CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No. : 500-11-036133-094

SUPERIOR COURT

Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBI BOWATER 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

SUPPLEMENTARY AFFIDAVIT OF DONNA BALLARD

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I Introduction and Overview

1. In this affidavit Her Majesty the Queen in Right of the Province of Newfoundland and Labrador ("the Province") responds to the Contestation filed by Abitibi (as defined in its Amended Contestation dated 20 January 2010) with respect to the Province's motion for a declaration, *inter alia,* that:

(a) 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; and

(b) For greater certainty, that the orders issued by the Minister against Abitibi on 12 November 2009 pursuant to section 99 of the *Environmental Protection Act,* S.N.L 2002, chap. E-14.02 ("EPA") (the "EPA Orders") 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(t) and 15 of that Order.

2. In its Contestation, Abitibi makes the following assertions, among others:

(a) That the EPA Orders are monetary in nature and so barred by the Initial Order and the Claims Procedure Order issued by this Court (collectively, the "CCAA Orders") in the proceedings commenced by Abitibi *et al* under the *Companies' Creditors Arrangement Act* ("CCAA");

(b) That the EPA Orders, being barred by the CCAA Orders, would not be part of the plan of arrangement, as a result of the Province's failure to file a proof of claim;

(c) That the EPA Orders were issued in bad faith, and in violation of fairness and due process;

(d) The EPA Orders were based on the work of Conestoga-Rovers & Associates ("CRA"), which is flawed;

(e) That Abitibi is not a person responsible, within the meaning of the EPA, because it no longer owns or controls the Buchans site or the Grand Falls - Windsor site;

(f) That other parties are responsible for some of the contamination at certain of the sites, and that the continuing operations of one of those parties at the Buchans site would, in any event, make it impossible for Abitibi to undertake any remediation;

(g) That, even if the EPA Orders were validly issued, and survive the conclusion of the CCAA process, they cannot be complied with because Abitibi no longer has possession, control or power over its former sites.

3. With respect, the Province does not accept that this Court has the constitutionally effective jurisdiction to make findings about, or otherwise to inquire into, any of the matters raised by Abitibi and described in subparagraphs (c)-(g) in paragraph 2 above or which otherwise pertain to the legal or factual merits of EPA Orders, including: the Province's motive or intention in issuing these orders; the existence or non-existence of persons other than Abitibi who might also be responsible for the contamination that is the subject of the orders; and defences that Abitibi may seek to raise in response to these orders.

4. It is the Province's position that any factual or legal arguments that Abitibi wishes to make about the merits of the EPA Orders may be decided only in accordance with the EPA or other laws of the Province and in administrative or judicial proceedings established by and conducted under the laws of the Province. Indeed, Abitibi has, pursuant to the EPA and the laws of the Province, appealed the EPA Orders. It has done this in the correct forum, established under the laws of the Province for that purpose, and has raised in its appeal, among other arguments, the matters described in paragraph 2 above.

5. Unfortunately, by making the assertions it does in the Contestation over the legal and factual merits of the EPA Orders, Abitibi attempts to distort the issues before the Court on this motion under the CCAA and the *Constitution Act, 1867* arising from the terms of the CCAA Orders. Accordingly, by this Affidavit, the Province is providing additional background to the EPA and the EPA Orders to eliminate those distortions and to direct the Court to the relevant issues before it.

II Background to the EPA Orders

a) The *Environmental Protection Act*

6. The EPA is the environmental protection statutory regime in the Province.

7. The EPA permits the Minister to issue orders, requiring the remediation of contaminated sites, against the person responsible for a contravention of the EPA. The EPA defines a "person responsible" to include the owner of a substance or thing, the owner or occupier of land on which an adverse

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effect has occurred or may occur, the owner or operator of an undertaking, and a previous owner of a substance or thing.

8. An order issued under section 99 of the EPA requires a person to take certain steps to remediate contamination. An order issued under section 99 of the EPA does not require a person to pay money, directly or by necessary implication, to the Province. An order issued under Section 99 of the EPA is not, directly or by necessary implication, a claim for compensation by the Province. Section 99 of the EPA does not, therefore, create any debtor-creditor relationship between the Province and the person who is subject to the order.

