands that have been confiscated by the Province pursuant to the *Abitibi Act*, when they were not surrendered to the latter years ago.

[87] In the case of such lands that are not in its possession anymore, Abitibi suggests that it has likely no power to comply with the EPA Orders. It cannot realistically access lands in the possession of third parties (including the Province) to complete the remediation ordered by the EPA Orders.

[88] Even if it has the right, based on procedural fairness and natural justice, to challenge the EPA Orders, Abitibi states that its well-known reality is quite different. Given that it is under CCAA protection, it considers that it is precluded, from a practical standpoint, from seeking a judicial review of the EPA Orders. The time and costs associated with challenging them would significantly drain Abitibi's limited resources and the potential recovery for all of its stakeholders.

[89] Of course, the Province refutes these assertions. In its view, the EPA Orders are merely the result of the proper exercise of the Minister's statutory duties and powers under the *EPA*. Be it as current or former owner, Abitibi is a "person responsible" under the *EPA*. What is being required in the EPA Orders simply derives from Abitibi's industrial activities in NL.

iii) the CRA Reports

[90] That said, the EPA Orders are based on the CRA Reports²⁶ that relate to the five sites where there are alleged violations of the *EPA*, namely Grand Falls-Windsor, Stephenville, Botwood, Buchans and the Logging camps.

²⁵ Exhibit NL-14.

²⁶ Exhibit NL-5.

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[91] Abitibi contends that the failures and weaknesses evident in the CRA Reports lead to the reasonable inference that they were commissioned for the purpose of providing support for political decisions already taken, rather than for the purpose of forming a good faith view of the matter.

[92] While it is certainly not the role of the Court to analyze in details these reports upon which the EPA Orders were issued, in assessing the true nature of these orders, the Court cannot, however, ignore the following general observations that appear from a superficial review of these reports:

- (a) each CRA Report states that it was prepared for the Province's NAFTA/CCAA Counsel, WeirFoulds LLP. They were thus, apparently, produced for litigation purposes rather than in pursuit of a statutory duty;
- (b) the CRA Reports consistently fail to distinguish between lands owned or operated by Abitibi and those owned or occupied by third parties; and
- (c) the CRA Reports, in the absence of applicable criteria identified in the Province's regulations, apply environmental standards from the provinces of Ontario and BC, which, according to Abitibi, technically do not apply as they are not adapted to NL distinctive hydro geological characteristics.

[93] In addition, the following particular highlights coming from these CRA Reports are worth mentioning at this stage.

[94] The CRA Report concerning the Grand Falls-Windsor site focuses primarily on anticipated issues that would arise as and when the mill site is actually decommissioned. Yet, although the Province is no doubt aware that it is now the owner of the Grand Falls mill site as a result of its *Abitibi Act*, it has issued the EPA Order in respect thereof only to Abitibi, not to itself.

[95] With respect to the Stephenville site mill, Abitibi's operations were shut down in December 2005. Between 2006 and 2008, Abitibi completed a decommissioning and demolition program that included the levelling of the majority of the main mill buildings and related infrastructure. Since the closure of the mill, it has allegedly expended some \$2 million in environmental assessments and site clean up.

[96] It is not seemingly disputed that substantial portions of the Stephenville mill served as the Harmonville Base of the United States Air Force ("USAF") between 1941 and 1966. During that time, several fuel storage and dumpsites for by-products of the air force base were apparently established.

[97] Moreover, in the late 1960s, the Province passed legislation that allowed for the construction of a kraft linerboard mill in Stephenville, which was taken over and operated by a Crown corporation, Labrador Linerboard Limited ("Linerboard"), from 1972 to 1977. This linerboard mill was ultimately closed in 1979 when it was purchased by Abitibi, converted to a pulp and paper production mill and operated as such until its closure in 2005.

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[98] On December 18, 2008, simultaneously with the *Abitibi Act*, the Province revoked the agreement for the timber supply rights in relation to the Stephenville mill by passing the *Labrador Linerboard Limited Agreement 1979 Repeal Act*²⁷.

[99] In view of this background, Abitibi estimates that a substantial portion of the costs associated with the remediation of the Stephenville site are directly attributable to the 25 years of intensive use of the site by USAF and Linerboard, under the stewardship and responsibility of the Province.

[100] Yet, according to Abitibi, despite being the lessor of the Stephenville site to the USAF and the owner of the Crown corporation for the former linerboard operation, the Province has made no effort to establish its own level of responsibility under the *EPA*, nor has it taken any steps to pursue itself, USAF or Linerboard under the Act.

[101] Turning to the CRA Report concerning the Botwood site, it refers to an area around the Town of Botwood where Abitibi formerly had a storage and shipping operation relating to its Grand Falls mill.

[102] The Botwood Report does not, however, limit itself to Abitibi's operations at Botwood. It also reviews the following:

- (a) storage and shipping operations utilized by ASARCO, a corporation unrelated to Abitibi or its predecessors, for its mining operations at Buchans, which CRA erroneously conflated with Abitibi for the purposes of the Botwood Report;
- (b) the bed of a railway (the Botwood - later Grand Falls - Central Railway) owned and operated by a company which has now been dissolved following the transfer to third parties of its property interests; and
- (c) storage and other facilities transferred to the Town of Botwood in the 1980's and used for storage of construction materials, vehicle servicing and other activities, including an area for a community mail box.

[103] Similarly to the situation prevailing for the Stephenville site, these other parties were not targeted by the EPA Orders concerning the Botwood site.

[104] As to the Buchans site where Abitibi's operations ceased in 1984, it was part of the original lands granted in 1905 under a "Charter Lease" to the Anglo-Newfoundland Development Company, a company that merged with Abitibi's predecessor in 1961. Mining operations were developed on certain lands at Buchans in the 1920s as part of a joint venture with a predecessor of ASARCO, under an agreement pursuant to which the latter operated the mine.

²⁷ S.N.L. 2008 c. 42, filed as Exhibit D-2.

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[105] The land beneath the Town of Buchans was surrendered to the Province by grants in 1978 and 1979. In 1994, most of the remaining interests of Abitibi in the area surrounding Buchans were also relinquished to the Province following the ending of mining operations by ASARCO in the early 1980's. In 2005, ASARCO filed for Court protection under Chapter 11 of the *U.S. Bankruptcy Code*.

[106] At the time of the passage of the *Abitibi Act*, Abitibi retained some residual surface and timber rights in the area, as well as a small 2 MW hydroelectric power station near the town.

[107] Here again, neither ASARCO nor the Town of Buchans was included in the scope of the EPA Orders.

[108] Finally, the CRA Report concerning the Logging camps allegedly recounted an inspection of some forty-eight (48) camps. Development and use of the Logging camps by Abitibi began in the 1940s and continued until recently. However, Abitibi only has active records for twenty (20) Logging camps, which have all been closed after 1965.

[109] As it only has active records of twenty (20) such camps closed since 1965, Abitibi considers that the other twenty eight (28) logging camps investigated by CRA are either not its logging camps, or date back to decades when horse power was the predominant source of power in the camps and few, if any, refueling sites were likely to have existed.

[110] The Logging camps report does not segregate the impact of third party activities from what may have resulted from Abitibi's prior activities. Yet, many such sites have, after dismantling and clean up by Abitibi, been used for other purposes by third parties, including seasonal fishing or snowmobile camps, cottages and other similar activities.

[111] In fact, soil and other samples were taken by CRA at only six of the locations, with no method of distinguishing whether results obtained were attributable to these subsequent activities or to the original logging camps.

[112] For Abitibi, the lack of objectivity and "directed verdict" nature of the EPA Orders is shown by the Lake Ambrose logging camp, at s. 2.2.3 of the Logging Camps Report.

[113] After noting in the report that chainsaws and motorized vehicles were not used in the logging operations of Abitibi until the late 1950's (as prior operations were performed using horse and man power), and after noting the closure of this camp in the mid-1950's, the report nevertheless went on to attribute various readings of fuel contamination to Abitibi's operations.

[114] The fact that the Lake Ambrose site is currently used recreationally and that there are nearby cottages was not considered at all in the Logging camps report.

[115] Between Abitibi, who had not operated on the site for fifty years and used only horse power and man power, and current recreational dwellers, most likely with power

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boats, snowmobiles, ATV's, automobiles and generators, the Province still chose the probable source for the observed contaminations of waste oil, fuel and similar items as being Abitibi.

[116] For Abitibi, this telling example gives a good idea of what the Province is ready to accept and do under the circumstances.

THE LEGAL FRAMEWORK

[117] This factual background summarized, the legal framework relevant to this case includes, besides the paragraphs of the First Stay Extension Order and Claims Procedure Order referred to before, statutory provisions from both the CCAA and the BIA, as well as sections of the EPA.

1) The CCAA and the BIA

[118] The term "claim" is defined as follows in the CCAA (as applicable to this restructuring):

Definition of "claim"

12. (1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act.

Determination of amount of claim

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount:

[...]

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and[...]

(Our emphasis)

[119] The reference to "debt provable" is a misnomer. It is commonly agreed that it is rather meant to refer to the expression "claim provable" of the BIA. Under s. 2 of the BIA, "claim provable in bankruptcy", "provable claim" or "claim provable" include any claim or liability provable in proceedings under the BIA by a creditor. Pursuant to s. 121(1) of the BIA, "claims provable" and "contingent claims" consist of:

Claims provable

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation

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incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Contingent and unliquidated claims

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

(Our emphasis)

[120] Aside from that, both the CCAA and the BIA contain provisions pertaining to environmental costs and claims, which state the following:

Subsections 118(8) & (9) of the CCAA	Subsections 1406(7) & (8) of the BIA
<i>Priority of claims</i> (8) <u>Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge</u> (a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and (b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law. <u>Claim for clean-up costs</u> (9) <u>A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.</u> (Our emphasis)	<i>Priority of claims</i> (7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security (a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and (b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law. <u>Claim for clean-up costs</u> (8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

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[121] Finally, It is worth noting that amongst the new amendments to the CCAA that came into force on September 18, 2009, the following provision dealing with regulatory bodies was added:

Meaning of "regulatory body"

11.1 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

2) The EPA

[122] Turning to the EPA, s. 7 provides that a person shall not release or permit the release of a substance into the environment in an amount that may cause an adverse effect. S. 99 allows for the issuance of orders where the Minister believes on reasonable grounds that a person responsible has contravened or will contravene the EPA:

99. (1) Where the minister believes on reasonable grounds that a person responsible has contravened or will contravene this Act or the terms or conditions of an agreement, approval, amended or varied approval, licence or an undertaking exempted or released under this Act, the minister may, whether or not that person has been charged or convicted in respect of the contravention, issue an order, in writing, requiring a person at that person's own expense, to

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(a) stop or shut down an activity or an undertaking immediately, permanently, or for a specified time, where, with respect to that activity or undertaking, there has been a contravention of this Act, the regulations or a term or condition applicable to that activity or undertaking;

(b) do all things and take all steps that are necessary to control, manage, eliminate, remedy or prevent an adverse effect or an environmental effect and to comply with this Act, the regulations or terms or conditions applicable to an approval, activity or undertaking in accordance with directions set out in the order;

(...)

