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, as amended)

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

ABITIBIBOWATER INC.

and

ABITIBI-CONSOLIDATED INC.

and

BOWATER CANADIAN HOLDINGS INC.
and the other Petitioners listed on the motion

Petitioners

and

ERNST & YOUNG INC.

Monitor

and

ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent on the motion

WRITTEN SUBMISSIONS OF ATTORNEY GENERALOF BRITISH COLUMBIA

CONTESTATION OF AND CROSS-MOTION IN RESPONSE TO THE PETITIONERS' AMENDED SECOND MOTION FOR THE ISSUANCE OF VARIOUS ORDERS AUTHORIZING THE SALE OF NON-CORE PROPERTIES AND THE ISSUANCE OF AN AMENDED RECEIVERSHIP ORDER IN RESPECT OF 4513541

Introduction

1. The Petitioners seek an order (the Motion for Vesting Orders) authorizing the sale of certain lands in several provinces.

2. Among those properties is an industrial landfill located in or near the town of Gold River, British Columbia (the "Highway 28 Property").

3. The various properties have three things in common. Each has an environmental condition, although of different degrees of seriousness. For each, the Petitioners have estimated environmental remediation costs that approach or exceed the assessed value of the property. The Petitioners characterize that as their "Environmental Exposure". And each property is surplus to the Petitioners' needs, post-restructuring.

4. The Motion for Vesting Orders does not seek approval to transfer any of the so-called non-core properties to a going-concern purchaser. Rather, they are to be transferred to a numbered company in receivership. The receiver will presumably use best efforts to market the properties, until the limited amount of money supplied to meet the costs of maintaining and marketing them all runs out. Then, or at some earlier point in the process, the properties may be abandoned.[1]

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[1] Alternatively, the numbered company may be dissolved and, by operation of section 228 of the *Canadian Business Corporations Act*, R.S.C. 1985, c. 44, the property could vest in Her Majesty the Queen in right of Canada.

In the further alternative, the properties may forfeit for non-payment of taxes. In that potential eventuality and in British Columbia, the Highway 28 Property would fall under the administration of the Ministry of Agriculture and Lands as landowner. However, ownership liability for any costs of remediation would not arise under EMA as the Crown is not an owner within the meaning of the contaminated sites provisions for properties which it involuntarily acquires ownership: EMA, section 46(1)(g).

If the properties are abandoned, the regulator may, or may not, take steps to remedy environmental conditions on any of the properties. In BC, if the regulator were to take steps, such steps could include (1) issuing a pollution abatement order to a person who owned or occupied that land on which the substance (causing pollution) is located or was located immediately before it was introduced into the environment to, inter alia, and at that person's expense, undertake works to prevent the pollution: EMA section 83; (2) issue a remediation order

5. The current motion is a transparent device by which the Petitioners seek to dispose of properties which, if they still owned them on CCAA emergence, will clearly involve continuing environmental responsibilities. According to the Petitioners' theory, they can avoid those responsibilities by ceasing to be the current owner and having their obligations as former owner compromised in these proceedings. That is what the Petitioners evidently mean when they say their "Environmental Exposure" will be "crystallized".

Claim and "claim"

6. Central to the Petitioners' intentions in that regard is the definition of "Claim" they have included in the Claims Procedure Order, which provides in material part as follows:

> "***Claim" means any right ... of any Person against one or more of [the Petitioners] in connection with any ... obligation of any kind whatsoever ... based in whole or in part on facts which existed on the Canadian Filing Date***, together with any other claims of any kind that, if unsecured, would constitute a debt provable in bankruptcy within the means of the *Bankruptcy and Insolvency Act* ....

The words in bold italics are clearly intended to expand the meaning of Claim beyond that which, by operation of section 12 of the CCAA, is submissible to a plan of compromise and arrangement in the present proceedings (hereinafter, a "claim"): see Judgment on Amended Motion for a Declaration regarding Orders issued pursuant to the Environmental Protection Act (#445) (hereinafter, the "N/L Judgment").

