File No. 33797

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

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)

MEMORANDUM OF ARGUMENT OF THE RESPONDENTS, ABITIBIBOWATER INC., ABITIBI-CONSOLIDATED INC. AND BOWATER CANADIAN HOLDINGS INC.

PART I - FACTS

A. OVERVIEW

1. This application for leave to appeal is merely one more attempt by Her Majesty the Queen in Right of the Province of Newfoundland and Labrador (the "**Province**" or "**Newfoundland**") to interfere with the Debtors' (collectively or singularly as the context requires, "**Abitibi**") restructuring efforts with a view to seeking retribution for a plant closure. The application raises no question of public importance or issues of law or mixed law and fact involved in that question that would justify intervention by this Honourable Court.

2. The issue at the core of this dispute is whether five orders issued by the Province pursuant to the Province's *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, (the "**EPA**") (the "**EPA Orders**") against Abitibi (with respect to lands it no longer owns) are monetary claims subject to compromise in the CCAA proceedings. While the Province now resiles from its position, all parties agreed at the hearing and the Court found *"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."*

> Judgment of the Honourable Mr. Justice Clément Gascon, J.S.C., dated March 31, 2010 (the "Judgment") at para. 126, Application Record of Her Majesty the Queen in Right of the Province of Newfoundland and Labrador (the "Province's Application Record"), Tab 3, p. 31.

3. By way of judgment dated March 31, 2010 (the "**Judgment**"), the Honourable Mr. Justice Clément Gascon, J.S.C. (the "**Supervising** Judge") of the Quebec Superior Court, Commercial Division (the "**CCAA Court**") held that the EPA Orders were, on the particular facts of this case, monetary in nature and fell within the meaning of claim under the *Companies' Creditors Arrangement Act*, R.S. 1985, c.C-36 (the "**CCAA**"), were stayed under paragraph 10 of the Initial Order (defined below) and are subject to compromise.

4. On May 18, 2010, the Court of Appeal for Quebec released its judgment easily dismissing the Province's motion seeking leave to appeal the Judgment, holding that there was no "*prima facie* merit to the appeal". With reference to the Supervising Judge's decision that the EPA Orders were financial or monetary orders and fell within the definition of "claim" under the claims procedure order, the Honourable Jacques Chamberland, J.A. stated that *"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."*

Judgment of the Honourable Mr. Jacques Chamberland, J.A. dated May 18, 2010 (the "CA Judgment") at para. 39, Province's Application Record, Tab 4, p. 70.

5. On the last possible day for filing, and taking full advantage of the summer break, the Province brought the within application seeking leave to appeal the Court of Appeal's decision refusing leave to appeal in respect of the Judgment. The Province makes the very same arguments it made before the Supervising Judge and the Court of Appeal for Quebec.

6. This case satisfies neither the established criteria for granting leave to appeal in CCAA matters, nor does it raise an appealable issue on the merits of a judgment as fact-specific as this. The issues raised by the Province have been definitively determined on two occasions and, it is respectfully submitted, the Province's application raises no question of public importance or issues of law or mixed law and fact involved in that question that would justify intervention by this Honourable Court.

B. ABITIBI'S INSOLVENCY PROCEEDINGS

7. Abitibi filed for protection under the CCAA on April 17, 2009, and the Supervising Judge issued an initial order granting, *inter alia*, a stay of proceedings (the "Initial Order"). The initial stay of proceedings has been extended a number of times and is currently set to expire on September 30, 2010.

Fifty-Seventh Report of the Monitor dated September 7, 2010 (the "Monitor's Fifty-Seventh Report") at para.1, Application Record of the Abitibi Respondents ("Abitibi's Application Record") Tab B1, p. 139.

Judgment at para. 9, Province's Application Record, Tab 3, p. 8.

8. On August 26, 2009, the Bankruptcy Court issued a Claims Procedure Order (the "CPO"), in which the holders of Claims and Subsequent Claims (as defined in the CPO) against Abitibi were ordered to file their Proofs of Claim with the Monitor

by November 13, 2009 (the "**Claims Bar Date**"), failing which their claims would forever be barred. The Province did not contest the CPO, did not lodge any appeal within the prescribed period and did not file a Claim by the Claims Bar Date.

> Judgment at para.10, Province's Application Record, Tab 3, p. 9.
>
> Claims Procedure Order dated August 26, 2009 (the "CPO Order"), Province's Application Record, Tab 6, p. 97.