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

(...)

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

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

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

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

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

(iv) prepare and submit a contingency plan,

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

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

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

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

(...)

(Our emphasis)

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[123] S. 102 further provides that the Minister may do the following to insure compliance of the orders issued:

102. (1) Where an order is served upon the person to whom it is directed, that person shall comply with the order immediately or, where a period of compliance is specified in the order, within the time period specified.

(2) Where a person to whom an order is directed does not comply with the order or part of the order or service of that order cannot be carried out, the minister may take whatever action he or she considers necessary to carry out the terms of the order.

(3) Where the minister

(a) takes an action under subsection (2) to carry out the terms of an order; or

(b) incurs costs, expenses or charges in order to investigate and monitor the compliance of a person with an order,

the reasonable costs, expenses or charges incurred by the minister in taking that action are recoverable by the minister from the person to whom the order was directed as a debt owed to the Crown and the minister shall notify the person against whom the order is made of his or her determination of the amount of the recoverable costs, expenses and charges.

(...)

(Our emphasis)

[124] Finally, a "person responsible" is defined in the EPA (s. 2 (x)) as including, amongst others:

(i) the owner of a substance or thing,

(ii) the owner or occupier of land on which an adverse effect has occurred or may occur,

(iii) the owner or operator of an undertaking,

(iv) a previous owner of a substance or thing.

(...)

(Our emphasis)

THE QUESTIONS AT ISSUE

[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:

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- 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?

[126] 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.

ANALYSIS AND DISCUSSION

1) Overview

[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.

[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 issues 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.

2) The CCAA

[140] It is widely accepted that the CCAA is a remedial statute. Its purpose is to facilitate the making of a compromise or arrangement between an insolvent debtor and

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its creditors. The goal is for the former to be able to continue in business and avoid the devastating social and economic consequences of a cessation of operations²⁸.

[141] In any restructuring conducted under the CCAA, the courts must keep in mind these key objectives, while also giving weight to these broader socio-economic or public interest considerations. As it happens, CCAA courts in Canada have generally found considerable interpretive flexibility in the provisions of the CCAA to enable them to facilitate the achievement of its purposes²⁹.

[142] To that end, any analysis of the CCAA must be guided by "the modern rule" of statutory interpretation. Pursuant to this rule, "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament"³⁰.

[143] Likewise, in exercising its jurisdiction in a broad and flexible manner to insure the CCAA's effectiveness, the Court must remember that its role is one of judicial oversight. It is expected to supervise the process and keep it moving towards its ultimate goal, that of an acceptable arrangement. In doing so, it has a broad jurisdiction to decide all matters that arise and to create an orderly environment for the restructuring. This would, no doubt, be negatively affected if, for instance, debtors were forced to expend resources to deal with claims outside of the CCAA process.

[144] Applying these considerations to the situation at hand, the Court is of the view that it has the authority to decide if the EPA Orders qualify as claims under the CCAA and can be described as provable or contingent claims under the BIA.

[145] In that regard, the CCAA contains no restrictive definition of "creditor" other than the circular definition of "unsecured creditor" to mean any "creditor" who is not a secured creditor. S. 12(1) of the CCAA further defines "claim" in the broadest possible terms as "any indebtedness, liability or obligation of any kind, that, if unsecured, would be a debt (sic) provable in bankruptcy". In fact, under s. 12(2)(a), the "amount of an unsecured claim shall be the amount [...] (iii) [...] proof of which might be made" under the BIA.

[146] As for the BIA, s. 2 similarly has a non-exhaustive definition of "claim provable in bankruptcy" which "includes any claim or liability provable in proceedings under this Act

²⁸ *Stelco Inc., (Re)*, (2005) 9 C.B.R. (5th) 135, 2005 CanLII 8671 (Ont. C.A.), at paras 32ff; *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 CanLII 587 (Ont. C.A.), at paras 44-61; *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 CanLII 327 (B.C.C.A.), at paras 27-29; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, (1990) 51 B.C.L.R. (2d) 84 (B.C.C.A.), at para. 22. See also SARRA, Janis, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thompson Carswell, 2007), at p. 9.

²⁹ See, for instance, *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CanLII 587 (Ont. C.A.), pertaining to third parties releases in a plan of arrangement.

³⁰ See, *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 26, and *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21.

by a creditor". Ss. 121 and 135 also define provable or contingent claims in very broad terms.

[147] The amended CCAA does not depart from this scheme. If anything, it re-confirms the intentionally broad and remedial goals of the Act, with terms that place in the courts' hands the powers necessary to secure its ends.

[148] Accordingly, environmental obligations arising from a regulatory order that remain, in a particular fact pattern, truly financial and monetary in nature can be qualified as claims under the CCAA. Likewise, if one is convinced that there exists, in such a fact pattern, a claim that "might" be filed, it is open to be compromised on the plain reading of s. 12 of the CCAA.

[149] Regarding this, the principles that generally apply to the determination and compromise of contingent claims under the CCAA process can apply to claims like those arising from the EPA orders. Contingent claims may be compromised under the CCAA and the Court has the authority to decide if a contingent claim exists by reason, for instance, of past obligations.

[150] While not applicable to these proceedings, s. 11.1 of the amended CCAA is instructive on this matter of jurisdiction. It operates to limit the broad jurisdiction of the court to stay proceedings (under what is now s. 11.02 of the amended CCAA) in relation to regulatory bodies.

[151] However, even s. 11.1 does not contain any bright line between regulatory and financial orders. S. 11.1(2) restricts the power of the court in its general stay under s. 11.02 from impacting regulatory proceedings "other than the enforcement of a payment ordered by the regulatory body". S. 11.1(3) allows the supervising court to remove this restriction on the general stay power if (i) it is of the opinion that "a viable compromise or arrangement could not be made in respect of the company" if the restriction were to apply, and (ii) making such an order is not contrary to the public interest.

[152] Further, s. 11.1(4) reserves to the court the power to decide when a regulatory body is seeking to enforce rights as creditor.

[153] These amendments make two points quite clearly.

[154] First, the structure of the amended CCAA is as follows: (i) a general stay power is granted in s. 11.02 (in language identical to s. 11(3) of the CCAA applicable here); (ii) the general stay is initially restricted from applying to regulatory proceedings other than payment orders (similarly to the First Stay Extension Order here); and (iii) that restriction may be lifted by the court after a hearing.

[155] It follows from this that the general stay power in s. 11.02 of the amended CCAA (s. 11(3) of the CCAA) does permit the court to order a stay of regulatory proceedings,

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the only change being that a second hearing is required to stay any proceedings other than "a payment ordered".

[156] Second, the court, not the regulatory body, decides when a body is "seeking to enforce its rights as a creditor" and if so found, the court may stay that as well.

[157] Parliament has therefore confirmed that the CCAA may be employed to place an appropriate check on regulatory actions, particularly when they are purely "monetary orders". This is exactly the kind of jurisdiction the Court is exercising here. Of course, this exercise requires the Court looking at substance over form.

[158] From that standpoint, it is true that the Province has sought to frame the EPA Orders so as to fall within the limited environmental exemption of paragraph 10.1 of the First Stay Extension Order.

[159] Yet, an examination of their consequences, their content, the Province's behavior regarding them and the statutory framework within which they were issued show that they are and were most likely intended to be in substance financial or monetary orders.

3) The True Nature and the Impact of the EPA Orders

[160] The true regulatory character or otherwise financial and monetary nature of a given order is influenced by who issues the order, who stands to benefit from it, what remains its genuine objective and what means of enforcement truly exist in reality.

[161] Although presented as injunctive orders, the facts demonstrate that the practical, intended and inescapable result of the EPA Orders was the creation of monetary claims. Money is, clearly, the only remedy in this case. In fact, given the lack of assets or activities of Abitibi in the Province, the EPA Orders can, in all likelihood, only be enforced by action taken outside NL.

[162] 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.

[163] 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.

[164] This situation is quite different from that of an existing owner of lands being asked to remedy an environmental condition in respect of ongoing operations. While the latter might be said to derive a corresponding benefit from the expense incurred arising from the improvement to the lands thereby occasioned, a former owner or a victim of confiscation has no such benefit.

[165] In her testimony, Mrs. Minville confirmed the obvious: decommissioning or remediation costs are normally offset by the added value eventually regained in the subsequent divestiture of the equipment, metal and real estate involved. Provided, of course, that you are still the owner. Otherwise, compliance with such an order is an expense devoid of any direct or indirect benefit.

[166] In the present situation, as the current owner of most of the lands in respect of which the remediation expenses have been ordered, the Province ends up being the intended beneficiary of the expenditures that it has used its discretion to order.

[167] 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.

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

[169] Be that as it may, this definitely justifies, at the very least, the Court, as opposed to the regulator involved, ascertaining the exact nature of the EPA Orders and deciding whether the Province is, in reality, seeking to enforce rights as a creditor. This is precisely what the amended CCAA has now codified at s. 11.1 (4).

[170] While the dividing line between regulatory claims and their financial consequences may be blurred at times, there can be no confusing the two when the regulatory authority is seeking to make orders concerning solely past actions and activities in relation to properties that the debtor has disposed or been dispossessed of.

[171] The broad CCAA and BIA provisions referred to above contain no comfort for a regulatory authority seeking to limit the Claims Procedure Order from impacting their plainly financially material actions with artificial distinctions about "regulatory" orders and "financial" ones. To an insolvent company in CCAA restructuring, an order to pay tens of millions of dollars directly is no different from an order to spend an equivalent amount on specific actions that will benefit others.

[172] Where, as here, the EPA Orders are moreover founded exclusively upon alleged actions in the past and relate in no way to activities taken after the commencement of proceedings, the supervising CCAA court applying such broad definitions has the jurisdiction to intervene.

[173] In the context of the EPA Orders and the *Abitibi Act*, the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.

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[174] With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.

[175] This is quite far from the situation of the detached regulator or public enforcer issuing order 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. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.

[176] From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator. Between the suggestion that the Province is merely seeking compliance with the EPA and the inference that it is rather looking to ascertain a monetary value and financial benefit through the execution in nature of its EPA Orders, the Court prefers the latter view based on the evidence as a whole.

[177] The fact that two of the five EPA Orders relate to property still owned by Abitibi does not change this end result. It is the global situation that must be considered here. This is, in fact, how the Province approached the situation and still treats it today.

[178] In all likelihood, the pith and substance of the EPA Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAFTA claims for compensation. The evidence presented at the hearing indeed supports this assertion.

[179] During Mrs. Ballard testimony, the Province's Counsel filed in the record a newspaper article of December 2009 reporting on an interview made with the Province's Premier on the Abitibi situation³¹.

[180] In that article, the Premier is quoted as saying that the Province is currently trying to put a price tag on what it will cost to clean the environmental damage Abitibi allegedly left behind at operations such as Grand-Falls, Botwood and Buchans.

[181] He is further quoted as stating that "if the assets do not exceed the liabilities, there will be no cash payment coming from the government" and that "in our assessment, at this point in time, there would not be a net payment to Abitibi".

[182] While the probative value of a newspaper article may generally appear weak at first sight, the situation at hand is different. This exhibit was filed by the Province itself and questions thereon were allowed without objection by anyone. Most importantly, there were no attempts to deny the truthfulness of its content.

