Environmental Issues under the *Companies’ Creditors Assistance Act* after *Newfoundland and Labrador v AbitibiBowater Inc.* -- A Legislative Response?

By Richard Butler

A. Introduction

Professors Ben-Ishai and Lubben, in their recent article “Involuntary Creditors and Corporate Bankruptcy: the Case of Environmental Claimants” do their able best to fit the “square peg” of environmental regulation into the “round hole” of Canada’s corporate restructuring legislation.

This short paper will attempt to deconstruct one of their article’s central and most useful concepts – the idea of environmental claimants as involuntary creditors – and show how it may be the key to a rational and constitutionally-sound legislative response to environmental issues under the CCAA after the ruling of the Supreme Court of Canada in *Newfoundland and Labrador v AbitibiBowater Inc.*

B. What the Supreme Court may decide in *AbitibiBowater*

The very notion of environmental “claimants” is predicated, one way or another, on the decision of the Supreme Court in *AbitibiBowater Inc.* By the time this paper is presented, the Court may have spoken. For now, however, it will be necessary to speculate on possible outcomes, in order to define how broadly environmental “claims” may be construed.

Reviewing the video of the hearing, there would seem to be three possible lines of thinking:

(a) Parliament’s traditional constitutional authority over bankruptcy and insolvency enables it to empower the CCAA court to look behind the form of any particular regulatory order and see if it has, in substance, the intended, practical and inevitable result of creating a debt or monetary liability in favour of the person who made the order. If so the CCAA court should treat the monetary consequences of the order as a claim of the person who made the order;

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4 2010 QCCA 965, lv. granted [2010] SCCA No. 269; see also Nortel Networks Corporation et al (Re) 2012 ONSC 1213 and *Northstar Aerospace Inc. (Re)* 2012 ONSC 4423, per G.B. Morawetz J.
5 September 21, 2012
(b) Parliament’s constitutional authority needs to remain in step with modern Canadian commercial and social reality. Parliament needs and has the power to treat any environmental order (or any other statutory responsibility – e.g. pension benefits, union successorship) which potentially creates a financial cost impediment to a successful restructuring, whether requiring the company to pay or perform, as being subject to the scheme of priorities in bankruptcy and insolvency. Therefore, Parliament can empower the CCAA court to treat all such costs as claims of the statutory authority which might impose them – whether or not an order or other regulatory step has been taken.

(c) Parliament’s constitutional authority, and the powers of the CCAA court, must be consistent with the underlying principles of democracy, federalism and the rule of law. Parliament cannot give the CCAA courts complete discretion to override provincial environmental laws even in order to achieve national commercial objectives. It cannot empower them to treat public environmental obligations and environmental regulators as private law debts in favour of the regulators as creditors. Provided that regulators haven’t taken steps under provincial law to become creditors (i.e. by doing remediation work, taking or realizing on security), the CCAA court cannot treat statutory responsibilities as claims subject to compromise and extinguishment.

C. Implications for CCAA Processes

In whatever scenario after AbitibiBowater, there are potentially two types of environmental claimants:

- persons (government or third party) who perform remediation work for which a restructuring company is responsible, and are thereby entitled to be reimbursed or to look to security for the cost of doing so (“voluntary environmental creditors”);
- regulatory authorities who make orders with monetary consequences for the restructuring company (“involuntary environmental creditors”).

Returning to Professors Ben-Ishai and Lubben’s article, the claims of voluntary environmental creditors are more readily submissible to the CCAA process, including for purposes of the stay of proceedings, voting and priority. However, it is extremely difficult to fit involuntary environmental creditors into the scheme of the CCAA.

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6 When the decision was rendered in Nortel Networks, counsel for AbitibiBowater brought that ruling to the attention of the Supreme Court. In doing so, the stakes were raised. If the Court did not previously appreciate the full implications of what AbitibiBowater and the Attorney General of Canada were arguing, they do now.