7. Following the N/L Judgment, in which the court held that the EPA Orders could be treated as contingent "claims", the Petitioners now apparently conceive that any and all environmental obligations and orders fall into the same category. On that view, they do not need their expansive definition of Claim and the constitutional questions

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to a current or former owner or operator of the property: EMA section 18 or (3) undertake remediation itself if the regulator is of the opinion contamination on the property is not being adequately remediated: EMA, section 58(2)(a).

pertaining to it would never need to be addressed. AGBC will vigorously contest that conception and view.

The purpose of AGBC's cross-motion

8. The purpose of the first declaration sought on AGBC's cross-motion is to establish, with respect to the Highway 28 Property, and by extension to all British Columbia properties, that the Petitioners' environmental obligations and/or the statutory powers and provisions relating to them, do not constitute a contingent "claim" which may be subject to a plan of compromise and arrangement.

9. That declaration, if granted, rebuts the Petitioners' apparent premise that any such combination of obligations, powers and provisions ***always*** results in a contingent "claim" – even on the facts pertaining to the Highway 28 Property.

10. Ontario and New Brunswick present arguments of public policy and equity in seeking to have this court exercise its discretion not to allow the sale of the non-core properties in those provinces. For the same reasons, the court should clarify that the law, when properly applied, could not ***ever*** convert environmental responsibilities *simpliciter* (i.e. obligations and orders) on those or any other properties into "claims" – despite the possible costs of compliance.

11. The second declaration sought on AGBC's cross-motion seeks to confirm, as it seems from the reasons in the N/L Judgment and despite the Petitioners' assertion that the Motion for Vesting Orders will "crystallize" their "Environmental Exposure", that the jurisdictional and constitution questions with respect to Claim remain open for argument and determination.

12. It is possible, if the court on the hearing of the cross-motions finds that the environmental obligations on the non-core properties, and by implication all the Petitioners' properties other than those subject to the N/L Judgment, are not contingent claims, that the Petitioners will amend the definition of Claim to exclude the pertinent environmental and other regulatory obligations. If not, the two declarations sought by AGBC will work together to enable this or some other court,

post-restructuring, to consider the constitutional question as it applies to a Claim which is not a "claim".

The N/L Judgment is not dispositive

13. In February of this year, Her Majesty the Queen in right of the Province of Newfoundland and Labrador challenged the ability of this court in these proceedings to treat certain orders under the *Environmental Protection Act* (Newfoundland/Labrador) as if it were a claim subject to compromise through a plan of compromise and arrangement under the *Companies' Creditors Arrangement Act*.

14. The court concluded, in the "unique" circumstances pertaining to the EPA Orders, that it could do so.

15. The combination of those circumstances led the court to distinguish between "the true regulatory character or otherwise financial and monetary nature of a given order": at para. 160. The court observed as follows: "This is quite far from the situation of the detached regulator or public enforcer issuing order[s] for the public good." at para. 175

16. Thus, the N/L Judgment should be distinguishable.

17. However, the Petitioners seem to consider it is dispositive of their Environmental Exposure on the non-core properties. They proceed on the theory that any power to make environmental orders with financial or monetary consequences, post-restructuring, based on pre-filing facts constitutes a contingent "claim", with the proof of the contingency being in the ultimate making of the order.

18. There are debt-creating and other enforcement provisions in the various provinces' environmental statutes, as in Newfoundland/Labrador.[2]

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[2] Indeed, there are debt creating and enforcement provisions in non-environmental statutes.

19. The environmental conditions on each of the non-core properties result from past (and present) conduct and may require future remedial action, as in Newfoundland/Labrador.

20. Now, by virtue of the Motion for Vesting Orders, the Petitioners hope to become former owners, as in Newfoundland/Labrador.

21. Unless the first declaration is granted, provincial ministries of environment legitimately fear that the vesting orders will complete the conditions precedent to a contingent "claim", as in Newfoundland/Labrador. A claim whose scope and dollar amount is difficult or impossible to quantify or prove. A claim premised in whole or part on regulatory steps not yet taken. A claim in favour of a creditor not yet ascertainable.