[183] The Court cannot ignore it in assessing the true nature of the EPA Orders.

³¹ Exhibit NL-16.

4) The Factual Context and the Content of the EPA Orders

[184] That is not all. When considering the true intent and nature of the EPA Orders, consideration of the broader context in which they have been issued and what their content reveals are also relevant.

[185] In this regard, the evidence shows that the EPA Orders were, on the balance of probabilities, most likely expected not to be complied with in nature by Abitibi, such that their enforcement would only be achieved through monetary condemnations. Accordingly, from the outset, the Province must have known that they were to be, in reality, nothing else than a strategic bargaining tool for its negotiations with Abitibi.

[186] This being the case, they can hardly be qualified as true regulatory orders. This rather supports the finding that they were, to the contrary, financial and monetary in nature, and intended to have this impact. Many factual elements justify this conclusion.

[187] First, in the months preceding the EPA Orders, the *Abitibi Act* was announced and passed, less than two weeks after Abitibi made public the intended closure of its Grand Falls mill operation.

[188] This led to Abitibi filing a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of NAFTA for the losses arising from this confiscation effected by the Province. As indicated earlier, according to Abitibi, the losses resulting from this enactment are well in excess of \$300 million.

[189] Not only was the Province fully aware of this, but it was known as well that if it were to ever file a claim in the restructuring process, Abitibi would raise the value of its cross-claims or set-off claims for this expropriation against the Province. 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 this counter-claim argument in front of the CCAA Court.

[190] As a result, it is a reasonable inference to draw that the Province had a definite interest in trying to avoid any claims process in the CCAA, so as to shield itself from the counter claim it knew Abitibi would surely oppose in compensation for the alleged wrongful expropriation of the *Abitibi Act*.

[191] Interestingly, in this case, the third party consultants (CRA) who issued the reports that formed the basis of the EPA Orders were retained not by the Minister in the exercise of her statutory duties, but by the Toronto litigation Counsel to the Province in the NAFTA proceedings. This is apparent from the face of each of the CRA Reports filed by the Province, which are addressed not to the Minister but to these lawyers.

[192] Second, the EPA Orders issued on November 12, 2009, over six (6) months after Abitibi filed for Court protection under the CCAA, ordered Abitibi to perform the following positive acts:

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- i) the submission for approval by January 15, 2010, of detailed Remediation Action Plans for all sites identified by CRA as having exceeded the allegedly applicable limits;
- ii) the completion of the approved site remediation actions by January 15, 2011 or by another date as may be agreed upon with EVNC; and
- iii) the closure of all landfills and lagoons/impoundments associated with each site by January 15, 2011.

[193] However, based on the evidence of Mrs. Minville, to submit detailed Remediation Action Plans as requested would have rather required close to a full year to be carried out adequately.

[194] Similarly, the closure of all landfills and lagoons or impoundments associated with each site being logically the last task to perform when a remedial action plan is implemented, requiring Abitibi to close these units no later than January 15, 2011 was unrealistic.

[195] In addition, given the magnitude and scope of the work ordered by the Province to be carried out simultaneously at the five locations targeted by the EPA Orders, based on Abitibi's past experiences with such projects in NL, it is highly doubtful that there existed sufficient resources (engineering firms, specialty providers such as drillers and laboratories and authorized specialty contractors) to carry out the work within the prescribed one-year time frame.

[196] All this suggests that the Province never truly intended for the EPA Orders to be abided by or complied with in nature given the unrealistic time frame imposed.

[197] Third, at the time the EPA Orders were issued, the Province knew or should have known that, in any event, it would be impossible for Abitibi to comply with them. There were a number of reasons for this.

[198] To begin with, since the approval of the AGI DIP Facility on May 6, 2009, Abitibi's operations have been funded through debtor-in-possession facilities under the supervision of the Monitor and Abitibi's creditors, including its secured lenders. Abitibi's access to funds was therefore limited to funding for its ongoing business operations and Abitibi enjoyed little discretion as to how these funds are allocated.

[199] Furthermore, even if Abitibi was in possession of the funds necessary to comply with the EPA Orders, it would not be possible for it to comply with the EPA Orders in the sequencing and timeframe imposed by these orders while seeking to manage the complex task of raising financing and organizing its emergence from CCAA proceedings.

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[200] Finally, the EPA Orders targeted sites that were expropriated (Grand Falls-Windsor, Buchans and the Logging camps) or surrendered to the Province long ago, such that Abitibi could doubtfully access properties that were now in the possession of third parties to complete the remediation efforts sought.

[201] The fact that Abitibi acknowledged in the past having on-going environmental obligations, like, for instance, for the Buchans site³², does not carry much weight when the sites at issue are not in its ownership, possession or control anymore.

[202] 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 monetary damages.

[203] One example will suffice. In view of the *Abitibi Act*, the Province is now the owner of the Grand-Falls paper mill. As such, the expenses of safely demolishing the mill and removing it normally belong to the Province as its new owner. In spite of this, the EPA Orders purport to require Abitibi to prepare a plan for the demolition of the Grand Falls mill that is now owned by and in possession of the Province.

[204] This order is as unenforceable as it is unjustifiable.

[205] When an order is most likely expected to be complied with through compensation in money rather than enforcement in nature, the regulator cannot avoid the qualification of the order as being a claim simply by refusing to wear the hat of a creditor for strategic purposes and financial or economic advantages, instead of valid public policy reasons.

[206] Actually, on February 8, 2010, the Minister noted in her decisions rejecting Abitibi's appeals of the EPA Orders that, in respect of each site, Abitibi had failed to comply with the EPA Orders within the set deadlines.

[207] Over all, it appears obvious that the Province knew that Abitibi could not, would not and will not be in a position to comply with its so-called injunctive or purely regulatory orders.

[208] Fourth and last, the Province is the transferee of most of the lands in respect of which the EPA Orders were issued. Yet, it has pointedly declined to make an order against itself despite the fact that it would be the beneficiary (in terms of improved land value) of any remediation work performed. The Province, as owner and occupier of the lands, is clearly a "person responsible" under s. 99 of the *EPA*.

[209] In a similar fashion, the Province, in its role as regulator, never asked other persons responsible under its *EPA*, like the towns involved, USAF, ASARCO or

³² Exhibits NL-8 to NL-11.

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Linerboard, to deal with the environmental obligations allegedly outstanding on the Abitibi Sites.

[210] In other words, the evidence suggests that the target was not the enforcement of statutory duties or obligations. The target was Abitibi.

[211] In light of these considerations, it is reasonable to infer that the intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question.

5) The Province's Behavior prior and after the EPA Orders

[212] There is more. Be it before or after the EPA Orders, the Province acted as a creditor with respect to the claims that they include.

[213] For instance, only days prior to issuing the allegedly non-monetary EPA Orders, the Province was before the Court in the Data Room Motion, arguing that it was a creditor of Abitibi precisely because of, amongst others, various environmental claims it allegedly possessed, including claims relating to Buchans, a site targeted by the orders.

[214] In the judgment on the Data Room Motion, the Court noted in fact that "the Province claimed that because of Abitibi's economic activities, it has exposed itself to numerous environmental obligations, the precise extent of which remains to be determined" and that "the Province alleged that it has incurred significant costs in that regard".

[215] Put another way, in its Data Room Motion, the Province alleged that it had already incurred significant costs and liabilities as a result of a) Abitibi's alleged failure to meet its obligations and b) its hiring of CRA environmental consultants.

[216] In a contradictory manner however, in the EPA Motion, the Province now alleges that the very same monetary claims that it sought to advance as a basis to seek access to the electronic data rooms of Abitibi are no longer monetary claims, and thus remain unaffected by the stay of proceedings and the Claims Procedure Order.

[217] While the arguments of the Province for access were denied for the reasons set forth in the judgment on the Data Room Motion, the fact that such potential claims are financial and monetary in nature remains plain and obvious.

[218] For the Province to now contend otherwise is not very convincing and seems opportunistic at best. Admittedly, if the hat of the creditor (be it actual or potential) was proper then, it certainly would fit as well now.

[219] In a similar vein, the evidence showed that the Province actually began the process of seeking third party tenders for some of the remedial work that it was

allegedly expecting Abitibi to perform pursuant to the EPA Orders, the whole merely days after issuing the orders and weeks before the compliance deadline had expired.

[220] Mrs. Ballard confirmed this. Requests for proposals concerning the remediation work at the Buchans site were released as soon as in December 2009³³.

[221] Mrs. Ballard explained as well that the Province did some emergency work to repair the integrity of a dam near Buchans, and even dealt with some health issues arising from potential lead exposures in that town. Both issues were covered in the CRA Reports that were the source of the EPA Orders.

[222] The Province thus appears to have so far taken some steps to liquidate, at least partially, the extent of its claims against Abitibi arising from the EPA Orders. This is consistent with the true financial nature of these orders and the status of creditor of the Province. The interview of December 2009 of its Premier is along the same lines³⁴.

[223] On the whole, not only have some alleged damages been liquidated and related costs incurred, but it also seems that the Province has already a very good idea of the total costs involved. Certainly precise enough for the Premier to say that in all likelihood, no net payment to Abitibi will ensue.

[224] This is quite far from a behavior that would be consistent with a pure regulatory order. It is rather conduct analogous to those cases where courts have concluded that it amounted to provable claims of regulatory bodies in bankruptcy processes³⁵.

[225] As matter of fact, these claims can easily be characterized as contingent. They are far from being too remote or even too speculative. To the contrary, they bear strong elements of probability and the Province has definite means of valuing them. It has in fact started the process, to such an extent that the Premier was able to affirm that there were no expectations of any net payment to Abitibi as early as in December 2009³⁶.

[226] Therefore, as things stand presently, the EPA Orders are more than likely to result in a debt and liability of Abitibi towards the Province in the short term at worst.

[227] In such a case, s. 12 of the CCAA authorizes the Court to determine the "amount" of the claim that may be compromised. It corresponds to the amount that "proof of which might be made". The CCAA does not provide solely for the compromise of filed or actual claims but has from its inception been correctly interpreted as permitting contingent claims to be included. Here, there is definitely a claim that "might"

³³ Exhibit NL-15.

³⁴ Exhibit NL-16.

³⁵ See, for instance, *Re Shirley*, (1995) 36 C.B.R. (3d) 101 (Ont. Cl. J.) and *Re General Chemical Canada Ltd.*, 2007 CarswellOnt 5497 (Ont. C.A.) ("*General Chemical*"), leave to appeal to the Supreme Court refused.

³⁶ Exhibit NL-16.

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be filed. That objective fact, not the subjective choice of the creditor to hold the claim in its pocket for tactical reasons, is the test under the CCAA.

[228] There may be difficulty in proving the amount or the right. Abitibi certainly contests every element of them. However, these objections would not put such a claim on a footing any different from other complex contingent claims that a claim officer or a court is called upon to consider in the course of CCAA proceedings.

[229] The fact that a claim may not be ascertained and may in fact be contested in its entirety during the CCAA process does not prevent it from being compromised. In many situations, courts have been called upon to determine the value of contingent or disputed claims for the purpose of having such claims included in compromises. The provable values of such claims are determined based on an assessment of the likelihood of the contingency occurring, followed by a quantification of the claim³⁷.

