MEMORANDUM OF ARGUMENT

PART I: FACTS

1. The Petitioners (the "Lemare Group") are a profitable group of companies that filed for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA"), on June 21, 2012, after forest revenue officials proposed an assessment under Part 11.1 of the *Forest Act*, R.S.B.C. 1996, c. 157, against the Petitioners Lemare Lake Logging Ltd. ("Lemare"), Lone Tree Logging Ltd. ("Lone Tree"), and the principals of the Lemare Group, Eric and Christopher Dutcyvich.

2. Lemare, Lone Tree, and the Dutcyvich brothers are holders of licences under the *Forest Act* authorizing them to harvest Crown timber. Lemare also harvests Crown timber under contracts with other licence holders that are not related to the Lemare Group.

3. Forest revenue officials appointed under Part 11.1 of the *Forest Act* and employed by the Ministry of Finance, Forest Revenue Audit Program ("FRAP") believe that Lemare significantly underreported the volume and grade of timber, resulting in a significant underpayment of stumpage. FRAP believes that Lemare did so deliberately in order to avoid paying the correct amount of stumpage.

4. FRAP believes that Lemare has records that would allow the correct amount of stumpage to be calculated, but Lemare has refused to provide records in response to demands by FRAP. Lemare believes it is not required to provide the records sought, but the Province disagrees. This dispute has not been resolved and is discussed further in the Province's motion book in the proceeding with registry number CA040365.

5. On May 23, 2012, and June 14, 2012, FRAP proposed assessments (the "Proposed Assessment") against Lemare for stumpage totalling approximately $5 million, plus interest. As part of the Proposed Assessment, FRAP also proposed to assess 100% penalties under section 142.61 (1) of the *Forest Act*, which applies if the assessment of stumpage is based on a wilful contravention of the *Forest Act* or wilful provision of a false or deceptive statement. The total amount of the Proposed Assessment, including 100% penalties and interest to June 21, 2012, is approximately $11.5 million. Portions of the amount proposed to be assessed against Lemare in relation to licences held by Lone Tree, Eric Dutcyvich, and Christopher Dutcyvich were proposed to be assessed jointly against the licence holders and Lemare.

6. The Province may also make assessments against other licence holders for part of the Proposed Assessment.

7. The Lemare Group has positive cash flow and significant equity. Nevertheless, the Petitioners commenced the CCAA proceeding in the Supreme Court (the "CCAA Proceeding") on June 21, 2012 (the "Filing Date"), saying the Proposed Assessment rendered them insolvent.

8. The initial order in the CCAA Proceeding ("Initial Order") was made on June 21, 2012, without notice to Her Majesty the Queen in right of the Province of British Columbia (the "Province") and purported to stay any action, suit, or proceeding by the Province in relation to claims for unpaid stumpage, including proceedings currently under way. As a result, no assessment has been made.

PART II: POINTS IN ISSUE

9. The points in issue on this application are:

(a) whether the Province should be granted leave to appeal the claims process order pronounced October 26, 2012, and amended November 2, 2012 (the "Claims Process Order" or "CPO"); and

(b) whether a stay of the Claims Process Order should be granted pending the outcome of the appeal.

PART III: ARGUMENT

A. Reasons leave to appeal should be granted

10. Sections 13 and 14 of the CCAA grant a right to appeal an order made under the CCAA to the Court of Appeal with leave.

11. The Province submits that leave to appeal should be granted because the proposed appeal has a strong prospect of success, is important both to the parties and to insolvency practice generally, is of utility in the circumstances of the CCAA Proceeding, and would not unduly hinder the progress of the CCAA Proceeding.

Test for leave to appeal

12. In *Edgewater Casino Inc. (Re)*, 2009 BCCA 40, the court held that the test for leave to appeal in CCAA proceedings is the same test that generally applies on

applications for leave to appeal. As set out at paragraph 17 of Mr. Justice Tysoe's reasons, the test involves consideration of the following factors:

(a) whether the point on appeal is of significance to the practice;
(b) whether the point raised is of significance to the action itself;
(c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
(d) whether the appeal will unduly hinder the progress of the action.

13. Despite comments in previous court decisions saying leave to appeal will be granted sparingly in CCAA proceedings, the court in *Edgewater* rejected the proposition that there is a special test for leave to appeal in CCAA proceedings.