9. Section 107 of the EPA provides a mechanism whereby an order under section 99 may be appealed. Abitibi has, by filing appeals from the EPA Orders, elected to use that mechanism. A copy of the EPA is communicated herewith as **Exhibit NL-7.**

b) The Abitibi Sites

10. The sites owned, or formerly owned, by Abitibi (as defined above, and including its predecessors) in the Province, that are the subject of the EPA Orders, are described below.

i) Buchans

11. The Buchans site consists of a number of metal mines, and the associated ore processing and waste disposal facilities. Metal mining operations had been conducted on the Buchans site since the 1920s. By a Co-Tenancy Agreement, entered into as of the first day of January, 1976, Price (Nfld.) Pulp & Paper Limited, a predecessor of Abitibi, became a co-tenant with ASARCO Incorporated ("ASARCO") of the Buchans site. ASARCO and Abitibi are, in correspondence and in other documents related to Buchans, variously described as the "Co-Tenancy" or the "owners". A copy of the Co-Tenancy Agreement is communicated herewith as **Exhibit NL-8.**

12. Mining operations at the Buchans site ceased in 1984. Following the cessation of the mining operations, some work was undertaken with respect to the closure of the mines and remediation of the contamination caused by the mining operation.

13. In November of 1991, ASARCO and Abitibi entered into a "Environmental Compliance Schedule (Buchans Co-Tenancy)" (the "Compliance Schedule"). The other parties to the Compliance Schedule were Environment Canada and the Newfoundland Department of Environment & Lands. The Compliance Schedule stated that the objectives of the compliance program were the following:

This Agreement between the Buchans Co-Tenancy, Environment Canada and the Newfoundland Department of Environment & Lands details an environmental compliance program to be undertaken by the owners, ASARCO Inc., and Abitibi-Price Inc., at the now abandoned Buchans operation. The objectives of this program are:

1. To protect the water quality and aquatic life of Buchans Brook, Red Indian Lake, and the Exploits River.

2. To comply with the federal Fisheries Act, and the Metal Mining Liquid Effluent Guideline made pursuant to Section 36 of that Act, and the Newfoundland Environmental Control (Water and Sewage) Regulations, 1980.

3. To establish and undertake environmental monitoring and evaluation programs.

A copy of the Compliance Schedule is communicated herewith as **Exhibit NL-9**.

14. Given that the mining, and related operations, caused the discharge of contaminants that affected areas beyond the Buchans site, including, for example, Buchans Brook, Red Indian Lake and the Exploits River, the Compliance Schedule included those areas.

15. The obligations described in the Compliance Schedule were those required by federal and provincial law. What the Compliance Schedule did was impose specific time lines on fulfilling those obligations, as well as imposing certain reporting requirements.

16. Pursuant to the Compliance Schedule, ASARCO, on behalf of the Co-Tenancy, filed quarterly reports with Environment Canada and the Province. In addition to the quarterly reports, ASARCO, directly or through its environmental consultants, filed periodic reports on behalf of the Co-Tenancy, on matters related to the environmental condition of the site.

17. Almost immediately following the signing of the Compliance Schedule, and from time to time thereafter, the Co-Tenancy asked for extensions to the deadlines in the Compliance Schedule. The extensions were requested because the remediation work required by the Compliance Schedule had not been completed. The most recent was a request for an extension until June of 2009.

18. In August of 2005, ASARCO filed for Reorganization under Chapter 11 of the *United States Bankruptcy Code*.

19. In July of 2006, Abitibi submitted, to Environment Canada, and to the Department of Environment and Conservation of the Province, what was called a "Buchans Mine Action Plan Towards Environmental Compliance and Closure" (the "Action Plan"). That Action Plan contained the following statement:

> Abitibi-Consolidated ("Abitibi") is continuing its commitment to the required environmental compliance and closure of the Buchans mine site ("Site"). An Environment Closure Schedule ("Schedule") has been agreed between the provincial and federal governments and the former Co-Tenancy (ASARCO and Abitibi) and this continues to be the guideline for which all remediation and compliance roles are established. Since cessation of mining operations at the Site in 1984, numerous initiatives have been undertaken to assist in meeting the Schedule. Results to date have been encouraging with natural, passive, bio-remediation techniques taking priority over mechanical or chemical treatment systems.

20. The Action Plan was stated to have the following objectives:

> The overall objective of the Plan is compliance with the applicable provincial and federal regulations. Specifically, they are:
>
> 1. To comply with the federal *Fisheries Act* and the Metal Mining Liquid Effluent Regulation and Guidelines, made pursuant to Section 36 of that Act, and the Newfoundland Environmental Control (Water and Sewage) Regulations, 1980.
>
> 2. To protect the water life and aquatic life of Buchans Brook, Red Indian Lake and the Exploits River.
>
> 3. To establish and undertake environmental monitoring and evaluation programs.

