

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

**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**

A. OVERVIEW AND SUMMARY

1. The Petitioners seek an order (the Motion for Vesting Orders) authorizing the sale of certain assets, including an industrial landfill located in or near the town of Gold River, British Columbia (the Highway 28 Property).
2. The Attorney General of British Columbia (AGBC) responds on behalf of the statutory decision-makers under British Columbia *Environmental Management Act* and regulations (collectively, EMA). AGBC also represents the government of British Columbia in ensuring that the policy objectives of provincial legislation continue to be met. AGBC is also responsible under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, for responding where in a cause, matter or other proceeding, the constitutional validity or constitutional applicability of any law, including an enactment of Canada, is challenged, as well as for bringing such challenges.
3. AGBC is concerned about the Motion for Vesting Orders as it applies to the Highway 28 Property and other properties proposed to be sold. The concern arises if or to the extent the motion's purpose is to "crystallize" the Petitioners' obligations under EMA as former owner – i.e. to have them characterized and/or confirm they will be treated as environmental "claims" which are provable and subject to compromise in or through these proceedings. AGBC submits that if the vesting order is to be granted the court should at the same time make a declaration that the environmental obligations and regulatory powers which pertain to the Highway 28 Property (and other properties) do not constitute a contingent "claim" under the *Companies' Creditors Arrangement Act*. That leaves open the questions of whether the more expansive definition of "Claim" contained in the Claims Procedure Order in within the jurisdictional or constitutional authority of the court in these proceedings.
4. AGBC also has concerns about ambiguity in section 6 of the proposed form of vesting order.
5. AGBC brings its cross-motion to clarify the status of the Petitioners' environmental obligations in British Columbia going forward. AGBC seeks two declarations. The first is to have the court declare that, with respect to the Highway 28 Property at least, there is no contingent "claim" within the meaning of that term under the CCAA. The second is to have the court declare that the questions of statutory jurisdiction or constitutional authority pertaining to the definition of "Claim" in the Claims Procedure Order, as it purportedly includes the Petitioners' obligations under EMA and other provincial enactments, remain to be determined. AGBC also seeks an amendment to the proposed form of vesting order, to remove the ambiguity in section 6.

B. BASIS FOR CONTESTATION AND CROSS MOTION

Background

6. The Petitioners or their predecessors carried and/or carry on industrial activities at locations in British Columbia, including at the Highway 28 Property.
7. As a result of those activities, the Petitioners have ongoing obligations under EMA, as well as under other British Columbia enactments of general application.
8. In general, the Petitioners' obligations under EMA are to do or refrain from doing certain things, including with respect to the Highway 28 Property. Such obligations may be termed public obligations. They are enforceable by order of the statutory decision-maker, and if necessary by prosecution and penalties.
9. Failure to perform public obligations may *also*, in certain circumstances and after specified steps are taken, result in a private obligation – a debt or liability to a person who has performed remediation work the Petitioners were responsible for performing.
10. Full particulars of the Highway 28 property, including its environmental condition and the nature and status of the Petitioners' public obligations in that regard, are set out in the affidavit(s) filed and to be filed by AGBC. The enactment provisions under which those public obligations arise and through which they may be enforced, or may give rise to private law debts or liabilities, are also set out in those affidavits.

Impact of the Motion for Vesting Orders

11. Normally, there would be no objection to the sale or disposition of non-core properties like the Highway 28 Property as part of downsizing in CCAA proceedings. However, if the court's approval of the sale of the Highway 28 Property is in any way based on the reasoning, or purportedly achieves the outcomes, set out in paragraphs 4 through 7 or paragraph 32 of the Motion for Vesting Orders, AGBC does object.
12. By effecting the sale of the Highway 28 Property, the Petitioners will no longer be the current owner going forward, and will not be subject to public or private obligations as current owner. However, AGBC objects if the sale were also found to complete a process by which the Petitioners' public obligations as former owner were also "crystallized" a "claim" or a Claim in these proceedings.
13. Specifically, AGBC would object if the proposed sale were taken to limit the Petitioners' ongoing public obligations in British Columbia, or the enforceability of those public obligations. AGBC submits that, on the facts pertaining to the Highway 28 Property, there are no private law debts or liabilities, contingent or otherwise, based in any way on those public obligations such as to constitute a "claim". AGBC further submits that the effect of the expansive definition in the

Claims Procedure Order in those respects, including as it may pertain to the Highway 28 Property, has not yet been determined, and in particular requires a further hearing of and decision on questions of jurisdiction and constitutional authority.