[230] The same process may be adopted whether the claim is a complex litigation claim, a claim under human rights legislation, a claim under a guarantee not yet demanded or a claim for environmental remediation under the *EPA* in respect of formerly owned properties³⁸.

[231] If, under the CCAA, a debtor can compromise contested debts arising from pay equity and labor standards statutes, class actions and personal injuries claims, or even pension plans disputes, it can certainly compromise environmental claims that are financial in nature and whose likely enforcement is through a monetary condemnation as opposed to an execution in nature upon the debtor.

[232] There is no reason to make an exception in this case. In *Anvil Mining Range Corp.*³⁹, Farley J. sanctioned a liquidation plan of arrangement under the CCAA in respect of mines against which certain government creditors held secured claims. One of these was a \$60 million claim by the Department of Indian Affairs and Northern Development that included future environmental remediation costs. In a judgment upheld by the Ontario Court of Appeal, Farley J. noted that the claim had been acknowledged as "contingent since it relates to reclamation costs in the future".

[233] Contingent claims are nothing more than incomplete claims, the enforceability of which depends on some contingency or future event that has not yet occurred (and may never occur). In the case of a guarantee, it might be the non-payment by the principal debtor. In the case of an environmental claim of the sort advanced by the Province, it would be the decision of the latter to carry out the remediation and pass along the cost as the *EPA* provides.

³⁷ See, *Air Canada, Re*, 2004 CanLII 6674 (Ont. S.C.), at para. 6; *Air Canada, Re*, 2006 CanLII 42583 (Ont. S.C.), at paras 24 and 25.

³⁸ See, with respect to guarantee claims, *Algoma Steel Corp. v. Royal Bank*, 1992 CarswellOnt 162 (Ont. S.C.), at paras 12ff.

³⁹ *Anvil Range Mining Corp., Re*, 2001 CarswellOnt 1325, at para. 15 (Ont. S.C.); aff'd. in *Anvil Range Mining Corp., Re*, 2002 CarswellOnt 2254 (Ont. C.A.)

[234] The fact that all the elements of the claim do not presently exist does not deprive a contingent claim of its essential element of being a claim that can be quantified and the amount of which can be compromised.

[235] The holder of a guarantee that has not been called cannot seek to avoid the compromise of his or her claim by saying "you cannot compromise the guarantee I hold as I have not demanded on it yet". Likewise, neither can the Province allege that the claims for the costs of remediation of the properties which it has seized without compensation cannot be compromised simply because it chose not to actually ask for money in a situation where it is reasonable to conclude that this is the only way to go.

[236] Under such circumstances, a conditional creditor cannot have the luxury of electing whether or not its claim is subject to compromise under the CCAA. That would defeat its basic objectives and key purposes.

6) The EPA and the Applicable Case Law

[237] In the present case, the EPA Orders were issued pursuant to s. 99 of the EPA, which provides that the Minister may make an order "requiring a person, at that person's own expense" to do any of the listed category of actions.

[238] The jurisdiction to make such order is specifically couched in terms of the ability to cause a person to incur an expense. From that standpoint, such an order is, by its very nature, financial or monetary.

[239] Furthermore, 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 do so. It provides that the expenses incurred by the Minister in doing so "are recoverable by the minister from the person to whom the order was directed as a debt owed to the Crown".

[240] Contrary to the situation that prevailed in some decisions invoked by the Province⁴⁰, the EPA thus contains a "debt-creating provision" in the event that a person targeted by an environmental remediation order fails to comply with it.

[241] As the EPA provides that the regulatory agency may perform the task itself and assert a claim against the debtor in respect of the costs of the performance of the obligations, the mechanism of a monetary judgment is then clearly contemplated as a means of enforcing environmental compliance. This is explicitly the case in subsection 102(4) of the EPA.

[242] Even if steps had not been taken by the Province to perform the work itself (and here, some have definitely been), this would signify nothing more than the difference between an accrued claim and a contingent one. Indeed, on the facts of this case, a money claim is the only mechanism for enforcement realistically open to the Province.

⁴⁰ See, for instance, *Re Lamford Forest Products Ltd.*, (1991) 10 C.B.R. (3d) 137 (B.C.S.C.) ("*Lamford*").

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In such a context, it is difficult to sustain, as the Province argues, a demarcation between enforcement of the law and pursuit of a monetary judgment.

[243] There is little doubt that if the Province were to take the steps that clearly lie within its power to take under the EPA (i.e. performing the allegedly necessary remediation and making a claim for the costs so incurred), the resulting costs would be monetary claims provable in bankruptcy.

[244] The only difference at the moment is that the Province maintains that the last step in the process of quantifying its claims under the EPA Orders can be kept in its pocket and managed at its discretion for the purpose of gaming the CCAA and the priority of creditor claims hereunder.

[245] With respect, this is hardly a defensible position.

[246] To this day, although it is aware of the fact that Abitibi cannot comply with the EPA Orders, the Province maintains that it has chosen to compel Abitibi to fulfill the terms of the EPA Orders rather than resort to an exercise of its powers under s. 102 of the EPA.

[247] The Province adopts this approach because it needs to argue, for strategic purposes, that it is not a "creditor" of Abitibi, a few weeks after arguing the opposite position in the Data Room Motion.

[248] For the Province, the definitions of claims and provable claims found in the CCAA and in the BIA 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, it argues, the conclusion reached in *Jameson House Properties Ltd. (Re)*⁴¹, where the British Columbia Court of Appeal said that a claim for CCAA purposes must consist of "a debt or liability ... that must be owed by the [debtor] to the person seeking to prove the claim..."

[249] The Province's argument rests primarily on the distinction made in the *Panamericana*⁴² case between a situation "where the government insists that the person fulfill his or her statutory duties or obligations from his own resources" and one where the government avails itself from the debt-creating provision in its environmental legislation to perform the remedial work. Only in the latter situation would the government create a "debt owed to the Crown" and could not be anything else than a creditor.

[250] In *Panamericana*, the Court 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". If the liability of the receiver for the abandonment of oil

⁴¹ (2009) 11 W.W.R. 425, at para. 47 (B.C.C.A.).

⁴² *Panamericana de Bienes Y Servicios (Receiver of) v. Northern Badger Oil & Gas Ltd.*, (1991) 81 D.L.R. (4th) 280 (Alta C.A.) ("*Panamericana*"), leave to appeal to the Supreme Court refused.

wells was present, that liability was not owed, however, to a "creditor". It was rather owed to the public at large:

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. (p. 290)

(Our emphasis)

[251] Likewise, in the two cases indexed as *Strathcona (Country) v. Fantasy Construction Ltd. (Trustee of)*⁴³, the Alberta Court of Queen's Bench ruled that an insolvent debtor must comply with its regulatory obligations to the public before paying the creditors. Relying on *Panamericana*, it stated that an obligation of the bankrupt to comply with public safety or environmental standards based on statutory authority must be honoured by the Trustee using estate assets notwithstanding resulting prejudice to creditors of the bankrupt.

[252] The court held, however, that where the regulatory authority has chosen to make itself a creditor by monetizing the regulatory obligation, the authority's status changes from that of an "enforcer" outside the scheme of bankruptcy distribution to a "creditor" within it:

Clearly, it is essential to this reasoning that the public agency charged with enforcing the general law of Alberta not have taken steps to make itself a creditor. If it has exercised a statutory authority or authority obtained from some other source, such as a Court Order, to do whatever ought to have been done by the party with the obligation and to recover the costs of doing so, it has become a creditor. From then on, the object of the whole process has changed. The public agency is no longer seeking to require the party with the general law obligation to comply. It is seeking to recover money. If the party with the obligation is in bankruptcy, collection of the money, its debt, by the public authority must be subject to the scheme of distribution created by the BIA⁴⁴.

(Our emphasis)

⁴³ (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*").

⁴⁴ (2005) 261 D.L.R. (4th) 221 (Alta Q.B.), at para. 46.

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[253] In a similar fashion, pleads the Province, the Ontario Court of Appeal decided in *Bulora*, thirty years ago, that a court-appointed receiver-manager was required to expend money under its control – money that would otherwise be paid to secured creditors – in order to comply with regulatory obligations⁴⁵.

[254] The Court considers that the *Panamericana*, *Strathcona* and *Bulora* decisions are distinguishable from the present situation based on the relevant facts.

[255] Pivotal in these decisions was the fact that the regulators involved were not acting as creditors, nor seeking the recovery of a debt. They were rather public agencies seeking to enforce the general law of the province involved. None was deriving a direct pecuniary benefit through the compliance of the orders issued. That no steps had been taken (i) to enforce the law at issue, (ii) to make the regulator involved a creditor or (iii) to seek the recovery of money were also key to the findings adopted by the courts.

[256] On top of that, in each of *Panamericana*, *Strathcona* and *Bulora* (and in *Lamford* too), the debtors were still the owner of the assets covered by the orders to be complied with.

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

[258] Given the lack of any presence of Abitibi in the Province and the obvious adequacy of money as a remedy to its alleged claims, the only effective means by which the EPA Orders can, on the balance of probabilities, be effectively enforced is by invoking s. 102(3) and (4) of the *EPA* now or later.

[259] Put otherwise, looking at the true substance over the apparent form, it is not the public "enforcer" taking steps to enforce the general law. It is, to the contrary, the enforcing authority clothed as a creditor.

[260] From that perspective, the situation at hand bears a lot of similarities to *Re Shirley*⁴⁶. In that case, the regulating authority was found to have a provable claim for costs expended and to be expended following a clean-up order ignored by the debtor but upon which the Ontario Minister of Environment had had to begin work partially.

⁴⁵ *Canada Trust Co. v. Bulora Corp.* (1980) 34 C.B.R. (N.S.) 152 (Ont. C.A.) ("*Bulora*"), affirming (1980) 34 C.B.R. (N.S.) 145 (Ont. S.C.); see also, along the same lines, *Re Lamford Forest Products Ltd.*, (1991) 10 C.B.R. (3d) 137 (B.C.S.C.) ("*Lamford*").

⁴⁶ (1995) 36 C.B.R. (3d) 101 (Ont. Ct. J.).

[261] If, like there, the Province can, and no doubt will, "create" a debt next month based on the same jurisdictional cloth as now exists, that future obligation based on presently existing facts is as subject to compromise as the debt "created" today.

[262] In other words, as this review of the case law indicates, only limited cases in limited circumstances⁴⁷ have so far ruled that non-monetary statutory obligations are not claims provable in a bankruptcy process or in a CCAA restructuring. The cases actually contain strong caveats⁴⁸ to this kind of rulings where the duty is based on a statute that includes a "debt-creating" provision and where the regulator has taken steps to engage in the process by which such debt is created.

[263] Both conditions required for this exception to apply are present here, in a context where it is, furthermore, highly likely that the Province will have no other alternative but to pursue the monetary claim process of its EPA under the circumstances.