9. On May 4, 2010, Abitibi filed its Plan of Reorganization and Compromise (as amended, the "**Plan**") in conjunction with a similar Plan filed by its affiliates in proceedings in the United States under Chapter 11 of the U.S. Bankruptcy Code (the "**Chapter 11 Proceedings**") with a view to conforming to a timetable for a rapid exit from the CCAA Proceedings and Chapter 11 Proceedings by the end of September, 2010. The Plan was voted upon by the Affected Unsecured Creditors at a meeting of such creditors held on September 14, 2010 and a sanction hearing is scheduled for September 20, 2010.

> Monitor's Fifty-Seventh Report at para. 67, Abitibi's Application Record, Tab B1, p. 143.

10. The restructuring of Abitibi's debt load is a cross-border undertaking, affecting tens of thousands of stakeholders, including employees, pensioners, creditors and government authorities. As noted in the Judgment, as of March 31, 2010, over 480 entries had been recorded in the court record, with the CCAA Court having rendered in excess of 55 different judgments and orders.[1]

> Judgment at para. 300, Province's Application Record, Tab 3, p. 53.

11. Justice Gascon, as Supervising Judge, has been presiding over this restructuring for over one year and has issued the quasi-totality of the judgments and orders in connection with Abitibi's proceedings under the CCAA (the "**CCAA Proceedings**"). His lengthy experience has given him invaluable, hands-on

experience with all of the circumstances surrounding the restructuring and context of any motions brought before him. He was ideally situated to understand the full context of the Province's motion.

C. BACKGROUND TO THE EPA MOTION

12. The Judgment contains an accurate and detailed factual description of the industrial activities of Abitibi in the Province, the expropriation without compensation of Abitibi's assets in the Province under the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 (the "**Abitibi Act**") and the facts surrounding the issuance of the five EPA Orders by the Province. Set out below is a summary of the most salient facts to the background of this litigation.

> *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2009, c. A-1.01, Abitibi's Application Record, Tab A2.
>
> Judgment at paras. 43-116, Province's Application Record, Tab 3, pp.15-26.

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

> Judgment at para. 53, Province's Application Record, Tab 3, p. 17.

14. However, twelve days later, on December 16, 2008, the Province introduced and passed, within a single day, the Abitibi Act. The Abitibi Act had the unprecedented effect of, *inter alia*, confiscating, with immediate effect and with no compensation whatsoever, substantially all of the assets, property and undertakings of Abitibi in the Province, including a portfolio of rights in freehold or quasi-freeholds acquired and paid for over almost a century. The Act also cancelled all

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[1] Note: As of the date of this filing, there are closer to 700 entries in the Court record and nearly 90 judgments and orders have been issued by the CCAA Court.

water and hydroelectric agreements between the Province and Abitibi, cancelled all pending legal proceedings instituted by Abitibi against the Province in respect of water rights and denied Abitibi access to the Province's courts to seek redress in respect of the foregoing.

Judgment at para.54, Province's Application Record, Tab 3, p. 17.

15. As a result, in April, 2009, AbitibiBowater Inc., Abitibi's parent company, filed a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of NAFTA in respect of its losses. Following unsuccessful negotiations between the Province and Abitibi, a Notice of Arbitration under Chapter 11 of NAFTA claiming damages was filed on February 25, 2010.[2]

Amended Contestation of the Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act, S.N.L. 2002, CHAP. E-13.02 (the "Amended Contestation") at para. 15, Abitibi's Application Record, Tab B2, p.148.

Judgment at para. 62, Province's Application Record, Tab 3, p. 19.

16. 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 Data Room Motion was dismissed with costs by the Supervising Judge in reasons released on November 9, 2009 and the Province did not appeal that ruling. As noted in the Judgment, the Province claimed to be a creditor of Abitibi in the Data Room Motion yet it adopted the precise opposite position a few weeks later in the context of the EPA Motion. The Court also noted that the Province wanted access to the electronic data rooms not to enhance the restructuring process but to assess the extent of Abitbi's present and future ability to cover its undetermined and potential environmental claims that had yet to be filed.