7 Quebec (Procureur général) c. Canada (Procureur général) 2010 SCC 61, at para. 159, 182-83, 196

8 E.g. as in Re General Chemical Canada Ltd. 2007 ONCA 600 and many other cases cited in argument in AbitibiBowater.
For instance:

- Are regulators’ existing or potential orders or directives “claims” on which proceedings may be stayed under initial orders? Or are they “regulatory body proceedings” which may continue unless and until there is evidence that a viable compromise or arrangement could not be made if they did (CCAA section 11.1)?

- How can a claim be proven for purpose of voting when there is no present requirement to perform remediation work, no way to identify the nature or scope of potential work, and no way to begin to quantify the purported claim?

- Are regulatory authorities the proper claimant? And what if someone else eventually does the remediation work?

- At what point do involuntary environmental creditors get super-priority under CCAA section 11.8? Are they in a separate class for voting purposes? Must they value their security claim in order to claim for the unsecured balance? And how would they do that?

As a matter of practice, restructuring companies (if it suits them) treat regulatory obligations or orders in relation to contaminated land as stayed claims and simply ignore them. They abandon (one way or another) contaminated land that is not worth cleaning up. They classify involuntary environmental creditors’ claims as unsecured against the company’s remaining assets, and value those claims at zero. Problems solved. Well, not so fast.

Those technical, procedural problems are deeply implicated in and also compound the issues identified by Professors Ben-Ishai and Lubben. Would proper recognition of such claims enable involuntary environmental creditors to block the company’s reorganization? Would the release of claims against the reorganizing company also operate as against purchasers of contaminated property? Bargain price or otherwise? How will all of this affect senior lenders’ choice between a going-concern and an asset-sale restructuring? Would legislated super-priority over the entire enterprise, successorship to all environmental obligations where substantially all the assets and undertaking are purchased, and/or joint and several environmental liability for parent companies indeed effectively inhibit secured lending and the ability to do business?

The goal of making companies internalize the cost they impose on involuntary creditors is entirely laudable. It is the essence of “polluter pay”. Yet Ben-Ishai and Lubben ask, is it really practicable? Would it be in the overall public interest? In this author’s view, the key question is: Who should get to decide such fundamental policy questions?

We will return to that key question at the end of this paper, but first it is necessary to consider with greater precision the legal position of regulators, for the purpose of taking them out of the mix.
D. The Position of Regulators after AbitibiBowater

The idea of regulators as involuntary environmental creditors is, with respect, based on a faulty premise. It fails to distinguish between regulators exercising their statutory powers and governments exercising their democratic responsibility for environmental stewardship as an aspect of the larger public interest.

Regulators, as such, can never be creditors at all – for CCAA purposes or otherwise. Regulators are pure creatures of statute. Their duties and powers are exhaustively set out therein. They are bound by principles of administrative law in performing or exercising those duties and powers.

In general, regulators must proceed in a fair and unbiased manner. They must take into consideration all relevant factors and no irrelevant ones. Their process must be transparent and intelligible, and the result must be within the range of possible, acceptable outcomes defensible on the facts and law of any particular case.

For environmental regulators, not every instance of contamination requires a remediation order. Not every remediation order will require the environment to be returned to its pristine state. Regulatory decision-making is informed by the use to which contaminated property is proposed to be put. It also considers any present and future risk to the surrounding environment and public health and safety. It must be based on the evidence of facts in all those respects, as well as on existing standards and criteria.

Regulators are not allowed to fetter the future exercise of discretion, including by presuming that some specific environmental condition may be found to exist in the future, which will result in a specific order requiring certain work, and which will not be performed. They must base their decisions only on relevant considerations of fact in existence at the point of decision-making.

In sum, the very nature of environmental regulation and decision-making and the principles of administrative law are inimical at every point with regulators being treated as claimants in CCAA proceedings. Two examples must suffice.