A copy of the Action Plan is communicated herewith as **Exhibit NL-10**.

21. In August of 2008, Abitibi wrote to the provincial Department of Environment and Conservation to indicate that Abitibi had retained AMEC Earth & Environmental ("AMEC") to conduct a Phase I ESA at the Buchans site to "identify potential areas of concern ("AOCs") posed by the past mining operations at the above-mentioned location". Abitibi further stated that "As part of the Phase I ESA, AMEC will also perform a preliminary risk screening of each AOC to determine the need for subsequent Phase II ESA work. The risk screening will identify if there is

any potential for exposure and impact to human health and/or to the environment. The results of this screening assessment, as well as recommendations for next steps, as appropriate, will be included in a Phase I ESA report, to be submitted to NLDOEC who will review and concurrence." A copy of Abitibi's letter to the Province, dated 14 August 2008 is communicated herewith as **Exhibit NL-11**.

22. By letter dated 12 June 2009, the Province asked Abitibi to provide ESA reports for the Abitibi sites, as well as an update on the status of remediation work at those sites. A copy of the Province's letter, dated 12 June 2009 is attached to the Province's Motion as **Exhibit NL-1**, and is reproduced here for ease of reference.

23. By letter dated 18 June 2009, counsel for Abitibi responded to the Province's request by saying that the reports either did not exist, or if they did exist, had not been reviewed by Abitibi. A copy of Abitibi's letter to the Province, dated 18 June 2009, is attached to the Province's Motion as **Exhibit NL-2**. It is reproduced here for ease of reference. The Province notes that none of the material asked for in its letter to Abitibi of 12 June 2009, has yet been provided to the Province.

24. As of June, 2009, the work and studies variously promised in the Compliance Schedule, the Action Plan, and the August, 2008 letter, had not been, respectively, completed and filed.

ii) Stephenville

25. Abitibi operated a pulp and paper plant at Stephenville from approximately 1980 on. Abitibi closed the plant in 2005.

26. Following the closure of the Stephenville plant, Abitibi took steps to decommission the site. Those steps included the preparation of a Phase II/III Environmental Site Assessment ("ESA") and a Remedial Action Plan ("RAP"). However, Abitibi did not provide a report on the findings of the Phase II/III ESA and did not provide a RAP to the Province.

27. In his letter of 18 June 2009, referred to in paragraph 23 above, counsel for Abitibi advised that the outstanding Phase II ESA report was in draft form, and that the bulk of the remedial action plan remained to be developed in light of the pending Phase II ESA work.

iii) Grand Falls-Windsor

28. Abitibi operated a pulp and paper plant at Grand Falls-Windsor ("GFW") from approximately 1910 on. Abitibi closed the GFW plant, effective March, 2009.

29. In order to conduct its operations at GFW, Abitibi required both a general certificate of approval, issued pursuant to the EPA, as well as certificates of approval for specific aspects of its operations. Abitibi was required to report to the Province on compliance with those certificates of approval. In addition, Abitibi provided the Province with reports, from time to time, on specific incidents involving the discharge of contaminants.

30. As a result of the Certificates of Approval, the periodic reports on compliance with the requirements of those Certificates of Approval, and reports on incidents involving discharges of contaminants, the Province was aware of the discharge of contaminants into the environment as a result of the operations at the GFW site. A copy of Abitibi's general certificate of approval for GFW, which is Certificate of Approval No. AA05-015441, is communicated herewith as **Exhibit NL-12**. An example of a certificate of approval for a specific matter, being Certificate of Approval GF-WMS09-05647D, is communicated herewith as **Exhibit NL-13**.

31. Following the closure of the GFW operation, Abitibi was required, by the terms of Certificate of Approval No. AA05-015441 to provide, among other things, an "Industrial Site Decommissioning and Restoration Plan" ("Plan"). The Plan was to address, among other things, how Abitibi proposed to deal with environmental contamination on the site.

32. In his letter of 18 June 2009, referred to in paragraph 23 above, counsel for Abitibi advised that preparation of the Plan was "ongoing".

iv) Botwood

33. Botwood was a shipping terminal operated by Abitibi from approximately 1910 on. The shipping terminal had two principal purposes. One was a shipping terminal for ore mined the Buchans site and for paper produced at GFW. The other was for the receipt of Bunker C oil used in the operations at Buchans. Abitibi closed Botwood at or about the same time as GWF in 2009.