[2] A settlement agreement between Abitibi and Her Majesty the Queen in Right of Canada resolving Abitibi's NAFTA claim was approved by the Quebec Superior Court on September 1, 2010 and will result in a payment to a Canadian company controlled by AbitibiBowater Inc. of $130 million upon implementation of the CCAA Plan and consummation of the Chapter 11 Plan. See the Fifty-Seventh Report of the Monitor, September 7, 2010 at para. 36, Abitibi's Application Record, Tab B1, p.140.

Judgment of the Honourable Mr. Justice Clément Gascon, J.S.C., dated November 9, 2009 (the "Data Room Judgment"), Abitbi's Application Record, Tab B3, p. 216.

Judgment at paras. 77 and 214-216, Province's Application Record, Tab 3, pp. 20 and 41.

17. On November 12, 2009, three days after the dismissal of the Data Room Motion, the Province issued the EPA Orders against Abitibi requiring it to submit detailed Remediation Action Plans for approval by January 15, 2010 and to complete the approved site remediation actions by January 15, 2011. The Province, by failing to apply to the CCAA Court in order to obtain a lifting of the stay of proceedings pronounced in the Initial Order prior to the issuance of the EPA Orders, issued the EPA Orders in full violation of the stay. As noted in the Judgment, compliance with the EPA Orders was impossible given various factors, including: (i) the time constraints imposed by the EPA Orders, (ii) the lack of physical resources available in the Province to perform the remediation; (iii) Abitibi's inability to access funds to comply under its debtor-in possession financing facilities, and (iv) Abitibi's lack of access to the sites that required remediation.

Amended Contestation at para. 48, Abitibi's Application Record, Tab B2, p.153.

Judgment at para. 79 and 192-204, Province's Application Record, Tab 3, pp. 21 and 38-40.

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

19. On April 27, 2010, the CCAA Court authorized the Debtors to transfer the properties of Botwood and Stephenville (two properties targeted by the EPA Orders but which had not been expropriated by the Province) to an inactive subsidiary of Abitibi and in respect of which the Court authorized the appointment of a Receiver under the BIA with the power and resources to manage and sell these properties. As

a result of this, Abitibi retained no continuing ownership interest in any of the lands which were the object of the EPA Orders.

> Approval and Vesting Order in Respect of Non-Core Properties dated April 27, 1010, Abitibi's Application Record, Tab B4.
>
> Receivership Order in Resepct of 4513541 Canada Inc. dated April 27, 2010, Abitibi's Application Record, Tab B5.

D. DECISION ON THE EPA MOTION

20. The hearing on the EPA Motion lasted three days between February 24 and 26, 2010. The Supervising Judge, in addition to hearing the testimonies of two live witnesses, examined documentary evidence supplied by both sides. The reasons of the Supervising Judge are 306 paragraphs long. In addition to accurately describing the issues submitted for adjudication, the Judgment makes numerous and detailed references to the evidence that was presented before the CCAA Court.

21. The Judgment concludes that the EPA Orders are in pith and substance financial or monetary in nature and thus, were not exempted from the Stay of Proceedings or from the CPO. After examining (i) the provisions of the CCAA, (ii) the true nature and impact of the EPA Orders, (iii) the factual context of the issuance of the EPA Orders and their content, (iv) the Province's behaviour prior and after their issuance, (v) the EPA and the applicable case law, and (vi) the end result of the Province's position, the Supervising Judge concluded:

> 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.
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> Judgment at paras. 133 and 161, Province's Application Record, Tab 3, pp. 32 and 35.

22. Although the Province had not filed a timely claim in the CCAA Proceedings, the Court reserved the right to hear an application by the Province to extend the time to file its claim if it so chooses. Given the Supervising Judge's conclusion regarding the financial or monetary nature of the EPA Orders, he determined that there was no need to address the Province's alternative argument that the definition of "Claim" in the CPO was outside of the constitutional competence of a CCAA Court.

> Judgment at paras. 134 and 138, Province's Application Record, Tab 3, p. 32.

E. DECISION ON THE LEAVE TO APPEAL MOTION

23. The Province then brought a motion before the Court of Appeal for Quebec seeking leave to appeal the Judgment. Before the Court of Appeal, the Province argued that the Supervising Judge erred because the Province has the exclusive jurisdiction to determine how the EPA is to be applied, provincial legislation operates in the insolvency context and the CCAA cannot be interpreted to give a CCAA Court the power to immunise Abitibi from compliance with the EPA Orders.