22. Provincial environmental statutes and their administration are based in large measure on the legitimate policy objective of internalizing the externalities of industrial or commercial activities[3] – in short, making the "polluter pay".[4] Unless the first declaration is granted, provincial ministries legitimately fear that, if they pursue that policy with respect to the Petitioners post-emergence, their orders will be characterized *ex post* as monetary in intent, as in Newfoundland/Labrador.

23. AGBC submits that environmental regulators must have the assurance that any future regulatory order with respect to a property will not, on the basis of the N/L Judgment, automatically and retrospectively confirm that the regulator or the government must have had a contingent "claim".

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[3] The internalization of the environmental externalities of industrial or commercial activities seeks to ensure that in the pursuit of private benefit (corporate profit) economic actors do not create social costs (damage to the environment): see Our Common Future: The World Commission on Environment and Development (Oxford University Press 1987), p. 220-222. Regulatory tools used to encourage the internalization of externalities include limits on emissions (to air, water, or land), criminal sanctions (fines, penalties, and/or imprisonment) for violation of same, and civil liability for damage to environment.

[4] With respect to contaminated sites, as stated in *Imperial Oil v Quebec (Minister of Environment)* 2003 SCC 58, at para 23, the polluter pay principles has "...become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial environmental legislation..."

24. The same is true for

- the properties in Mackenzie, British Columbia, and other properties previously disposed of through these proceedings,
- properties the petitioners ceased to own before these proceeding commenced, and
- properties the petitioners never owned but simply used in the course of their business.

There is, at law, no "claim" respecting environmental obligations or orders

25. Every environmental order is "targeted", in the sense of being directed to a person who had or has the ability to prevent the environmental harm underlying the order. The regulator has discretion to direct orders as he or she considers appropriate. As with the exercise of any statutory power, such orders are subject to judicial review in provincial superior courts on grounds of procedural fairness and reasonableness. An order made for an improper purpose, or based on irrelevant considerations, will be quashed.

26. All environmental (or other regulatory) obligations have potential financial or monetary ***consequences***. Compliance with every environmental order will likely require the expenditure of money by the person against whom it is made. That does not make those obligations or orders of a "financial or monetary ***nature***".

27. In the N/L Judgment, the Petitioners argued: at para. 32, and the court apparently found: at para. 130, that based on the monetary consequences in that case the EPA orders were in "pith and substance" of a "financial or monetary nature": see also Court of Appeal judgment, at para. 39. Strictly speaking, the pith and substance analysis properly applies to ***legislation***, in order to determine its true character, including for constitutional purposes. On a pith and substance analysis of EMA (and any other environmental legislation), correctly applied, the first premise is what must

be done, and not who pays.[5] The essence of environmental regulation is risk identification and risk management, not making orders to return the environment to its pristine state whenever there's money available. Potential monetary consequences do not mean those enactments, or the obligations or orders made under them, are ***ever*** in pith and substance financial or monetary in nature. Contrast tax statutes, and the obligations and orders made under them.

28. It is, as noted, a critical element of the "polluter pay" principle that former owners, if and to the extent they were a polluter, be held accountable for the cost of remediating contamination. The EMA contains provisions which enable "responsible persons" to limit their potential exposure. For example, they can seek to be declared "minor contributors", and if so declared, their liability exposure is capped at a set amount.[6] Alternatively, they can remediate existing contamination and obtain a Certificate of Compliance. Holders of Certificates of Compliance are not in the future a responsible person for remediation costs incurred by a future owner when changing the use of the site.

29. In addition, private arrangements for allocating environmental responsibility can be entered into between buyers and sellers. They can adjust the purchase price or provide indemnities which reflect who is intended to pay for what, recognizing that if environmental remediation is required, and someone (whether the government or a private party) carries out the work, all responsible persons will (subject to the other provisions of the EMA) be jointly and severally liable.