If a regulator were to submit a proof of claim for environmental contamination, the decision to do so would be open judicial review on the ground that he or she had abdicated responsibility to safeguard the environment and public health and safety by fettering the discretion to deal with any harm arising in the future. Not to mention that he or she lacked any statutory to do so.

If a regulator, prompted by an impending insolvency, makes an order that is not necessary on the facts, in an opportunistic attempt to compel the company to clean up

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9 This section is extracted from a previous article by the author: “Restructuring Objectives Aren’t Always Paramount (Part 1): Historical Contaminated Sites and Companies’ Creditors Arrangement Act Proceedings” (2010), Eighth Annual Review of Involvery Law. To some extent, this paper – especially in its conclusions – constitutes Part 2.
contamination or to lay the foundation for a proof of claim, such orders would equally be challengeable in administrative law.

It is true that environmental statutes often empower regulators to undertake clean-up work and treat the costs of doing so as a debt to the government. It is also possible, as the CCAA court found in *AbitibiBowater*, that environmental orders could conceivably be made for other than true regulatory purposes. In either instance, however, the regulator is operating in another distinct capacity. And in any event, those would be circumstances involving the government as a “voluntary environmental claimant”.

E. The Position of Government(s)

The question, then, becomes whether and on what basis governments, as distinct from environmental regulators *per se*, can be treated as involuntary environmental claimants for CCAA purposes.

To some extent, the forthcoming decision of the Supreme Court of Canada in *AbitibiBowater* should answer that question. However, at least for now, a convenient starting point for analysis is the Court’s decision in *Century Services*.10

In that decision, Justice Deschamps confirmed that the recognized purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.11 She went on to elaborate why:

> Companies retain more value as going concerns [and] intangible losses, such as the evaporation of the companies' goodwill, result from liquidation. Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs. Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.12

She then set out how the CCAA court’s discretion works to achieve those goals:

*CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs. Judicial discretion must of course be exercised in furtherance of the *CCAA’s* purposes. ....13

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10 *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60
11 Id., at para. 15.
12 Id., at para. 18 (citations omitted)
13 Id., at para. 56 and 57
Justice Deschamps concluded her purposive analysis of the CCAA courts’ discretion as follows:

The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.14

Those are all compelling points. However, for purposes of considering the concept of involuntary environmental claimants, it is necessary to articulate and examine their unspoken constitutional premise — whether and in what circumstances Parliament, through the CCAA courts, is the arbiter of all aspects of the public interest arising in an insolvency and potential restructuring.

Or, returning to the key question identified above, who gets to say whether or when restructuring objectives take precedence over the public interest in the environment and public health and safety?

Assuming (without conceding, or at least not yet,) that governments can in some circumstances be made involuntary environmental creditors in CCAA proceedings, surely the principles of federalism and democracy must leave them with a meaningful way to fulfill their mandate for environmental stewardship. If the Supreme Court denies the appeal in *AbitibiBowater*, a legislative response is therefore strongly indicated.

F. Legislative Response(s)

For one thing, amendments to the CCAA would be required to correct the misfit between a statutory scheme designed to deal with debtor-creditor relations and involuntary environmental claims based on public law powers and duties.

First, the CCAA must distinguish between regulatory body proceedings and involuntary environmental claims. It could conceivably do so by deeming the government under whose jurisdiction the company has environmental obligations to have a claim in that regard. The artificiality of doing so is immediately apparent. Square peg in round hole. If the CCAA is really meant to be a way for restructuring companies to transfer the cost of performing historical environmental obligations onto the taxpaying public, it should say so directly. Whether that would be within Parliament’s constitutional authority remains an open question. Unless of course the national government is going to assume full responsibility for all environmental remediation remaining unperformed as a result of bankruptcy and insolvency. However, for now, let us suppose that the CCAA – post-*AbitibiBowater* – continues to rely on the fiction of compromising a deemed claim.