24. On May 18, 2010 the Court of Appeal issued its judgment, easily dismissing the motion for leave to appeal, finding that the "Province's application raises no issue which satisfies the test for granting leave to appeal under the CCAA."

> CA Judgment at para. 31, Province's Application Record, Tab 4, p. 69.

25. With respect to the Province's argument that the EPA Orders were not financial or monetary fines or orders but rather simply require Abitibi to take steps to comply with its statutory obligations under the EPA, the Court of Appeal for Quebec stated:

> 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, and b) that it can, if it so chooses, postpone that conversion until after the restructuring is completed.
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> 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).
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> 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.

CA Judgment at paras. 40-42, Province's Application Record, Tab 3, p. 70.

26. The Court of Appeal agreed with the Supervising Judge that since the EPA Orders were found to be in substance financial or monetary in nature, the Province's constitutional arguments are of no genuine importance and need not be decided.

CA Judgment at para. 32, Province's Application Record, Tab 3, p. 69.

PART II - QUESTION IN ISSUE

27. The issue in this case is whether the Quebec Court of Appeal erred in denying leave to appeal in this case having regard to the established test for granting leave to appeal in CCAA matters.

PART III - ARGUMENT

28. Subsection 40(1) of the *Supreme Court Act*, R.S., 1985, c. S-26 provides that an appeal lies to this Court, with leave, when:

> with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

29. This Honourable Court is not simply a "court of error" and in considering the exercise of its discretion to grant leave to appeal, the fact that a court reached the wrong result is in itself insufficient. Moreover, this Court will not decide abstract questions of law and will rarely grant leave where the appeal has become academic.

> Justice Sopinka, "The Supreme Court of Canada" (10 April 1997), cited in Henry S. Brown, *Supreme Court of Canada Practice, 2010* (Toronto: Carswell, 2009) at p. 474-475, Abitibi's Book of Authorities, Tab. 1.

30. The Province alleges that the Judgment: (i) conflicts with decisions in other provinces; (ii) raises the question of who should bear the costs of compliance with environmental law; and (iii) raises the question of whether the CCAA provides the statutory power to remove hurdles under provincial law that impair a debtor company's ability to restructure.

31. However, as set out in more detail below, it is respectfully submitted that an appeal of the Court of Appeal's refusal to grant leave to appeal of the Judgment raises absolutely no question of public importance or any issues of law or mixed law and fact involved in that question requiring this Honourable Court's consideration. The Province's entire appeal is based on the erroneous premise that Abitibi's statutory duty has been extinguished. As stated by the Supervising Judge and the Quebec Court of Appeal, Abitibi's duty to remove environmental contamination has *not* been extinguished - rather, the EPA Orders are merely characterized in the context of the restructuring process as claims under the CCAA which are called for,

determined and ultimately compromised under a plan of arrangement, after the latter has been voted upon by the creditors and approved by the Court. In determining that the EPA Orders are, in reality, financial or monetary claims within the definition of "Claim" under the CPO, the Supervising Judge gave careful consideration to the facts of the present case, the jurisprudence, and the purpose and provisions of the CCAA and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). Parliament has carefully considered and balanced the rights of provincial environmental regulators with the rights of debtor companies and other stakeholders in the insolvency context, resulting in thoughtful and deliberate amendments to the CCAA and the BIA. There is simply no basis to argue that this Honourable Court should determine who should bear the costs of environmental compliance - Parliament has considered this very thing.

> Judgment at paras. 131 and 290, Province's Application Record, Tab 3, pp. 31 and 52.
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> CA Judgment at para. 33, Province's Application Record, Tab 4, p.69.

A. NO QUESTION OF PUBLIC IMPORTANCE OR ISSUES OF LAW OR MIXED LAW AND FACT

i. No Conflicting Decisions or Constitutional Questions

32. After a thorough review of all of the evidence, including a review of the true nature and impact of the EPA Orders, the factual context of the issuance of the EPA Orders and the Province's behaviour prior to and after their issuance, the Supervising Judge found that the true nature and intention of the EPA Orders was to create a monetary claim against Abitibi. He did not extinguish Abitibi's regulatory duties and, in fact, left the door open for the Province to seek an extension of the Claims Bar Date to allow the Province to file a claim regarding Abitibi's alleged breach of duties in accordance with the CPO. The Court of Appeal for Quebec refused to grant leave to appeal from this decision, finding that the Province had

failed to demonstrate that the cumulative criteria for seeking leave to appeal in CCAA matters set forth in *Re Canadian Airlines Corp.* had been met – in particular, the Court found that there was no *prima facie* merit to the appeal and that the appeal would unduly hinder the progress of the CCAA Proceeding.