30. Such statutory and other arrangements do not provide current owners with a windfall benefit, in having the property and a money claim too. It recognizes that former owners (those who are not "minor contributors") took the benefit of ownership or use of the land, without at that time neutralizing the consequent environmental impacts – i.e. they failed to internalize the externalities. The law does not support

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[5] In *Beazer East, Inc. v British Columbia (Environmental Appeal Board),* 2000BCSC 1698, 84 B.C.L.R. (3d) 88, [2000] B.C.J. No. 2358, Tysoe, J stated, at para 56:

"The purposes of the Act [the *Waste Management Act*, R.S.B.C. 1996, c. 118, the predecessor to EMA] are for the prevention of pollution and the identification and remediation of contaminated sites…":

[6] EMA, section 50

viewing the ability of government, or any other new owner, to cause would-be former owners like the Petitioners to contribute to environmental remediation as "having its cake and eating it too".

31. As well as those conceptual difficulties, there are also practical problems in treating environmental obligations as "claims".

32. In some circumstances, it may be possible to quantify the cost of compliance with a regulatory order, or the costs of remediation. But by no means in all. And by no means the likelihood that further orders may be made, or the potential cost of compliance with them. Or against whom those orders might be made. Or whether a future order will need to be made at all.

33. While it is not yet resolved in the case law whether a person, through a civil proceeding, can be required to return property to its pristine state, there is no proper presumption that environmental regulators will require the environment to be returned to that state. Regulatory requirements are informed by (a) the use to which the property is being or will be put, and (b) present or future risk to the surrounding environment and public health and safety as evidenced by existing standards or criteria.

34. For all of the foregoing reasons, it is therefore practically impossible to calculate total "Environmental Exposure" for the purposes of crystallizing a "claim".

35. Further, there is no proper presumption that orders will not be complied with, even by former owners. There are provisions in the EMA enabling access to previously-owned property to comply with environmental orders.[7]

36. Finally, for there to be a contingent "claim" requires that the claimant be identifiable: see *Algoma Steel Corporation Limited v Royal Bank of Canada, Montreal Trust Company et al* 1992 Carswell Ont 162, 11 C.B.R. (3d) 1 (Ont. Ct. J.), at para. 17. The purpose of the CCAA is to enable a plan of compromise and arrangement to be presented to creditors for a vote based on the amounts of their respective "claims". That purpose breaks down if there are "claims" uncertain not only in amount but also

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[7] EMA, s. 48(14), (15), (16).

in whether it is the government or some other or future owner or operator, or both, who may be entitled to prove and vote.

37. The jurisprudence with respect to contingent "claims" requires a degree of certainty as to quantum and as to the likelihood that the facts comprising the cause of action on which a "claim" is based may indeed come into being. Further, unlike the contingent liability arising by reason of ***private obligations*** such as guarantees: see *Algoma* for example, only in very limited circumstances have contingent "claims" have been found to exist based on pre-filing ***public obligations***:

- where the regulator had already entered the land of concern and been actively engaged in clean-up: *Re Shirley* 1995 CanLii 7399 (On. S.C.) or already taken responsibility for clean-up (albeit having completed only some of the work): *Anvil Range Mining Corp.* 2001 Carswell Ont 1325 (On S.C.); aff'd. 2002 Carswell Ont 2254 (C.A.);
- where the regulator had already moved on cash security respecting the contaminated site with the intention of proceeding with clean-up: *General Chemical Ltd.* (2006) 22 C.B.R. (5^{th}) 298 (On. S.C.), aff'd. (2007) 35 C.B.R. (5^{th}) 163 (C.A.);
- where the regulator had commenced and concluded a monetary penalty proceeding before CCAA filing (albeit that the final appeal had been determined before emergence): *Air Canada* 2006 CanLii 42583 (On. S.C.); contrast *Air Canada* 2004 CanLii 6674 (On. S.C.).

38. For all those reasons, the law does not support treating environmental obligations or orders, whether in connection with the non-core properties or any other properties the Petitioners may own or no longer own, as contingent "claims" – despite their targeted nature, the potential cost and lack of benefit to former owners, the potential for future liability to a person who performs those obligations, or possible impact on corporate restructuring. The presence of those features is not enough. There must in addition have been some specific step or steps taken, before and/or during the CCAA proceedings, whose ***practical, intended and inescapable result*** is to create a debt or liability owing to some specifically identified person.