[264] Besides, the core of the *Panamericana* argument is that the receiver, having elected to operate the business, could not shirk its duty to follow a regulatory requirement arising from that very operation under general law. This narrow view, which is the ratio of the case, was relatively uncontroversial (although subsequent amendments to the BIA and to the CCAA have effectively overruled it by placing limits on a receiver's obligations).

[265] By contrast, Abitibi has not carried on business in NL since the time of filing and the EPA Orders were issued primarily in respect of properties formerly owned by Abitibi and in regard to activities in most cases years in the past.

[266] As a result, viewed as a case that found liability of a court-appointed receiver, *Panamericana* is of little relevance following the amendments to the BIA and CCAA that limited this liability explicitly. However, in its analysis, the Alberta Court of Appeal went beyond a consideration of the receiver's responsibility as an operator of the business to consider what claims may or may not be provable in bankruptcy. Such analysis was, arguably, an *obiter*; most CCAA courts have not followed it in subsequent decisions.

[267] In that regard, the Court notes that the *Panamericana* decision did not consider that the BIA (like the CCAA) explicitly contemplates the proof of contingent and unliquidated claims which, combined with the "debt creating" provisions of a statute like

⁴⁷ See, *Panamericana de Blennes Y Servicios (Receiver of) v. Northern Badger Oil & Gas Ltd.*, (1991) 81 D.L.R. (4th) 280 (Alta C.A.) ("*Panamericana*"); leave to appeal to the Supreme Court refused; *Strathcona (Country) v. Fantasy Construction Ltd. (Trustee of)*, (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*"); *Canada Trust Co. v. Buloa Corp.*, (1980) 34 C.B.R. (N.S.) 152 (Ont. C.A.) ("*Buloa*"), affirming (1980) 34 C.B.R. (N.S.) 145 (Ont. S.C.); and *Re Lamford Forest Products Ltd.*, (1991) 10 C.B.R. (3d) 137 (B.C.S.C.) ("*Lamford*").

⁴⁸ See, *Re Shirley*, (1995) 36 C.B.R. (3d) 101 (Ont. Ct. J.); *Strathcona (Country) v. Fantasy Construction Ltd. (Trustee of)*, (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*"); and *Re Lamford Forest Products Ltd.*, (1991) 10 C.B.R. (3d) 137 (B.C.S.C.) ("*Lamford*").

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the *EPA*, definitely allows for the Province to be qualified as a contingent creditor with an eminently provable claim.

[268] In addition, in *General Chemical*⁴⁹, the Ontario Court of Appeal recently declined to follow the *Panamericana* decision precisely because of the amendments to the *BIA* and the *CCAA* that were subsequent to it:

"[45] In this court, the MOE repeats its arguments below and raises, as it did there, the case of *Panamericana De Bienes Y Servicios (Receiver of) v. Northern Badger Oil and Gas Ltd.* 1991 CanLII 2698 (AB C.A.), (1991), 81 D.L.R. (4th) 280 (Alta. C.A.). In that case, the court found that provincial environmental legislation concerning oilwell clean up costs did not conflict with the scheme of distribution under the BIA, and had to be complied with even though that reduced the amounts otherwise available for distribution in the bankruptcy.

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

(Our emphasis)

[269] In that judgment, the Ontario Court of Appeal expressly approved of the motion judge's finding that "[...] to permit the MOE to effect a delay in distribution would be to give a quasi-priority over other unsecured creditors [...]"⁵⁰. The premise of the first instance judge's reasoning was that federal legislation is paramount and that a provincial law may not seek to reorder the scheme of distribution set out in the *BIA*.

[270] It is worth mentioning that, similarly, the constitutional validity of the *CCAA* as a whole is well established⁵¹. Relying on the paramountcy doctrine, often have the *CCAA* courts emphasized that the operation of the *CCAA* regime cannot be thwarted by the operation of provincial legislation⁵².

[271] In sum, on a proper reading of its terms or their reasoning, neither the *EPA* nor the applicable case law are of any help to the Province in the fact pattern at issue.

⁴⁹ *General Chemical Canada Ltd., Re*, (2007) 35 C.B.R. (5th) 163 (Ont. C.A.) ("*General Chemical*"), leave to appeal to the Supreme Court refused.

⁵⁰ *General Chemical Canada Ltd., Re*, (2006) 22 C.B.R. (5th) 298 (Ont. S.C.J.), at para. 37.

⁵¹ *Re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659.

⁵² See, *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, (2008) 92 O.R. (3d) 513, at paras 102 to 104 (Ont. C.A.); *Nortel Networks Corp., Re [Union and Employee Benefit Appeal]*, (2009) 59 C.B.R. (5th) 23, at paras 38, 44 and 47 (Ont. C.A.); *Skeena Cellulose Inc., Re*, (2003) 43 C.B.R. (4th) 187, at paras 42 and 50 (B.C.C.A.).

7) The Province's Position

[272] All things considered, the Province's position amounts to an assertion that (i) the financial consequences of regulatory orders, however material, cannot be affected by the CCAA in any way, whether the obligations relate to past, present or future actions by a debtor; (ii) the regulatory authority alone gets to decide what is a regulatory order without court intervention; and (iii) generally "immune" regulatory orders can be converted into potentially "compromisable" monetary orders at the whim of the provincial regulator without court oversight or review.

[273] This contention 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 super-priority beyond the reach of compromise.

[274] The Court disagrees with such a proposition.

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

[276] When paragraph 10.1 of the First Stay Extension Order was added, the intent was not to grant super-priority status to regulatory bodies for pre-filing claims. Rather, this amendment simply permitted regulatory bodies to continue to regulate Abitibi in respect of its conduct after the commencement of the CCAA proceedings. From that perspective, this amendment was adhering to the spirit of s. 11.1 of the amended CCAA.

[277] This limited amendment to the stay provisions of the Initial Order recognized that a government is not prevented from issuing regulatory orders in good faith in relation to ongoing health, safety, security, public order or environmental concerns. Abitibi is required to address these since it must abide by government regulations in relation to its ongoing business operations while under CCAA protection.

[278] Such concerns are distinguished, however, from past environmental liabilities of a monetary nature relating to assets that are, for the most part, no longer under Abitibi's control.

[279] With respect, the Province's proposition would, moreover, render meaningless significant amendments made by Parliament to the CCAA and the BIA in 1992, 1997 and 2009 so as to strike some balance between bankruptcy and insolvency laws and environmental obligations.

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[280] These amendments notably incorporated s. 11.8 in the CCAA in 1997. Pursuant to that section, remediation costs for environmental damage enjoy a special status. The Crown benefits from a first rank priority on the contaminated property or contiguous property of a debtor for the costs of remedying any environmental condition or damage provided, of course, the debtor still owns it (s. 11.8(8)). These clean-up costs are also acknowledged as claims under the Act (s. 11.8 (9)).

[281] The lien is attached to the contaminated property and other contiguous real property of the debtor that is related to the activity that caused the contamination. Nonetheless, the lien does not give the Crown any priority over the rest of the creditors on the other assets of the debtor. In that regard, the Crown remains an ordinary unsecured creditor⁵³.

[282] The Province claims that this s. 11.8 priority exists only if the Crown has incurred the costs. It is therefore not applicable here.

[283] In contrast, for Abitibi, statutory liabilities to remedy environmental damage should be provable claims under the CCAA, whether or not the Crown has effectively incurred the costs. For it to be a priority claim under s. 11.8, it should be sufficient that the likelihood of enforcing the remediation by incurring the cost be greater than the likelihood of enforcing it by an execution in nature against the debtor.

[284] In that context, claims eligible to the priority of s. 11.8 would also be subject to any compromise to be reached under the CCAA.

[285] It is not necessary to decide this issue here in view of the Court's finding that the EPA Orders are financial in nature and thus, qualify as claims under the CCAA no matter what.

[286] In any event, in this case, one reality remains. By expropriating Abitibi, the Province effectively "realized" on any security to which it would have otherwise been potentially entitled under s. 11.8(8) of the CCAA should the expropriated lands be contaminated. Nevertheless, by its position, it still seeks to go further and indirectly take for its benefit other property and assets of Abitibi located beyond its borders.

[287] In the Court's opinion, this should not be allowed outside the limited framework of the CCAA restructuring process.

[288] All in all, this position adopted by the Province not only fails to take into account the true impact of these relevant amendments to the law, it also runs counter to the spirit of the CCAA and the well-established principle of compromise of contingent claims.

⁵³ *General Chemical Canada Ltd., Re*, (2006) 22 C.B.R. (5th) 298 (Ont. S.C.J.); aff'd. in *General Chemical Canada Ltd., Re*, (2007) 35 C.B.R. (5th) 163 (Ont. C.A.) ("*General Chemical*"), at para. 42, leave to appeal to the Supreme Court refused.

[289] The Province's position rests on the premise that obligations or duties to comply with the general law are not "claims" but rather "obligations" that cannot be "extinguished" upon a debtor's insolvency.

[290] It shall be noted that, contrary to what the Province often said, claims cannot properly be qualified as "extinguished" upon insolvency. They are rather called for, determined and ultimately compromised under a plan of arrangement, only after the latter has been voted upon by the creditors and approved by the Court.

[291] In the Court's view, monetary claims disguised as regulatory orders issued in relation to pre-filing activities on lands which are no longer in control of a debtor should not, in a situation where the costs of the remediation efforts are reducible to money, be permitted to remain uncompromised and in existence post-emergence where to do so could threaten the presentation of a viable compromise or plan of arrangement.

[292] In line with its rehabilitative objectives, the CCAA does not contain a provision analogous to section 178 of the BIA whereby certain "excepted claims" (such as fines or penalties) could constitute debts that survive bankruptcy (or in the CCAA's case, emergence). In *Air Canada*⁵⁴, Cummings J. qualified excepted claims as "exceptions to the normative policy objective of rehabilitation" and concluded that they did not apply to proceedings under the CCAA.

[293] If the Court were to accept the Province's position, the remediation obligations would become, in effect, priorities or unaffected obligations to be satisfied in full by Abitibi before the remaining value of its enterprise is allocated among the other creditors and claimants. The net effect of such a determination would be the reallocation of value away from the creditors generally in favour of the Province and the size of such reallocation would be material.

[294] Environmental liabilities of this magnitude would also, if uncompromised upon emergence from the CCAA process, act as a sword of Damocles over Abitibi by threatening its continuity post-emergence. In fact, this mere threat could very well preclude obtaining needed exit financing and prevent a plan from being adopted, unless a potentially risky and costly strategy of devising a liquidation plan were employed. This would defeat the very objectives of the restructuring process.

[295] If that were to be the case, the net result would be that the ability of Abitibi to successfully restructure would be challenged on a number of levels. At the very least, the restructuring process would likely become more complicated, including further delays and costs.

[296] The Court considers that this is definitely not the preferred way to go.

⁵⁴ *Air Canada, Re*, 2006 CanLII 42583 (Ont. S.C.), at paras 34ff.

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FINAL REMARKS

[297] In closing, as the CCAA Judge presiding over this restructuring, the Court believes that some final remarks are warranted.

[298] For all stakeholders involved, the restructuring of Abitibi is by no means an easy task. The extent of the indebtedness is huge. It is in the range of many billions of dollars.