> *Re Canadian Airlines Corp., Re,* (2000) 19 C.B.R. (4th) 33 (Alta. C.A.) at paras. 6-7, 28-29, 35, 41-42 and 45-46, Abitibi's Book of Authorities, Tab. 2.
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> CA Judgment at paras. 46-47, Province's Application Record, Tab 4, p. 71.

33. The Quebec Court of Appeal correctly recognized that, having regard to the nature of CCAA proceedings, appeal courts are to be cautious about interfering with a discretionary order of a judge exercising his or her supervisory functions. The burden is on the applicant to demonstrate that the cumulative criteria articulated in *Re Canadian Airlines Corp.* has been met; in this case, the Court of Appeal determined that the Province's application raised <u>no issue</u> which satisfied the test for granting leave to appeal under the CCAA.

> CA Judgment at paras. 25-31, Province's Application Record, Tab 4, pp. 68-69.
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> *Fantom Technologies Inc., Re,* 41 C.B.R. (4th) 55 (Ont. C.A.) at para. 17, Abitibi's Book of Authorities, Tab. 3

34. Despite the Supervising Judge's factual finding regarding the true nature of the EPA Orders, and the significant deference that such a decision is owed, the Province continues to assert that it alone can decide whether the EPA Orders should be treated as non-monetary statutory orders or as financial or monetary orders to be treated as "claims" and subject to a claims process under the CCAA Proceedings. The absurdity of such a contention is obvious as it amounts to a claim that a provincial regulatory authority has the non-reviewable discretion to determine whether orders or obligations pursuant to provincial legislation are subject to compromise under federal insolvency legislation or whether the provincial authority will, in effect, be granted a super-priority over all other creditors.

35. To support such a contention and argue that there is a conflict in the laws of different provinces as to whether the definition of claim includes statutory orders such as the EPA Orders issued in this case, the Province relies on the Alberta Court of Appeal's decision in *Panamericana de Biennes Y Servicios (Receiver of) v. Northern Badger Oil* and a few decisions that followed *Panamericana.*[3]

> *Panamericana de Biennes Y Servicios (Receiver of) v. Northern Badger Oil & Gas Ltd.*, [1989] A.J. No. 1229 (ABQB); [1991] A.J. No. 575 (AB C.A.); motion for leave to appeal to SCC refused [1991] S.C.C.A. No. 497 ("*Panamericana*"), Province's Application Record, Tab 22.

36. The core of *Panamericana* is that a receiver, having determined to operate the business, cannot shirk its duty to follow a regulatory order arising from that very operation under general law. Viewed as a case that found liability of a court-appointed receiver, *Panamericana* was a case of little relevance following the amendments to the BIA and the CCAA which set the limits of such liability explicitly.

37. The Supervising Judge correctly determined that the *Panamericana* decision is distinguishable on the facts of the present case and has been superseded by subsequent amendments to the CCAA and the BIA.

> Judgment at paras. 264-267, Province's Application Record, Tab 3, pp. 48-49.

38. The Supervising Judge carefully considered the case law put forward by the Province and found that the cases all involved situations where, unlike here, the regulators were not acting as creditors, nor seeking recovery of a debt. In those cases, none of the regulators were deriving a direct pecuniary benefit through compliance with the orders issued and none had taken steps to enforce the law at

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

issue, to make the regulator involved as a creditor, or to seek recovery of money. Moreover, in each of those cases, the debtors were still in possession of the assets covered by the orders. The Supervising Judge therefore determined that *Panamericana* was inapplicable to the case at hand and held:

> 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.
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> Judgment at paras. 254-257, Province's Application Record, Tab 3, p. 47.