There is no conceivable "claim" respecting the Highway 28 Property

39. The Highway 28 Property, despite the assertions contained in the Petitioners' motion materials, is simply incapable of constituting a contingent "claim".

40. The Highway 28 Property is owned by Bowater Canadian Forest Product Inc./Bowater Produits Forestiers Du Canada Inc. ("BCFPI"), one of the Petitioners in these proceedings. (Affidavit of Hubert Bunce, para 22).

41. The predecessor of BCFPI was issued a Permit in 1973 authorizing the discharge of refuse (dredged material) from the docks and log handling facility at the Gold River Pulp Mill. The nature or characteristics of the refuse authorized to be discharged was dredged material – silt, sand, bark and small branches. (Affidavit of Hubert Bunce, paras 2 -8, Exhibits 1 – 8; para 16, Exhibit 11).

42. The disposal of dredgate at the site ceased in or about 1988 (although it was stored on site until about 1992). Data obtained from 1991 dredging samples indicated strong evidence that a portion of the dredgate discharged to the site contained low levels of dioxins/furans, polycyclic aromatic hydrocarbons and heavy metals. However, at that time, those concentrations were below levels considered by the Ministry of Environment to create a hazard to the surrounding environment or population (Affidavit of Hubert Bunce, para 18, Exhibit 13).

43. In 1993, the permit was amended to authorize the discharge of industrial refuse comprising woodwaste, soil and gravel to a maximum amount of 10,000 cubic meters/yr. (Affidavit of Hubert Bunce, para 21, Exhibit 14).

44. In 1997, BCFPI licensed the use of the Highway 28 Property to what is now Western Forest Products Inc. and assigned the Permit to Western Forest Products Inc. (Affidavit of Hubert Bunce, para 23, Exhibit 16, paras 10-15, Exhibits 9 – 10).

45. Western Forest Products Inc. continues to discharge under the Permit.

46. The most recent site visit was undertaken on August 19, 2008, by Mr. Bunce for the Ministry of Environment and was for the purpose of assessing compliance with the Permit. As a follow up to that visit, Mr. Bunce wrote to the Permittee, Western

Forest Products Inc. reminding it that the Permit required that waste at the landfill not remain uncovered for greater than 30 days and that constant compliance with the Permit was imperative. (Affidavit of Hubert Bunce, paras 24 -25, Exhibit 17).

47. There is no current technical information in the possession of the Ministry as to the conditions of the soils or groundwater underlying or adjacent to the Highway 28 Property. (Affidavit of Hubert Bunce, para 27.) The Petitioners estimate the cost of site remediation to be $500,000.00. It is possible they have reached that estimate on better or more current information than is available to the Ministry.

48. Under EMA, and despite the terms of the Permit, both BCFPI and Western Forest Products Inc. would be current owners, Western would also be a current operator, and BCFPI would be also be a former operator. As such, all would potentially be "responsible persons" under EMA.

49. If the Highway 28 Property were found to be a contaminated site and Western Forest Products Inc. incurred costs of remediating, it would then have a statutory cause of action against BCFPI.

50. Even so, there is no conceivable contingent "claim" with respect to the Highway 28 Property, for the following reasons.

51. The mere fact that there are statutory cost recovery provisions does not give rise to the contingency of a claim against any potentially "responsible person". There will never be liability unless some potential claimant has actually or effectively undertaken remediation. That is the contingency which must be considered.

52. British Columbia would have a claim against BCFPI in respect of the Highway 28 Property if the government were to incur the costs of remediation.[8] However, section 58 of EMA only applies if there is a "contaminated site", and if the statutory decision-maker chooses to exercise his or her discretion to expend (scarce) public funds on remediation at that particular site. There is no evidence to suggest that the government will ever undertake remediation of the Highway 28 Property.