[299] Term lenders, secured noteholders and bondholders each have concerns. The same goes for numerous trade creditors. Thousands of employees and pensioners may be affected. Dozens of facilities are at stake. Tens of communities are looking forward to a positive outcome. Pension plans, collective agreements and commercial contracts of all sorts must be looked at and, in many cases, reviewed and reconsidered.

[300] To date, the Court record indeed shows that more than 480 entries have been recorded in less than a one-year span. During that period, the Court has rendered in excess of 55 different orders on various issues.

[301] The hard reality of real time litigation in CCAA restructurings is that parties do not have the luxury of debating forever their disagreements. This is simply not possible when the debtor is fighting for survival. The preferred route to follow remains, at least in the Court's view, to try to find an acceptable forum where each side is able to fully present their position, and get it ruled upon.

[302] No doubt harsh feelings exist between the Province and Abitibi as a result of the events of certainly the last eighteen months, perhaps even more. So far, it has led them to many battlefields, be it in the NAFTA proceedings, in the Data Room Motion or in the present EPA Motion. All that without taking into account the many discussions that these must have unquestionably provoked.

[303] Both believe, no doubt honestly, that they have legitimate claims to raise one against the other. That may well be. However, they should be careful and, in truth, attentive so that their disagreements do not end up causing much more serious difficulties to many others. Unfortunately, it is clear that their disputes have this very potential.

[304] It is this Court's hope that they will find a way to agree on an appropriate forum in which to arbitrate their differences, ideally sooner rather than later. Delays in this respect do not serve the best interests of either of them. In the global picture, this has moreover the potential of being far more detrimental to a number of other bystanders to their disputes.

[305] To some extent, this judgment forces the Province and Abitibi to at least consider bringing some of their claims within the realm of this restructuring, and not leave them

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outside with the very negative consequences this may potentially bring upon the whole process.

[306] The Monitor plainly voiced it. This restructuring may be put in jeopardy if no solution is found along these lines. If that were to be the end result, the whole purpose of the CCAA would have been ignored and set aside. With all the efforts deployed so far by so many, that would be most unfortunate.

FOR THESE REASONS, THE COURT:

[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");

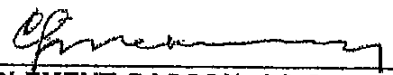
[308] **DISMISSES** the intervention of the Intervening Parties, Her Majesty the Queen in right of the Province of British Columbia (the "HMQBC") and the Attorney General for British Columbia (the "AGBC");

[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;

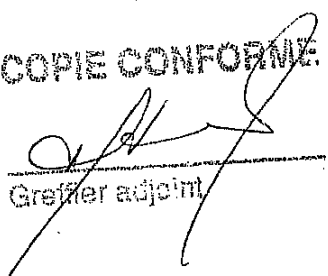
[312] **WITH COSTS** against the Province in favor of the Debtors, but **WITHOUT COSTS** against the HMQBC and the AGBC.


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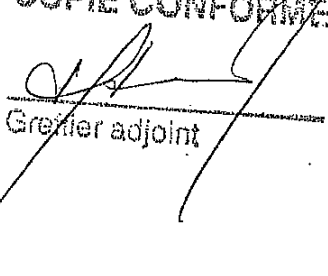
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National Association, Indenture Trustee for the Senior Secured Noteholders

Dates of hearing: February 24, 25 and 26, 2010

SCHEDULE "A"
ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.
20. ABITIBI-CONSOLIDATED (U.K.) INC.

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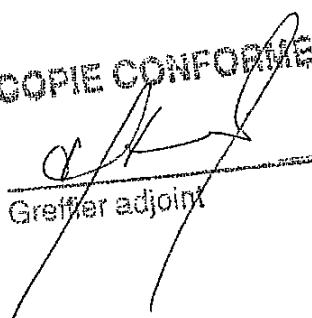

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SCHEDULE "B"
BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

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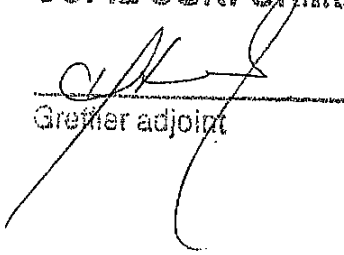
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SCHEDULE "C"
18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

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TAB 4

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-020594-107
(500-11-036133-094)

DATE: MAY 18, 2010

IN THE PRESENCE OF THE HONOURABLE JACQUES CHAMBERLAND, J.A.

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 BONDHOLDERS

and

AD HOC COMMITTEE OF THE SENIOR SECURED NOTEHOLDERS AND U.S.
BANK NATIONAL ASSOCIATION, INDENTURE TRUSTEE FOR THE SENIOR
SECURED NOTEHOLDERS

IMPLEADED PARTIES

JUDGMENT

[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,

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on March 31, 2010, under the *Companies' Creditors Arrangement Act* (R.S. Canada, 1985, c. C-36, as amended) (the "CCAA").¹

[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.

[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.²

[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.³

[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.

¹ 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.

² "According to Abitibi, its losses resulting from the enactment of the *Abitibi Act* will exceed \$300 million" (Judgment *a quo*, par. 59).

³ "(...) 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).

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[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.

[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.⁴

[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:

⁴ "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).

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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 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:

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(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*.⁵

[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 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.

⁵ Judgment *a quo*, par. 25.

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[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 issues 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.

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[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");

[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;

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- 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" (*In Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265, at 272 (B.C.C.A.)).

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

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.

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[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 monetary in nature. This is essentially a finding of fact reached after considering 1) the true nature and impact of the CCAA (judgment

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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*,⁶ 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).

⁶ 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".

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[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".

[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"⁷ 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.

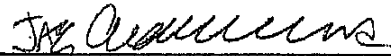
[50] This concern does not justify, in my opinion, granting leave to appeal. First, this statement from the judge of first instance is nowhere to be found in the conclusions of the judgement *a quo*. Second, the statement is only one of the many reasons expressed by the judge of first instance to justify 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.

⁷ Judgment *a quo*, par. 189.

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


JACQUES CHAMBERLAND, J.A.

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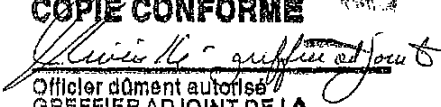
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Date of hearing: May 12, 2010

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TAB 5

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PART I ~ STATEMENT OF FACTS

OVERVIEW

1. Industrial pollution is one of the scourges of the modern age. Whether through deliberate action or carelessness, environmental contamination is frequently the by-product of industry's quest for profits. From the Sydney tar ponds in Cape Breton¹ to the Cheakamus River derailment in British Columbia² and the Gulf of Mexico oil spill, examples of catastrophic industrial pollution can be found across Canada and internationally.

2. In an effort to prevent pollution and to redress its effects, the federal and all provincial governments have enacted environmental protection legislation. At the heart of all this legislation is the "polluter-pay" principle. The "polluter-pay" principle requires that the person who is responsible for pollution be responsible for cleaning it up. The point of this principle is to ensure that governments are not left to clean up pollution caused by industrial activities and that taxpayers are not left footing the bill. This principle has become entrenched in the public policy of Canada and has been endorsed by this Court.³

¹ See e.g., Timothy W. Lambert & Stephanie Lane, "Lead, Arsenic, and Polycyclic Aromatic Hydrocarbons in Soil and House Dust in the Communities Surrounding the Sydney, Nova Scotia, Tar Ponds" *Environmental Health Perspectives* 12:1 (January 2004) 35, Tab 30 at 153-154.

² See e.g., E. Wayne Benedict, "Canada's Railway Safety Regulatory Regime: Past, Present & Future" (2007) 34 *Transp. L.J.* 147, Tab 29, at 147.

³ See e.g., *Imperial Oil Ltd. v. Québec (Minister of the Environment)*, [2003] 2 S.C.R. 624, Tab 18 at paras. 20-25, 39.

3. In this case, the Québec Superior Court ("**CCAA Court**") relieved a company being restructured under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**")⁴ from the company's statutory duty to comply with orders made under the *Environmental Protection Act* ("**EPA**")⁵ of the Province of Newfoundland and Labrador ("**Province**"). Consistent with the "polluter-pay" principle, these orders required the company to develop and implement a remediation plan to restore property in the Province to its pre-contaminated state. The effect of the CCAA Court's order was to transfer the obligation and costs of removing contamination of the lands and waters of the Province from the company and its creditors to the Province and its taxpayers.

4. This case raises three issues that are of public importance:

- (i) The decision conflicts with judgments of other provinces that have considered the application of provincial environmental law to federal bankruptcy and insolvency law. Resolving this conflict and ensuring consistency across the country in the application of federal bankruptcy and insolvency legislation is a matter of public importance.
- (ii) The case raises a policy issue under federal bankruptcy and insolvency law over the question of who should bear the costs of compliance with environmental law (and by necessary implication, other regulatory laws) by a company attempting to restructure: the company's creditors or the public at large?
- (iii) The case raises an issue about the limits of the CCAA Court's power: whether the CCAA provides a court with the statutory authority to remove all hurdles under provincial law that impair a debtor company's ability successfully to restructure under the CCAA?

⁴ The restructuring proceedings are being conducted under the provisions of the CCAA that were in effect on 17 April 2009 (Tab B). The differences between those provisions and the provisions of the CCAA now in effect (Tab C) are immaterial to the issues raised on this application for leave to appeal.

⁵ S.N.L. 2002, c. E-14.2, Tab D.

FACTS

Abitibi's Restructuring

5. AbitibiBowater Inc. and its affiliates ("**Abitibi**" or "**the company**") is attempting to restructure its affairs by negotiating a plan of compromise and arrangement with its creditors pursuant to the CCAA. An Initial Order was made under the CCAA on 17 April 2009. Since Abitibi's head office is located in Montréal, the Initial Order was granted and the restructuring process throughout Canada is being supervised by the Superior Court of Québec sitting as the CCAA Court. The company is seeking to emerge from the CCAA proceedings in October 2010.⁶

6. A few months after the Initial Order was granted, Abitibi sought and obtained from the CCAA Court a Claims Procedure Order (the "**CPO**"), which sets out the process whereby creditors may file claims against Abitibi.⁷

7. Paragraph 3(t) of the CPO defines "claim" in exceptionally broad terms. Amongst other things, "claim" is defined to include any breach of a statutory duty. And paragraph 15 of the CPO bars and extinguishes any "claim" that has not been filed in accordance with the CPO. Thus, unless a "claim" arising out of a breach of a statutory duty is filed pursuant to the CPO, and is made subject to compromise along with all other such claims, Abitibi's obligation to fulfil its statutory duty is permanently extinguished.

⁶ Fifty-First Report of the Monitor, 20 July 2010, Tab 9, at para. 25. It appears from the proposed plan of arrangement that the company's unsecured creditors will receive a tiny recovery on their claims whereas the company's secured creditors will be paid in full. Forty-Seventh Report of the Monitor, 6 July 2010, Tab 8, at paras. 43-62.

⁷ CPO, Tab 6.

The EPA

8. As with other provinces of Canada,⁸ and the Federal government,⁹ the Province has enacted legislation for the protection of the environment, namely the EPA.