39. Moreover, since *Panamericana* was decided, Parliament has, in fact, carefully considered the issue of who should bear the cost of environmental compliance in the insolvency context and has struck a deliberate and considered balance with three consecutive sets of revisions and refinements to the federal insolvency legislation (1992, 1997 and 2009). The revisions to the BIA and the CCAA can be summarized as follows:

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

(b) In 1992, revisions were made to the BIA to protect trustees from personal liability however, these revisions did not similarly protect receivers (subsection 14.06(2) and 14.06(3) of the BIA). In 1997, further revisions were made to the BIA which: (i) extended the protection to receivers and interim receivers (s. 14.06(1.1) BIA), (ii) raised the standard for personal liability of trustees to gross negligence or wilful misconduct (s. 14.06(2)(b) BIA), (iii) provided the Crown with a lien against contaminated property or contiguous property for the costs of remedying any environmental condition or damage (s.14.06(7) BIA), and (iv) acknowledged clean-up costs as provable claims under the BIA (s.14.06(8));

(c) In 1997, similar amendments were made to the CCAA to: (i) shield the Monitor from personal liability for any environmental condition or damage provided such environmental condition or damage did not arise as a result of the Monitor's gross negligence or wilful misconduct (s. 11.8(3) CCAA), (ii) provide the Crown with a lien against contaminated property or contiguous property for the costs of remedying environmental damage (s.11.8(8) CCAA), and (iii) acknowledge that claims against debtor companies for the costs of remedying any environmental condition or damage are properly claims under the CCAA (s.11.8(9) CCAA).

Companies' Creditors Arrangement Act, R.S. 1985, c. C-36, s. 11.8, Abitibi's Application Record, Tab A4.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s.14.06, Abitibi's Application Record, Tab A6.

40. Thus, as a result of these amendments, Parliament has specifically decided that a claim by the federal or a provincial government for the costs of remedying an environmental condition or damage affecting the real property of a company is secured by a charge on that real property and any real property that is contiguous thereto and is related to the activity that caused the environmental condition or damage. The government does not otherwise have a security interest or lien over the other assets of the debtor. In a case such as the one at hand where the Province has chosen to expropriate the very lands over which it would normally have a lien, the

Province has effectively realized on any security to which it would be entitled under section 11.8(8) of the CCAA and its claims for the costs of remedying environmental damage are simply unsecured claims over the remainder of the assets of the debtor.

41. In the face of these amendments to the BIA and the CCAA, it cannot reasonably be argued that Parliament intended to open the door to artificial arguments that the "timing" of the monetization of claims can be manipulated to defeat Parliament's clear intentions.

42. In fact, in reliance on these amendments, the Court of Appeal for Ontario has specifically rejected *Panamericana*. In *General Chemical Canada Ltd., Re,* the Court of Appeal stated that:

> In this court, the MOE repeats its arguments below and raises, as it did there, the case of *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 (Atla. 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.
>
> 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 provide 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.
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> *General Chemical Canada Ltd., Re,* (2006) 22 C.B.R. (5th) 298 (Ont. S.C.J.[Commercial List]; aff'd in *General Chemical Canada Ltd., Re,* (2007) 35 C.B.R. (5th) 163 (Ont. C.A.) at paras. 45-46; leave to appeal to the Supreme Court of Canada refused at 2008 CarswellOnt 879, ("*General Chemical*"), Abitibi's Book of Authorities at Tab 4.

43. As stated in *General Chemical,* to give effect to the Province's argument that environmental statutory obligations of a debtor company cannot form the basis of a claim or a contingent claim under federal insolvency legislation would thwart the operation of the CCAA regime. The case law is clear that the purpose of the CCAA regime cannot be thwarted by the operation of provincial legislation.

> Judgment, Province's Application Record, Tab 3, para. 270.
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> *Metcalfe & Masfield Alternative Investments II Corp. (Re),* (2008) 92 O.R. (3d) 513 (C.A.) at paras. 102-104, Abitibi's Book of Authorities, Tab 5.
>
> *Nortel Networks Corp., Re,* (2009) 77 C.C.P.B. (Ont. C.A.) ("Nortel Networks") at paras. 44 and 47, Abitibi's Book of Authorities, Tab 6.

44. As such, the Province's submission that there is a conflict in the law with respect to whether "claims" can include the monetary consequences of financial orders is wholly without merit. The definition of "Claim" used in the CPO is the same language that has been used and approved by hundreds of CCAA Courts and is fully supported by the broad definitions found in the CCAA and the BIA. By choosing to enact the Abitibi Act and confiscate many of the lands to which the EPA Orders relate, the Province has lost the security that Parliament decided to grant environmental regulators in the insolvency context. As stated by the Supervising Judge, the Province cannot "have its cake and eat it too."