14 Id., at para. 70
Second, the CCAA must somehow distinguish between the company’s statutory environmental responsibilities, generally, and those which create specific obligations. Only the latter could, no matter what the final decision in *AbitibiBowater*, conceivably be the subject of a deemed claim or other means of avoiding environmental orders going forward.

Third, the CCAA must properly look to provincial law to determine when a specific environmental obligation has arisen, in relation to what property, and what that obligation entails. The company’s current obligations under provincial law may be limited to provide a site assessment and/or remediation plan; or they may extend to engaging in ongoing monitoring or to performing remediation work. To include the latter under a deemed claim, the company may well have to carry out and pay for the former, as a cost of the restructuring. That is, not wait for the regulator’s order or direction to do so.

The crucial point is that, to be consistent with the design logic of the CCAA, companies will have to bring their environmental obligations to the point of sufficient certainty before involuntary environmental claims can legitimately be deemed to exist, be quantified as deemed claims, and be made the subject of any vote or plan of compromise or arrangement. If environmental obligations are too uncertain to be identified and quantified, they simply don’t fit within the rationale or scheme of an “Act to facilitate compromises and arrangements between companies and their creditors”.

All those matters must be addressed before Parliament and/or the legislatures ever reach the vexing questions of super-priority or deemed trust over some or all of the company’s assets, and the financial considerations and consequences raised in Ben-Ishai and Lubben’s article.

If provinces enact deemed trust provisions, as were considered in *Indalex*, or environmental successorship provisions to ensure symmetry of outcomes in all forms of restructuring, they should do so mindful of the potential impacts identified by Professors Ben-Ishai and Lubben.

Parliament should be similarly mindful of all of the foregoing in making any corresponding or complementary amendments to the CCAA and BIA.

**G. Conclusion**

CCAA section 11.1 empowers the court, in considering whether to stay regulatory body proceedings during the pendency of a restructuring, to do so if, in the court’s opinion, (a) a viable compromise or arrangements could not otherwise be made, and (b) it is not contrary to the public interest to do so. As I have argued elsewhere, that power is

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16 See “Using Federal Paramountcy to Get the Job Done in Companies’ Creditors Arrangement Act Proceedings” (2008), Canadian Bar Association, Fourth Annual Pan-Canadian Insolvency and Restructuring Conference.
entirely consistent with the CCAA’s purpose in preserving the status quo while a restructuring company attempts to work out a plan of compromise or arrangement with its creditors.

However, with all due respect for the sagacity of our CCAA judges, it would be inconsistent with fundamental constitutional principles to place the ultimate balancing of social, economic and environmental aspects of the public interest in the discretion of an insolvency court. Especially on a case by case basis, in the “hothouse of real time litigation.” And especially if the courts continue to be largely, if not entirely, undirected by specific expressions of Parliament’s legislative policy.

If the Supreme Court’s ruling in AbitibiBowater were to affirm the idea of involuntary environmental claimants, it is submitted that the skeletal legislative status quo in the CCAA surely could not be maintained.

Doing so would generate continuing uncertainty, including in relation to the rule of administrative law. And it would leave unresolved the practical and important questions of financial policy identified by Ben-Ishai and Lubben.

In addition, whatever the reasoning in AbitibiBowater, a legislative response would seem to be constitutionally indicated, given the matters of high policy involved. Parliament and the provincial and territorial legislatures are the ones who must find the ultimate balance in the public interest between restructuring objectives and environmental stewardship. They are the ones properly held accountable for their choices in that regard.

Consistent with modern co-operative federalism, any such response should be a coordinated one from both levels of government, equally sovereign in their respective fields, working together to ensure that their respective policy objectives are achieved to the maximum extent possible. Only complementary, mutually-acceptable legislative solutions will allow both levels of government to fulfill their respective democratic mandates.

In other words, something nuanced and respectful of Canada’s constitutional principles. Nothing unilateral, nothing automatically paramount.

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17 Quebec c Canada, supra footnote 7.
19 See Reference re Securities Act 2011 SCC 66, at para. 35, 54 – 62 and 90