The Newfoundland/Labrador decision

14. In the reasons for judgment on the Newfoundland/Labrador Amended Motion for a Declaration Regarding Orders Issued pursuant to the *Environmental Protection Act* (the N/L Motion), this court noted British Columbia's concerns about the definition of "Claim" in the Claims Procedure Order as it may be carried forward into the proposed plan of arrangement or any other orders in the proceedings: at paras. 28 through 30.
15. On the N/L Motion, the court decided that the Newfoundland/Labrador EPA Orders, despite being framed as "regulatory orders", were in substance financial or monetary in nature: at paras. 127 through 132. In view of that conclusion, the court found it unnecessary to discuss arguments whether it is possible to include statutory non-monetary obligations in the definition of "Claim"; but said that the determination of that question should await another day: para. 134 and 135. In that regard, the court wrote as follows:

Abitibi remains in ownership and occupation of the relevant properties it still possesses in BC. No orders of any sort and no notice of non-compliance are outstanding in regard of any environmental obligations of Abitibi in that province. Simply put, there are no pending issue[s] to resolve between Abitibi and the Intervening Parties.

16. In reaching that conclusion, the court observed that "questions of statutory jurisdiction or constitutional authority should not be ... decided in a factual vacuum".

There is no "claim" here

17. Unlike in Newfoundland/Labrador, there has been no regulatory step taken or work done which could lead to a debt or liability of the Petitioners to a person (successor owner or government) who remedies an environmental condition on the Highway 28 Property. The Petitioners are not even the environmental permittee on the Highway 28 Property.
18. Further, there has yet to occur or be identified an environmental condition or risk on or from the Highway 28 Property sufficient to require intervention by a statutory decision-maker, in the public interest, to protect against harm to the environment or to public health and safety.
19. If any such event were to happen, British Columbia law enables statutory decision-makers to require the Petitioners and other responsible persons to meet their public obligations in that regard. At present, that is the extent of the Petitioners' so-called "Environmental Exposure" with respect to the Highway 28 Property.

20. AGBC submits it is entirely wrong in fact and at law to purportedly monetize any such exposure. We continue to reject the contention that public obligations can constitute “claims” (including contingent claims) properly submissible to compromise in CCAA proceedings, whether
- (a) in and of themselves, OR
 - (b) because those public obligations may become the subject of regulatory body proceedings of the sort described in section 11.1(2) of the CCAA; OR
 - (c) because meeting those public obligations may involve expenditures of money, OR
 - (d) based on statutory provisions for enforcement of them, including the possibility of fines, OR
 - (e) based on statutory provisions that could, if someone else were to meet those public obligations, create a debt or liability of the Petitioners to that person.
21. Further, with respect to the Highway 28 Property, there are no known facts, other than the bare existence of public obligations respecting pollution and the statutory power to enforce them, on the basis of which the court could find the existence of a contingent “claim”. Any such “claim” is entirely theoretical and speculative. Indeed, who the putative claimant may be, for purposes of voting on the Petitioners’ plan of compromise and arrangement, is entirely uncertain.
22. The court is therefore able to declare, on the facts in evidence, that there is no “claim” – no debt or liability, present or future, to which the Petitioners are now or may before the plan implementation date become subject, by reason of those public obligations or the statutory provisions relating to them. AGBC now seeks such a declaration.