14. Instead, Mr. Justice Tysoe noted at paragraphs 18 to 22 of *Edgewater* that leave to appeal is generally granted sparingly as a result of the application of the usual standard used on leave applications to orders that are typically made in CCAA proceedings. Many orders made in CCAA proceedings are discretionary, and the deferential standard of review on an appeal from such an order lowers the prospect of success, such that the third factor listed above often weighs against granting leave to appeal. Furthermore, in a typical CCAA proceeding, where a company is experiencing serious financial difficulties such that the delay associated with an appeal could jeopardize its ability to reorganize and continue in business, the fourth factor listed above will often weigh against granting leave to appeal.

15. Where the grounds of appeal relate to matters other than the exercise of discretion, and where the companies' financial situation is sufficiently stable that the delay associated with an appeal would not cause significant prejudice, the fact that the order sought to be appealed from is made in a CCAA proceeding is not in itself a reason to deny leave to appeal.

Prospects of success of the proposed appeal

16. The Province submits that the proposed appeal has significant merit and raises substantial questions to be argued. As set out in the Notice of Application for Leave to Appeal, the Province submits that the Chambers Judge's decision was based on an erroneous interpretation of the law and findings of fact that were clearly not supported by the evidence.

17. The Province submits that the Chambers Judge erred in granting the Claims Process Order, insofar as it pertains to the Province's claim for unpaid stumpage under the *Forest Act*.

Jurisdiction to order the process for determining Crown claims

18. As set out in the Province's motion book in proceeding CA40370 (application for leave to appeal the Chambers Judge's dismissal of the Province's application seeking, *inter alia*, an amendment of the stay in the Initial Order to permit an assessment), the stay under the CCAA should not have prevented the commissioner under the *Forest Act* from making an assessment. Section 11.1 (2) of the CCAA provides that a stay does not affect steps taken by a regulatory body (which the commissioner is under the definition in section 11.1 (1) of the CCAA) other than "enforcement of a payment ordered".

19. Had an assessment been made, it would, according to section 142.81 (2) of the *Forest Act*, be valid and binding, subject to being amended, changed, or varied on appeal under Part 11.1 of the *Forest Act*. The Province submits that it would be wrong to deprive it of the benefit of this provision, given that the reason an assessment has not yet been made is the stay order that is broader than what is permitted under the CCAA.

20. Section 142.81 (2) of the *Forest Act* contains language similar to the provision in the federal *Income Tax Act* ("ITA") considered in *Re Carnat Construction Co. Ltd.*, [1958] O.J. No. 515 (S.C.), *Re Norris*, [1989] O.J. No. 995 (C.A.), and *Re Selkirk*, [1972] O.J. No. 958 (S.C.). In those cases, the Ontario courts found that the ITA provision deeming an assessment to be valid and binding subject to being varied or vacated on an appeal under the ITA did not conflict with the provisions of the *Bankruptcy Act* (as it then was) governing the process for determining claims in a bankruptcy. The courts held that, if an assessment was going to be challenged, it must be challenged under the ITA process.

21. The Province submits that the reasoning in *Carnat*, *Norris*, and *Selkirk* applies equally to the relationship between section 142.81 of the *Forest Act* and the CCAA provisions governing the determination of claims. If there is no conflict between the ITA provisions and the *Bankruptcy Act* (because the claim can be determined under the *Bankruptcy Act* based on the outcome of the ITA process), then there is similarly no conflict between section 142.81 of the *Forest Act* and the CCAA (because the claim can be determined under the CCAA based on the outcome of the *Forest Act* process).

22. Based on the above, the Province submits that the Chambers Judge erred in law in ordering a claims process that would circumvent the *Forest Act* assessment and appeal process.

Exercise of discretion based on erroneous findings

23. In the alternative, if the Chambers Judge had the jurisdiction to make the Claims Process Order as it pertains to the claim for unpaid stumpage, the Province submits that he erred in making the findings on which the decision was based. In particular, the Province submits that the Chambers Judge made the following errors:

(a) failing to apprehend the nature and extent of the prejudice suffered by the Province as a result of the Claims Process Order;

(b) failing to recognize the differences between the process for an appeal to court under the *Forest Act* and the claims process for Crown claims under the Claims Process Order;

(c) finding that there would be significant negative consequences to following the assessment and appeal process under the *Forest Act*;

(d) holding that proposed penalties under section 142.61 of the *Forest Act* were contingent claims, such that liability for the penalty could be established outside of the *Forest Act* process;

(e) misapprehending the nature of the statutory lien under section 130 of the *Forest Act* and the effect that an assessment would have in relation to the lien; and

(f) finding that the Province's investigation was complete and the Province had already heard everything the Petitioners had to say in response to the Proposed Assessment.