9. Section 99 of the EPA permits the Minister of Environment and Conservation ("**Minister**") to issue broad orders against a "person responsible" to remediate environmental contamination.¹⁰ Those orders may require 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. An order made under s. 99 of the EPA remains in effect until the Minister revokes it under s. 101 of the Act.

10. Where the person responsible does not comply with an order made under s. 99 of the EPA, then, pursuant to s. 102 of the Act, the Minister has the discretion to 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 s. 99 order are recoverable from the person against whom the order was made as a statutory debt. The statutory debt thus arises only when a person responsible fails to

⁸ See e.g., (pinpoint references are to the provisions in each legislative regime that allow the government to issue orders to comply such as the EPA Orders at issue in this case), *Clean Environment Act*, R.S.N.B. 1973, c. C-6, Tab F, at ss. 5, 5.001, 5.1, 5.2; *Environment Act*, S.N.S. 1994-95, c. 1, Tab G, at ss. 2, 3, 125, 132; *Environment Act*, C.C.S.M., c. E-125, Tab H, at ss. 24, 24.2; *Environmental Management Act*, S.B.C. 2003, c. 53, Tab I, at ss. 45, 47, 48; *Environmental Management and Protection Act*, 2002, S.S. 2002, c. E-10.21, Tab J, at ss. 2, 47, 51; *Environmental Protection Act*, R.S.O. 1990, c. E-19, Tab K, at ss. 7, 8, 147, 150; *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9, Tab L, at ss. 7, 7.1; *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, Tab M, at ss. 1, 210, 214; *Environment Quality Act*, R.S.Q., c. Q-2, Tab N, at ss. 25, 27, 29, 31.43, 31.46, 31.50, 31.62, 113, 114.3.

⁹ *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33, Tab E, at ss. 234, 235, 238, 239, 240.

¹⁰ EPA, Tab D.

comply with a s. 99 order, the Minister exercises his or her discretion to fulfil the person's obligations under the s. 99 order, and incurs expenses in fulfilling the terms of that order pursuant to s. 102 of the Act.

11. The purpose of sections 99 through 102 of the EPA, then, is to impose the obligation – and all of the associated direct and indirect costs – to remediate contaminated land on the person responsible, as defined in the legislation, so that the Province does not have to perform this task and have the taxpayers incur the associated expense. These sections accordingly embody the "polluter-pay" principle.

The EPA Orders

12. Beginning in 1905, Abitibi conducted large scale and intensive industrial activities on various sites throughout the Province (the "**Abitibi Sites**"). The Abitibi Sites are contaminated, some extremely so, including with heavy metals.¹¹

13. After the Initial Order was granted, the Minister issued five orders against Abitibi under s. 99 of the EPA ("**EPA Orders**").¹² The EPA Orders require Abitibi, *inter alia*, to submit for the Minister's approval a detailed remediation plan for the Abitibi Sites and to complete site remediation by 15 January 2011 or some other date as agreed with the Province's Department of Environment and Conservation.

¹¹ Supplementary Affidavit of Donna Ballard, sworn 25 January 2010, Tab 10, at paras. 37-44.

¹² Tab 7. Pursuant to s. 2(x) of the EPA, Tab D, Abitibi is a "person responsible" for the contamination because it either currently owns or formerly did own the Abitibi 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.

14. Abitibi refused to comply with the EPA Orders. The company asserted that based on the stay of proceedings in the Initial Order it did not have to comply with the EPA Orders during the restructuring period, and that based on the definition of claim found in the CPO it would not have to comply with these orders after it emerged from the CCAA.

15. Furthermore, Abitibi estimated that it would cost the company as much as \$100 million, and maybe more, to comply with the EPA Orders, and that such an expenditure would have "a material effect" on its ability to restructure under the CCAA. Abitibi's estimate of the remediation costs gives some indication of the scale of the contamination it is responsible for cleaning up.

Proceedings in the Courts Below

16. After issuing the EPA Orders, and prior to the imposition of the claims bar date under the CPO, the Province moved before the CCAA Court for an order declaring that the EPA Orders are not barred or extinguished and their enforceability is not affected by the CPO, and in particular by paragraphs 3(t) and 15 of that order. The hearing took place over three days and was based on a paper record supplemented by oral evidence.

17. The Province argued that CCAA Court could not (1) define claim for the purposes of the CCAA as including a breach of a statutory duty to remediate contaminated lands (which is the effect of paragraph 3(t) of the CPO); and (2) bar or extinguish or otherwise to immunise Abitibi from its statutory duty to remediate the

Abitibi Sites pursuant to the EPA Orders (which is the effect of paragraph 15 of the CPO).

18. For these reasons, the Province argued that the CCAA Court could not sanction a plan of arrangement and compromise that was based in part on sanctioning Abitibi's ongoing breach of the Province's laws. The Province served a Notice of Constitutional question in this regard.

19. The Province of British Columbia intervened in support of the Province's statutory interpretation and constitutional points.

20. In lengthy reasons the CCAA Court dismissed the Province's motion.¹³

21. The CCAA Court's analysis had three steps.

22. In the first step, the court held that the resolution of the challenge to the CPO depended on the definition of claim found in the CCAA.

23. In the second step, the court expanded the statutory definition of claim to apply to statutory duties that are "financial or monetary in nature".¹⁴

¹³ Tab 3.

¹⁴ In para. 126 of its judgment, Tab 3, the CCAA Court wrongly asserted that the Province agreed with this characterisation of the definition of claim. The Province did not do so. Indeed, in para. 2 of its judgment, the CCAA Court correctly summarised the Province's legal position ("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)). The Court of Appeal, Tab 4, at para. 35 of its judgment relied on para. 126 of the CCAA Court's decision.

24. And in the final step, the court concluded that the EPA Orders were financial or monetary in nature because of a combination of factors: the orders required Abitibi to spend money for a purpose that did not profit the company; the people of the province would benefit from having the contamination removed from the Abitibi Sites; the Minister has the discretionary power under the EPA to fulfil Abitibi's statutory duties and to claim from Abitibi any of the resulting costs; the application of the EPA was unfair to Abitibi because the EPA Orders require Abitibi to clean up contamination on property that the Province now owns as a result of having passed an act divesting Abitibi of that property.

25. The operative part of the court's reasoning is as follows:

[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 filed by Abitibi.¹⁵*

¹⁵

Tab 3.

26. The CCAA Court held that, based on its interpretation of the definition of claim in the CCAA, it did not have to consider the Province's (and British Columbia's) constitutional arguments.

27. Pursuant to s. 13 of the CCAA, the Province sought leave to appeal the decision of the CCAA Court to the Court of Appeal for Québec. The test for leave to appeal under the CCAA is whether there are serious and arguable grounds that are of real and significant interest to the parties or the practice.¹⁶

28. In extensive reasons, the Court of Appeal denied leave.¹⁷ The court was of the opinion that the test for leave was not met because the CCAA Court correctly interpreted the definition of claim used in the CCAA and that the CCAA Court's application of that definition to the EPA Orders was a finding of fact that could not be challenged on appeal.

29. By accepting that the definition of claim in the CCAA includes a debtor's statutory duties under provincial law, the Court of Appeal effectively determined, and dismissed, the appeal on the merits, as opposed to merely on the leave question. In the circumstances it is appropriate that if this Court grants leave to appeal, that the appeal consider the merits of the dispute.¹⁸

¹⁶ *Canadian Airlines Corp. (Re)* (2000), 19 C.B.R. (4th) 33 (Alta. C.A.), Tab 11, at paras. 5-7.

¹⁷ Tab 4.

¹⁸ The Court has done so in the past. See e.g., *MacDonald v. Montreal (City)*, [1986] 1 S.C.R. 460, Tab 21, at 506-512; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, Tab 23, at paras. 392-393; *Westar Mining Ltd. (Re)*, [1993] 2 S.C.R. 448, Tab 28, at 449.

PART II ~ QUESTION IN ISSUE

30. The case raises the following question of public importance: May a debtor's statutory duty to remove environmental contamination be extinguished under the CCAA like a commercial debt?

31. This question is of public importance for three reasons:

- (i) there is a conflict in the law of different provinces over the answer to this question arising from different interpretations given by the courts of those provinces to the statutory language used in both the BIA and CCAA;
 - (ii) it is important nationally to determine whether a company being restructured under the CCAA may shift the economic burden of the environmental obligations on to the public; and
 - (iii) it is important nationally to determine if the CCAA can be used to relieve a debtor from any obligation under provincial law that impedes its ability successfully to restructure under the CCAA.
-

PART III ~ ARGUMENT

Summary: This case will determine whether the bankruptcy and insolvency law of Canada can be used to extinguish a debtor's obligations under provincial law to clean up environmental contamination and thereby shift the responsibility for cleaning up the environment from the company responsible for the pollution (at the ultimate expense of its creditors) to the state (at the ultimate expense of the taxpaying public).

(i) It is a matter of public importance to resolve a conflict in the law of different provinces over the resolution of this issue

32. Based on the definition of claim in the CCAA, the lower courts in this case extinguished (through the CPO) all of Abitibi's statutory duties under the EPA and thereby relieved Abitibi of the obligation to comply with the EPA Orders by restoring the Abitibi Sites to their pre-contaminated states. The decision in this case conflicts with decisions from the courts of other provinces on whether the definition of claim includes such duties and permits a court to extinguish them like a commercial debt.

33. The definition of claim used in the CCAA is the same as the definition of claim provable used in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").¹⁹ That definition has been interpreted in two different ways across Canada in relation to a debtor's statutory duties under provincial law to act or to refrain from acting in a specified way – its regulatory obligations, in other words.

¹⁹ Section 12 of the CCAA, Tab B, as it stood at the time of this proceeding (now s. 2(1) of the CCAA, Tab C), used the nomenclature "debt provable". The parties and the courts accept that "debt provable" and "claim provable" mean the same thing.

34. Section 2 of the BIA provides that a claim provable "includes any claim or liability provable in proceedings under this act by a creditor".²⁰

35. Section 121 of the BIA deems to be a claim provable:

All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt ...²¹

36. Bankruptcy and insolvency is a federal head of power. It is federal because the framers of the constitution recognised the need to ensure consistency across Canada in the treatment of bankrupt or insolvent debtors. This objective is frustrated when provincial courts interpret the same provisions of federal bankruptcy and insolvency law differently.

37. The courts of some provinces have interpreted claim provable to exclude a debtor's regulatory obligations. In other provinces, such as Québec, the courts have interpreted this definition to include such obligations. Therefore, in some provinces a debtor must comply with the general law by acting in a specified way even if doing this requires the debtor to spend money thereby leaving less for its creditors. In other provinces, however, a debtor may be relieved from duties imposed by the general law in order to relieve the debtor from the compliance costs in order to leave more money for its creditors. Thus, under the same federal statutes, statutory duties, and hence regulatory law generally, are treated differently in different provinces.

²⁰ Tab A (emphasis added).