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[8] EMA section. 47 and 58

53. While the director under EMA could issue a remediation order to BCFPI,[9] (assuming the site is a contaminated site) that does not give rise to a "claim". That is simply the action of the regulator to force compliance with the law, namely obligations under EMA. No-one could reasonably suggest that the obligation to comply with a law – e.g. not to discharge waste into the environment without a permit – gives rise to a claim.

54. Finally, there is no evidence before the court of anything done or proposed to be done with respect to the Highway 28 Property, or any other property in British Columbia, the practical, intended and inescapable result of which will be a debt or liability of the Petitioners to anyone.

55. In sum, it is far too remote and speculative to suggest that British Columbia would ***ever*** incur costs of remediation or otherwise conduct itself such that it now has a contingent "claim" against BCFPI or any of the other Petitioners in that regard.

The jurisdictional and constitutional questions remain open

56. Although the constitutional validity of the CCAA as a whole is well established, AGBC maintains it is beyond Parliament's constitutional authority under the bankruptcy and insolvency power to enact a law whose purpose or effect is to extinguish public obligations simply because they may have financial or monetary consequences for restructuring companies. Thus, any particular provision of the CCAA, or indeed a broad interpretation of its various provisions, to that purpose or effect would be *ultra vires* (the invalidity argument).

57. AGBC further maintains that any federal legislation which impaired regulatory authorities' ability to enforce public obligations under such provincial laws would be unconstitutional for that reason, despite federal paramountcy (the interjurisdictional immunity argument).

58. British Columbia's environmental laws are in pith and substance for the provincial purpose of protecting the environment and public health and safety. In doing so,

[9] EMA, section 48

they may legitimately have incidental[10] monetary effect, including on restructuring companies and despite any order in CCAA proceedings. The federal and provincial statutory schemes should be interpreted and applied harmoniously, to ensure the policy objectives of both levels of government are achieved to the maximum extent possible (the cooperative federalism argument).

59. For those reasons, it cannot simply be assumed, even if *arguendo* there were a purported "claim", that paramountcy will automatically make provincial regulatory laws inoperative.

60. Further, any federal legislation which treated Claims which are not "claims" as subject to compromise must *a fortiori* be open to constitutional challenge.

61. No-one should go forward with this restructuring on the assumption that the N/L Judgment and/or the Claims Procedure Order are in any way dispositive of the jurisdictional and constitutional questions, for either "claims" or Claims. It may be, as noted, that following the decision on this motion the definition of Claim is appropriately amended. If not, those questions remain to be argued and decided.

Conclusion

62. AGBC seeks the declarations on its cross motion to establish whether or not British Columbia environmental regulators may be barred from performing the duties and exercising the powers set for them under EMA. In seeking those declarations, AGBC is mindful of the recent decision of the Alberta Court of Appeal respecting a statutory official's liability for contempt: *Ouellet v B.M.* 2010 ABCA 240. In that decision, the director of a government department was held personally liable for his department's failure to comply with a court order.

63. CCAA proceedings are all about money. There is overwhelming pressure to monetize everything – to translate everything to the same language – to fit everything into a single equation that describes and produces a successful

[10] The constitutional doctrine of "incidental effects" recognizes that provincial or federal legislation enacted under their respective heads of power may necessarily have constitutionally-incidental effect on the legislative jurisdction of the other level of government.

restructuring. Yet the court should not view environmental obligations two dimensionally – i.e. because they might cost money, they get treated like debts. It should appreciate in full and appropriately address the competing public interest

- in not allowing a company to divest itself of the expense of potential environmental compliance in order to improve its prospects of successful restructuring through a better post-restructuring bottom line,
- in requiring a company as a non-negotiable condition of restructuring to continue to meet its public obligations like any other corporate citizen.

64. The court should do so by finding that the Petitioner's environmental obligations, both on the facts of the Highway 28 Property and on the law in general, do not and cannot constitute a contingent "claim"; and by expressly confirming it has left open for decision the constitutional question of whether Parliament can validly pass legislation to compromise a Claim which is not a "claim".

All of which is respectfully submitted

Attorney General of British Columbia

per

R Butler

Richard Butler

"David Hatter"

David Hatter

"Elizabeth Rowbotham"

Elizabeth Rowbotham