> Judgment at para. 168, Province's Application Record, Tab 3, p. 36.

B. The Appeal is Academic and Would Unduly Hinder the CCAA Proceedings

45. The fundamental purpose of CCAA proceedings is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the business is able to continue for the benefit of all stakeholders. As such, the impact of granting the Province leave to appeal was and is a relevant consideration before all levels of Court.

Judgment at paras. 140-143, Province's Application Record, Tab 3, pp. 32-33.

Nortel Networks at para. 33, Abitibi's Book of Authorities, Tab 6, citing *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36.

Re Edgewater Casino Inc. et al, (2009) 308 D.L.R. (4th) 349 (B.C. C.A.) at paras. 21-22 and 27, Abitibi's Book of Authorities, Tab 7.

46. Not only does the within appeal raise no issues of public importance or issues of law or mixed law and fact that would warrant this Honourable Court's intervention, but the within appeal would, as found by the Court of Appeal for Quebec, unduly hinder the CCAA Proceedings.

47. The Plan has now been voted upon by the Affected Unsecured Creditors and the sanction hearing and emergence from the CCAA Proceedings are imminent. A contingent claim of this magnitude, which was estimated in the evidence potentially to exceed $100 million, would, were it to remain uncompromised, act as a Sword of Damocles over Abitibi if leave were granted prior to emergence. Were leave to be granted after emergence, parties would already have acted upon the judgment appealed from and the appeal would thereafter be moot. In either event, the granting of leave at this exceptionally late stage in the CCAA Proceeding for such a potentially material claim would not fail to be disruptive and thus does not meet the fourth criterion for granting leave to appeal in CCAA cases as established by the Court of Appeal in *Re Canadian Airlines Corp.*

Judgment at paras. 6 and 294, Province's Application Record, Tab 3, pp. 8 and 52.

Re Canadian Airlines Corp., Re, (2000) 19 C.B.R. (4th) 33 (Alta. C.A.) at paras. 6-7, Abitibi's Book of Authorities, Tab. 2.

PART IV - SUBMISSIONS AS TO COSTS

48. Abitibi seeks their costs of this application in accordance with the Court's usual practice.

PART V - ORDER SOUGHT

49. Abitibi seeks an Order dismissing the Province's application for leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 16, 2010

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PART VI - TABLE OF AUTHORITIES

Tab	Authority	Reference
1.	Justice Sopinka, "The Supreme Court of Canada" (10 April 1997), cited in Henry S. Brown, *Supreme Court of Canada Practice, 2010* (Toronto: Carswell, 2009).	pp. 474-475
2.	*Re Canadian Airlines Corp., Re,* (2000) 19 C.B.R. (4th) 33 (Alta. C.A.)	paras. 6-7, 28-29, 35, 41-42 and 45-46
3.	*Fantom Technologies Inc., Re,* (2003) 41 C.B.R. (4th) 55 (Ont. C.A.)	para. 17
4.	*General Chemical Canada Ltd., Re,* (2006) 22 C.B.R. (5th) 298 (Ont. S.C.J. [Commercial List]); aff'd in *General Chemical Canada Ltd., Re,* (2007) 35 C.B.R. (5th) 163 (Ont. C.A.); leave to appeal to the Supreme Court of Canada refused at 2008 CarswellOnt 879.	paras. 45-46 (C.A.)
5.	*Metcalfe & Masfield Altenrative Investments II Corp. (Re),* (2008) 92 O.R. (3d) 513 (Ont. C.A.)	paras. 102-104
6.	*Nortel Networks Corp., Re,* (2009) 77 C.C.P.B. (Ont. C.A.)	paras. 33, 44 and 47
7.	*Re Edgewater Casino Inc. et al,* (2009) 308 D.L.R. (4th) 349 (B.C. C.A.)	paras. 21-22 and 27

PART VII - LEGISLATION

1.	*Environmental Protection Act,* S.N.L. 2002, c. E-14.2
2.	*Abitibi-Consolidated Rights and Assets Act,* S.N.L. 2008, c. A-1.01
3.	*Supreme Court Act,* R.S. 1985, c. S-26
4.	*Companies' Creditors Arrangement Act,* R.S. 1985, c.C-36 (version in force prior to September 18, 2009)
5.	*Companies' Creditors Arrangement Act,* R.S.1985, c. C-36 (current version)
6.	*Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3