24. At paragraph 86 of his reasons, the Chambers Judge said "[a]ll that the Province really loses by what is proposed in the CPO is the rather time-consuming step of an appeal by Lemare to the Minister. That is no prejudice to the Province. Whether under the CPO or the *Forest Act*, the matter ultimately ends up in this Court."

25. The difference between the *Forest Act* process and the CPO process is not limited to the appeal to the Minister. Under the *Forest Act* process, the appeal to the Supreme Court would be by way of a petition proceeding. The parties disputing the Minister's decision would file a petition and supporting affidavits, and then the Province

would have the right to file a response to petition and its own affidavits. The timelines for filing documents could be extended by consent or by court order. The Province could apply for orders under Rule 22-1 (4) and (7) of the *Supreme Court Civil Rules* (e.g., cross-examinations, document discovery, and conversion to a trial) and the usual tests for granting such orders would apply. The proceeding may be converted to a trial if there is a *bona fide* triable issue that cannot be determined by reference to the documents, and serious and disputed questions of fact or law are raised: *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 at paras. 48-51. Either party could appeal to the Court of Appeal with leave, based on the test for leave to appeal from statutory decisions set out in *Queen's Plate Development Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 (C.A.).

26. The Claims Process Order, by contrast, sets out a process whereby the Province would be required to submit an "Adjudication Application" in support of its claim before the Petitioners are required to provide any materials in support of their position. There is nothing giving the Province the right to know the Petitioners' case and file a response and responding affidavits once the Petitioners' case is known. There is nothing providing for the types of orders that could be made under Rule 22-1 (4) and (7); further orders are at the Chambers Judge's discretion, and the Claims Process Order does not provide guidance for how that discretion is to be exercised, whereas the exercise of discretion under Rule 22-1 (4) or (7) would be guided by the principles in the case law dealing with those provisions. The Chambers Judge's final order could be appealed to the Court of Appeal with leave, but the test for leave would be the one set out in *Edgewater*, which is a more difficult test to meet than the one in *Queen's Plate*.

27. In addition, the Claims Process Order sets out extremely short timelines that make it difficult to gather evidence and prepare to present the Province's case. An appeal to court under the *Forest Act* need not take a long time if the Petitioners wish to have it proceed expeditiously, but it would allow enough additional time to enable the Province to properly present its case.

28. At paragraphs 84 and 86 of his reasons, the Chambers Judge refers to the need to balance interests, the need to "allow the company to survive", and his view that following the *Forest Act* process would "[detract] greatly from an orderly, timely process that preserves the goals of the CCAA." He implicitly found that following the *Forest Act* process would have significant negative consequences, including possibly threatening the Petitioners' survival. The Province submits that there was no evidentiary foundation for such a finding. While the *Forest Act* process might take longer than the process set

out in the Claims Process Order, there is no reason to believe it would take so long as to threaten the Petitioners' survival or that the process would not be orderly.

29. The Province further submits that the Chambers Judge erred in finding that the Province's investigation was complete and that the Province had already heard everything the Petitioners had to say in response to the Proposed Assessment. His error on these points would have affected his decision to grant the Claims Process Order. Had he not erred on these points, he would have appreciated the need for a process that would give the Province an opportunity to obtain additional relevant records and the right to respond to the Petitioners' case.

30. Forest revenue officials believe that Lemare has records relevant to the Proposed Assessment that it has not been given access to, and they want to see these records in order to calculate the amount of unpaid stumpage more accurately. In the face of repeated refusals to provide records sought, forest revenue officials decided to propose an assessment, inviting a response from Lemare. This does not mean that FRAP could not or would not investigate further. Thus it was an error to find that the investigation was complete.

31. Likewise, it is highly improbable that the Province has heard everything the Petitioners have to say in response to the Proposed Assessment. Since the amount of the Proposed Assessment is an estimate based on the evidence that forest revenue officials had access to, the Petitioners will likely attack the methodology used to arrive at the estimate. The Petitioners say they are preparing a comprehensive response to the assessments proposals and have engaged an independent expert to review the assessment proposals. There is virtually no chance they have said everything they have to say. The Province submits that the Chambers Judge's finding to the contrary was clearly in error.

Importance of the proposed appeal generally and to the parties

32. The issues raised by the proposed appeal are of general importance to insolvency practice, to the Province and likely to other governments and government agencies.