34. Between approximately 2001 and 2009, Abitibi commissioned a number of reports on the environmental condition of its facilities in Botwood. In his letter of 18 June 2009, referred to in paragraph 23 above, counsel for Abitibi stated that: "Although a limited number of reports do exist, they have not been reviewed and approved by our client's senior environmental personnel in Montréal, and are, accordingly, not from our client's point of view, final."

v) Logging Camps

35. Abitibi and its predecessors operated approximately 50 logging camps, spread across the Province. To the best of the Province's knowledge,

Abitibi had not conducted either ESAs or remediation work at any of those logging camps.

36. In his letter of 18 June 2009, referred to in paragraph 23 above, counsel for Abitibi advised the Province that "respecting the suggested ESA reports from our client's former logging camps and woodlands operations, none exist as the ESA process has not yet been initiated."

III The CRA Reports and EPA Orders

37. With its closure of the GFW plant, Abitibi ceased all operations in the Province. In respect of every site at which Abitibi had operated, the Province had information, much of it supplied by Abitibi, indicating that the discharge of contaminants into the environment on those sites. However, the Province had no complete, up-to-date reports on the environmental conditions at those sites, and whether, or to what extent, Abitibi had remediated contamination at those sites. As a result, the Province had reason to believe that, if there had been contaminants on the site, there had been either no remediation or the remediation was incomplete.

38. As set out in paragraph 22 above, the Province asked Abitibi, in June of 2009, for status reports on the environmental condition of Abitibi's various sites, and for copies of any reports on that subject. As described in paragraph 23 above, counsel Abitibi effectively refused to provide those reports.

39. Given Abitibi's refusal to provide the Province with reports which would indicate the state of contamination, and the status of any remediation work, on the sites on which Abitibi had operated, and given what the Province knew about the seriousness of the contamination on those sites, the Province had no choice but to arrange for an independent assessment of the environmental condition of those sites. In July of 2009, CRA was instructed to undertake Phase I and II ESAs of the sites.

40. In order to expedite the assessment process, the Province asked Abitibi for permission to get access to the sites to conduct its assessments. Abitibi granted that permission, but only after a lengthy negotiation and the imposition of a number of conditions. Those conditions included a requirement that Abitibi review CRA's standard operating procedures, review CRA's proposed test sites and review CRA's proposed testing methodologies. Abitibi also imposed a condition that its environmental consultant be allowed to accompany CRA during all of its testing, and to take split samples.

41. The lengthy negotiation over the terms of access, and the delays occasioned in the assessment work itself as a result of the need to have AMEC present, delayed the completion of the assessment.

42. During the course of its assessment work, CRA was required to seek the permission of Abitibi to get access to the Stephenville, Botwood and GFW sites, and to have Abitibi and AMEC personnel present when it undertook its assessment work. Abitibi thus exercised control over its sites, notwithstanding that it no longer conducted operations at those sites.

43. With the exception of CRA's work on the logging camps, and at Buchans, Abitibi had its consultant, AMEC, accompany CRA. AMEC took split samples of all of the tests that CRA conducted. AMEC, and therefore Abitibi, would have known what contamination CRA had identified and, therefore, would have known the findings that CRA was likely to make. In addition, Abitibi was in possession of reports indicating the environmental contamination at its sites. Given all of that, the fact that the Province would issue section EPA Orders, and indeed the content of those Orders, would hardly have been a surprise to Abitibi.

44. The CRA reports indicated the existence of environmental contamination, at levels exceeding applicable standards, at all of the former Abitibi sites. In the case of Buchans, the CRA reports indicated the presence of contaminants of a kind and at concentrations that posed a threat to human health.

45. The CRA reports were required by the discharge of contaminants into the environment at the Abitibi sites, by the apparent failure of Abitibi to fulfil its obligations to remediate contamination at the sites which it had operated, by the uncertainty as to whether Abitibi would undertake any further remediation work, and by the need for an independent assessment of the environmental condition of the sites. In addition, the assessment process which gave rise to the reports was done with the full knowledge, and active involvement of, Abitibi and its consultant, AMEC.

46. The EPA Orders were issued in order to ensure that Abitibi fulfilled its legal obligations to remediate the contamination it had discharged, on its sites, into the environment. The EPA Orders were also issued to ensure that Abitibi, its creditors, and this Court were aware of Abitibi's obligations as a plan of arrangement was developed.

AND I HAVE SIGNED:

DONNA BALLARD

SOLEMNLY AFFIRMED before

me at St. John's, this 25 day of

January, 2010

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