The jurisdictional and constitutional questions respecting “Claim”

23. AGBC would continue to take the same position on the Highway 28 Property and all other properties in British Columbia (and indeed the properties in Ontario and New Brunswick) even if there were now regulatory orders in place with respect to those public obligations, under which corrective steps were required immediately or inevitably to be taken by the Petitioners. We would do so despite the decision on the N/L Motion, which we say is at least distinguishable on the facts and, with respect, also failed to consider applicable principles of constitutional law.
24. AGBC expects to be filing a motion of its own, formally raising the jurisdictional and constitutional issues as they pertain specifically to properties in British Columbia of which the Petitioners are or become a former owner (the AGBC Motion). That motion may well include British Columbia enactments in addition to the EMA. It is anticipated that the grounds of the AGBC Motion will include the following:

- (a) The *Companies' Creditors Arrangement Act* is properly interpreted in accordance with the **presumption of constitutionality**. It should not be interpreted in a manner that would exceed the proper bounds of the ability of Parliament under section 91 of the *Constitution Act 1867* to make laws on a matter of bankruptcy and insolvency (i.e. in relation to the private law obligations of a bankrupt or insolvent person). It should not be interpreted in a manner to impair the operation of validly-enacted provincial legislative schemes or intrude into the provinces' exclusive authority under section 92 of that Act. It would be contrary to that presumption if the *Companies' Creditors Arrangement Act* were interpreted in these proceedings to enable the court to relieve the Petitioners from having to comply with their public obligations under British Columbia enactments, or affect the applicability or operation of any provision of a British Columbia enactment in that regard where, as here, there is no debt or liability, present or future, to which the Petitioners are now or may before the plan implementation date become subject by reason of the obligations or enactment. In particular, but without limitation, it would be contrary to that presumption for the court to approve a plan of compromise and arrangement or make any order which, alone or in combination with another order, would operate to that effect.
- (b) In *Companies' Creditors Arrangement Act* proceedings, the court's jurisdiction to rule provincial enactments inapplicable or inoperative is predicated on the **application of doctrines of constitutional law**. It would be contrary to those doctrines for the court (i) to give effect to a law or purpose of Parliament which is not within or necessarily incidental to the powers granted to Parliament under section 91(21) of the *Constitution Act 1867*, or (ii) to apply the *Companies' Creditors Arrangement Act* to impair or render inoperative schemes or provisions enacted pursuant to the powers granted to provinces under section 92 of the *Constitution Act 1867*. It would therefore be beyond this court's jurisdiction in these proceedings to make any order that renders a British Columbia enactment creating public obligations constitutionally inapplicable or inoperative or otherwise unenforceable with respect to the Petitioners, where, as here, there is no debt or liability, present or future, to which the Petitioners are now or may before the plan implementation date become subject by reason of the obligations or enactment.
- (c) It is beyond the ability of Parliament to make laws on or necessarily incidental to matters of bankruptcy and insolvency empowering the court in proceedings under the *Companies' Creditors Arrangement Act* effectively to engage in a **judicial review of the exercise of statutory powers** under provincial enactments. It is therefore beyond the jurisdiction of this court in these proceedings to make orders which, directly or in effect, grant relief in the nature of *mandamus*, prohibition, *certiorari* or declaratory or injunctive relief with respect to the exercise or proposed or purported exercise of such powers, including without limitation issuing or enforcing orders under the EMA against the Petitioners – whether or not compliance with any such orders requires the expenditure of money by them, or non-compliance results in prosecution and fines against them or may result in a debt or liability to another person.