33. The audit, assessment and appeal provisions in the *Forest Act* parallel those in provincial tax statutes. Certain provisions, such as section 142.81 (2), parallel provisions in the federal statutes such as the *Income Tax Act* and *Excise Tax Act*. The decision to order a claims process that circumvents the statutory process under the

Forest Act therefore has implications for other provincial and federal statutes. The Province submits that this issue is one of importance both for the Province and in general.

Utility of the proposed appeal in the circumstances of the parties

34. The Province submits that the proposed appeal will be useful in the circumstances of this case.

35. The amount of the Proposed Assessment is approximately $11.5 million. This includes unpaid stumpage of approximately $5 million, interest of approximately $1.5 million, and a penalty equal to 100% of the amount of stumpage. The 100% penalty under section 142.61 (1) of the *Forest Act* would apply only if the stumpage assessment is based on a wilful contravention of the *Forest Act* or the wilful provision of a false or misleading statement. The proposed stumpage assessment is an estimate based on the evidence made available to the Province. The Province believes that Lemare has records that would allow the amount of stumpage owing to be calculated more accurately, but Lemare has refused to provide the records sought by the Province.

36. If the *Forest Act* process is not followed and the Province is forced to try to prove its claim in the CCAA process, within extremely short timelines and without the usual procedural rights it would have outside the CCAA process, it will be difficult for the Province to prove its claim.

37. Not only is there a significant amount of revenue at stake, but there are also concerns about dishonest conduct. The purpose of an assessment under Part 11.1 of the *Forest Act* is not only to ensure the correct amount of stumpage is collected, but also to remove the benefit of dishonest conduct and to deter such conduct through the imposition of penalties. Allowing the matter to be determined on its merits based on a full hearing is necessary to avoid defeating these objectives.

Effect of an appeal on the progress of the proceeding

38. The Province submits that the proposed appeal will not unduly hinder the progress of the CCAA Proceeding. Any delay resulting from the appeal would be minimal and would be justified by the importance of the issues raised in the proposed appeal.

39. The Province is willing to consent to abridge the timelines for filing appeal books and factums in order to have the proposed appeal heard in January 2013 if the court's

schedule permits. The Province submits that even the normal timelines for an appeal would not be a significant delay in the context of this case. Very little has happened in the CCAA Proceeding since it was commenced approximately five months ago. The Petitioners have continued to profitably operate their business as they did before the commencement of the CCAA Proceeding. They have not sought DIP financing. As long as the Petitioners are protected by a stay, there is no real urgency to the CCAA Proceeding.

40. This is not a typical CCAA proceeding in which a company is struggling for survival. The Petitioners have positive cash flow and are financially stable. The delay caused by an appeal might be problematic in a typical CCAA proceeding, but not in this case.

41. The proposed appeal has a significant prospect of success and raises important issues. A modest delay in the CCAA Proceeding in order to deal with the appeal is consistent with the interests of justice in all circumstances of this case.

B. Reasons a stay of proceedings should be ordered

42. The Province submits that a stay of the Claims Process Order should be granted for the reasons set out in its motion book in proceeding CA40370.

PART IV: ORDER REQUESTED

The Province seeks an order that:

(a) by consent, the timelines in the Rules be abridged with respect to filing and serving motion books, reply books, and books of authorities such that this application is properly returnable on November 22, 2012;

(b) the Province be granted leave to appeal the Claims Process Order;

(c) if leave be granted in this matter and in any of the matters of the applications for leave to appeal in Court of Appeal file numbers CA40370 and CA040365, that all the appeals be heard together;

(d) the Claims Process Order be stayed pending the outcome of the appeal; and

(e) costs of this application be costs in the appeal.

PART V: TABLE OF AUTHORITIES

Case Law

Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc., 2009 BCSC 1701

Carnat Construction Co. Ltd. (Re), [1958] O.J. No. 515 (S.C.)

Edgewater Casino Inc. (Re), 2009 BCCA 40

Norris (Re), [1989] O.J. No. 995 (C.A.)

Queen's Plate Development Ltd. v. Vancouver Assessor, Area 09 (1987), 16 B.C.L.R. (2d) 104 (C.A.)

Selkirk (Re), [1972] O.J. No. 958 (S.C.)

Enactments

Appendix A: *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36, as amended

Appendix B: *Forest Act*, R.S.B.C. 1996, c. 157

Appendix C: *Supreme Court Civil Rules*, Rule 22-1