38. The seminal case on this issue is *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. ("Panamericana")*.²² In that case, the Court of Appeal for Alberta held that a court-appointed receiver of a bankrupt oil company had to comply with an order made by the Alberta Energy Resources Conservation Board requiring the company, for environmental reasons, to carry out proper abandonment procedures on suspended oil wells, even though the costs of complying with this order reduced the amount of money available to pay the company's secured creditors. The Court reasoned that the obligation imposed by the Board was not a claim provable because the Board was enforcing a duty found in the general law of the province from which the company was not immune merely because it was insolvent.²³

39. The Court also held that even though the Board (like the Province in this case) had the right to perform the required remediation work itself, and thus become a creditor, that possibility did not make the Board a creditor. The Board was a creditor only if it was seeking a direct payment of money from the debtor to the Board. The Board was not a creditor when it was seeking the debtor's compliance with provincial law (i.e., by requiring the company to perform the abandonment procedures at its own expense).²⁴

²¹ *Ibid.*

²² (1991), 81 D.L.R. (4th) 280 (Alta. C.A.), Tab 22.

²³ *Ibid.*, Tab 22, at 289-291, 299-300.

²⁴ *Ibid.*, Tab 22, at 289-291.

40. The principles enunciated in *Panamericana* have been applied by the lower courts of Alberta and by the lower and appeal courts of British Columbia.²⁵ These cases were decided in the context of amendments to the BIA and CCAA that were enacted after *Panamericana* was decided. These amendments limit a receiver's personal liability under Provincial environmental law and give a province a first charge over the bankrupt's property for any costs incurred by the province removing contamination from that property.²⁶ Thus, the Alberta and British Columbia decisions, either expressly or implicitly, hold that these amendments do not affect the *Panamericana* principle.

41. *Panamericana* was also used by this Court in *Husky Oil Operations v. Canada (Minister of National Revenue—M.N.R.)*,²⁷ to illustrate how provincial law may validly affect the "bottom line" in an insolvency, while not re-ordering priorities.²⁸

42. In contrast to these decisions, the Court of Appeal for Ontario and the Québec courts in this case have held that the CCAA and BIA can be used to eliminate a debtor's obligation to comply with the general law of a province.

²⁵ *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, (2005) 256 D.L.R. (4th) 536 (Alta. Q.B.), Tab 26; *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, (2005) 261 D.L.R. (4th) 221 (Alta. Q.B.), Tab 27; *Lamford Forest Products Ltd. (Re)* (1991), 10 C.B.R. (3d) 137 (B.C.S.C.), Tab 20; *Jameson House Properties Ltd (Re)*, [2009] 11 W.W.R. 425 (B.C.C.A.), Tab 19.

²⁶ BIA, Tab A, s. 14.06; and CCAA, Tab B, s. 11.8.

²⁷ [1995] 3 S.C.R. 453, Tab 17.

²⁸ *Ibid*, at paras. 30, 139, 142-149. The reference to *Panamericana* was found in that part of the dissenting judgment of Iacobucci J. (para. 146) in which he explained how provincial law may affect the bottom line of a bankruptcy. The majority agreed with Iacobucci J.'s analysis of this issue.

43. In *General Chemical Canada Ltd. (Re)* the Court of Appeal for Ontario affirmed a Superior Court decision which had held that the amendments to the BIA dealing with environmental matters were a complete code that precluded the operation of provincial environmental law except to the extent expressly permitted by those amendments.²⁹ The Court of Appeal for Ontario also expressly rejected the authority of *Panamericana* on the grounds that the *Panamericana* principle impermissibly affects the scheme of priorities found in the BIA by imposing the costs of compliance with provincial law on the creditors of a insolvent company.³⁰ In this way, the Court of Appeal's decision conflicts with both *Panamericana* and the decisions from the Alberta and British Columbia courts that were decided after the amendments to the BIA and CCAA and which found those amendments to be irrelevant to the application of the *Panamericana* principle.

44. Similarly, in the case at bar, the Québec Superior Court and the Court of Appeal for Québec rejected the *Panamericana* line of authority and held that the CCAA gave the Court the power to treat obligations under provincial law to restore the environment as a claim provable.

45. A company is required to make its BIA or CCAA filing in the province where it is incorporated.³¹ And proceedings under the BIA or the CCAA are effectively national proceedings.³² Therefore, the effect of the different provincial treatment of

²⁹ *General Chemical Canada Ltd. (Re)* (2006), 22 C.B.R. (5th) 298 (Ont. S.C.J.), Tab 13, aff'd (2007), 35 C.B.R. (5th) 163 (Ont. C.A.), Tab 14.

³⁰ *Ibid*, Tab 14, at paras. 45-46.

³¹ BIA, Tab A, s. 43(5); and CCAA, Tab C, s. 9(1).

³² *Sam Lévy & Associés v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, Tab 24, at para. 25.

claim provable has profound national significance to the application of provincial regulatory law: companies that are incorporated in provinces that accept *Panamericana* (Alberta and British Columbia) are required to fulfil their regulatory obligations under the laws of any province (and in particular their statutory duties to comply with provincial environmental law) regardless of the impact of doing so on their creditors. On the other hand, companies that are incorporated in provinces that reject this authority (Ontario and Québec) do not have to do this if the cost of compliance affects those companies' creditors, as inevitably will be the case.

46. It is a matter of national importance to determine whether compliance by the debtor with its regulatory obligations under provincial law is, or is not, a claim provable under the BIA or CCAA.

(ii) *It is a matter of public importance to determine whether a company being restructured under the CCAA may shift the economic burden of its environmental obligations on to the public*

47. Regulatory law provides the framework within which all companies operate. Compliance with regulatory law – such as the obligation to clean up environmental contamination – inevitably imposes an economic cost on the regulated entity. This is a cost which the state, as a matter of public policy, requires a company to assume in order to balance the public interest with a company's profit-making activities. Shareholders invest and creditors lend money based on, and with knowledge of, the regulatory framework within which the company operates and hence with knowledge of the associated costs of meeting those regulatory obligations.

48. The CCAA Court (and the Québec Court of Appeal) believe that a company and its creditors should be able to shift these costs on to the taxpaying public if:

- (a) the company and its creditors will not profit from meeting those obligations;
- (b) the public will benefit from having those obligations fulfilled;
- (c) the government has the ability to fulfil the company's regulatory obligations at the taxpayers expense; and
- (d) the application of the provincial law appears to the CCAA Court to be unfair to the debtor.

49. As explained below, all of this reasoning undermines Canadian environmental law as well as the effectiveness of much – if not all – provincial regulatory law generally.

50. The environmental laws in Canada impose a continuing obligation on the responsible person to restore contaminated property to its pre-contaminated state for as long as the property is polluted because it is in the public interest that the lands and waters of this country not be contaminated with the by-products of industrial activity. It is for this reason that the obligation to restore polluted property to its pre-contaminated state does not depend on whether the company owns the polluted property, or ever did, and without regard to whether the polluter will benefit from spending its money to remediate the property.

51. Furthermore, the objective of the "polluter-pay" principle underlying Canadian environmental law is different from many other provincial laws that create statutory debts or liens. The purpose of the EPA is not to enforce a payment obligation

owed to the state. Rather, its purpose is to enforce compliance with a polluter's statutory duty to clean up the pollution it has caused. This is a critical difference, which the lower courts in this case failed to recognise.

52. Thus, the reasoning of the lower courts in this case means that the federal bankruptcy and insolvency law may be used to licence environmental harm without responsibility. Shareholders and creditors of a company carrying on industrial activities may reap the benefit over many years (a century in the case of Abitibi) of the company's decision to avoid the costs of sound environmental stewardship and benefit again by permitting the company to shift the statutory obligations it failed to fulfil onto the public at large should it seek to restructure its affairs. Whether federal bankruptcy and insolvency law permits this result is a matter of public importance.

(iii) It is a matter of public importance to determine if the CCAA may be used to relieve a debtor from any obligation under provincial law that impedes its ability successfully to restructure under the CCAA

53. The CCAA Court in this case immunised Abitibi from the application of the EPA on the basis that compliance with the EPA Orders is not in Abitibi's economic interest and would for this reason impair Abitibi's ability to formulate a plan of compromise and arrangement that its creditors would accept. In doing so, the decision of the CCAA Court embodies an approach that increasingly pervades CCAA practice across Canada.

54. Formerly, courts and the insolvency bar accepted that the job of the CCAA Court was "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."³³ This is no longer the case. They now seem to believe that the CCAA Court is empowered – and required – to make whatever orders are necessary to ensure a successful result for the insolvent debtor.³⁴

55. Indeed, for the CCAA Court in this case, the fact that the impugned provisions of the CPO were standard boilerplate clauses regularly used in restructuring orders across Canada was enough to justify their acceptance without any analysis of whether there was any valid statutory basis for immunising the debtor company from the application of valid provincial law.

56. In this regard, the CCAA Court did not heed the caution given by this Court in *GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.*,³⁵ where the Court held that guarding the flexibility given to the insolvency process "with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the *Bankruptcy and Insolvency Act*".

57. More generally, this case raises squarely the issue of the remedial scope of the CCAA. Fifteen years ago this Court accepted in *Husky Oil* that provincial law can affect the "bottom line" in an insolvency (both for the benefit of and detriment to the creditors³⁶). It seems to follow that the CCAA does not authorise the CCAA Court to remove any impediment to a successful restructuring found in provincial law – whether

³³ *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 307 (B.C.C.A.), Tab 12, at para. 10 (emphasis added).

³⁴ See e.g., *Stelco Inc. (Re)* (2005), 75 O.R. (Ont. C.A.), Tab 25, at 16-17, 19, 22-23.

³⁵ [2006] 2 S.C.R. 123, Tab 16, at para. 50.

³⁶ *Husky Oil Operations v. Canada (Minister of National Revenue—M.N.R.)*, [1995] 3 S.C.R. 453, Tab 17, at 139, 142-149. For an example of where provincial law improved the bottom line for creditors, see e.g., *Giffen (Re)*, [1998] 1 S.C.R. 91, Tab 15.

through the definition of claim provable or otherwise. Yet this is what happened in this case. In effect, the CCAA Court used the CCAA as a "regulatory car wash" to cleanse Abitibi of regulatory obligations that imposed unwanted financial burdens on the company going forward. Whether the CCAA can be used in this manner is a matter of public importance.

PART IV ~ SUBMISSIONS RESPECTING COSTS

58. The Applicant submits that this is a case in which costs of this application should follow the event.

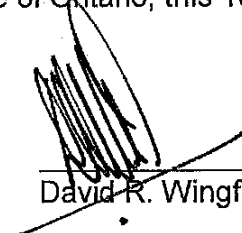
PART V ~ ORDER SOUGHT

59. The Applicant respectfully requests an Order granting leave to appeal from the judgment of the Court of Appeal for Québec dated 18 May 2010, and to consider the merits of the case below, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Toronto in the Province of Ontario, this 13th day of August 2010.

SIGNED BY:



David R. Wingfield

Paul D. Guy

Of counsel for Her Majesty The Queen In
Right of the Province of Newfoundland
and Labrador

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Cases

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E. Wayne Benedict, "Canada's Railway Safety Regulatory Regime: Past, Present & Future"
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Timothy W. Lambert & Stephanie Lane, "Lead, Arsenic, and Polycyclic Aromatic Hydrocarbons
in Soil and House Dust in the Communities Surrounding the Sydney, Nova Scotia, Tar Ponds"
Environmental Health Perspectives 12:1 (January 2004) 35

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