25. AGBC does not know whether the court would prefer to have the jurisdictional and constitutional arguments with respect to the expansive definition of Claim wait until a later stage in the proceedings or, indeed, until such time, post-proceedings, when the applicable law may be fully engaged on specific facts respecting the Highway 28 Property, or some other British Columbia property of which the Petitioners are a former owner.
26. It may be that the jurisdictional and constitutional questions will be engaged, one way or another, on the application for a plan approval order – including if it contemplates (contrary to section 11(2) of the *Crown Proceeding Act* R.S.B.C. 1996, c. 89,) a permanent injunction respecting public obligations as purported “Claims”. However, AGBC may be instructed to take the position that the injunction issue can be addressed by treating “regulatory body proceedings” as an exception to any such injunction, and/or by some other means which leaves aside the question of whether and in what circumstances public obligations could fall within the expansive definition of “Claim”.
27. Consistent with the findings of the court in its decision on the N/L Motion, it may be appropriate to have adjudication of the jurisdictional and constitutional questions await future events which provide, for British Columbia purposes, a complete set of concrete adjudicative facts on the basis of which to decide them, whether in this court or on a judicial review.
28. Such events may well never occur.
29. However, in the meantime, AGBC is not prepared to have it assumed by the Petitioners and other stakeholders (whether by inference from paragraphs 4 through 7 or 32 of the Motion for Vesting Orders or anything said in oral submissions on that motion, or from any other or future order or step in the proceedings), or ultimately by any other court, that the definition of “Claim”, by itself or together with any other order, “crystallizes” anything, without having the jurisdictional and constitutional questions as they relate to British Columbia remain open to be argued and decided.
30. To address any uncertainty in that regard, AGBC now seeks an order, declaration or direction in the terms set out below, or in other such terms as the court may prefer.

Terms of the vesting orders

31. As a separate matter, AGBC is also concerned that the proposed vesting order, as presently worded, may result in 4513541 Canada Inc. or its receiver taking the position that it is not responsible for any environmental condition on the Highway 28 Property, or other statutory obligation based on facts arising prior to the date of purchase.
32. The proposed form of wording could also be interpreted to authorize transfer of something which is part of or incidental to the Highway 28 Property that, under provincial law, is not transferable before statutory preconditions to transfer have

been met, or to excuse the Purchaser from complying with such statutory conditions subsequent as may arise following vesting.

33. Similar ambiguity was present in the vesting order originally proposed with respect to the sale of the Mackenzie, B.C. property. That ambiguity was resolved by inserting the following paragraph in the vesting order ultimately granted by the court with respect to that property:

ORDERS AND DECLARES that subject to any other or further order of this Court, nothing in this Order makes inapplicable (i) any obligation under any enactment of British Columbia that the Vendors or the Purchaser or any other person may have by virtue of having been or becoming the owner or operator of the Purchased Assets or any of them, or (ii) any consent by, approval of, notice to or other similar requirement involving the provincial government or a regional or municipal government under any enactment of British Columbia relating to the transfer of the Purchased Assets or any of them.

34. AGBC submits that a similar paragraph with respect to the Highway 28 Property should be inserted into any vesting order proposed to be granted with respect to that property.

WHEREFORE MAY THIS COURT

[1] Order and declare that

- (a) there is no “claim” within the meaning of that term under the CCAA by reason of any environmental obligations of the Petitioners with respect to the Highway 28 Property or the statutory provisions relating to them;
- (b) neither the vesting order with respect to the Highway 28 Property nor any other or further order of this Court, separately or in combination, has determined or will, without further hearing and order, determine the questions of statutory or constitutional jurisdiction raised or to be raised by AGBC in these proceedings, as such questions apply to the Petitioners’ obligations under any enactment of the province of British Columbia;

AND

- [2] Amend** the vesting order with respect to the Highway 28 Property by inserting as paragraph 6.1 the following:

6.1 ORDERS AND DECLARES that subject to any other or further order of this Court, nothing in this Order makes inapplicable (i) any obligation under any enactment of British Columbia that the Vendors or the Purchaser or any other person may have by virtue of having been or becoming the owner or operator of the Purchased Assets or any of them, or (ii) any consent by, approval of, notice to or other similar requirement involving the provincial government or a regional or municipal government

under any enactment of British Columbia relating to the transfer of the Purchased Assets or any of them.

AND

[3] **Make** such further or other orders as this Honourable Court deems appropriate.

(as at)
VICTORIA, BRITISH COLUMBIA
August 26, 2010

(s.) RICHARD BUTLER
Ministry of Attorney General
(per R. Richard M. Butler)
Solicitors for AGBC