

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

HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF NEW BRUNSWICK AS
REPRESENTED BY THE MINISTER OF THE
ENVIRONMENT.

Respondent on the motion

CONTESTATION 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 BACKGROUND INFORMATION

1. The Petitioners seek an order (“Motion for Vesting Orders”) authorizing the sale of certain non-core assets, including a former wood residues landfill site in the parish of Baker Brook, County of Madawaska, Province of New Brunswick (“Baker Brook Property”).
 2. Her Majesty the Queen in Right of the Province of New Brunswick as Represented by the Minister of the Environment (“Minister”) is the Minister of the Crown who is charged with regulatory oversight over all environmental issues in the Province of New Brunswick.
 3. The Minister opposes the Motion for Vesting Orders on the basis that:
 - a) **The Motion for Vesting Orders compromises the Minister’s right to liberally and fully apply the provisions of the Clean Environment Act, R.S.N.B. 1973, c. C-6, ; and**
 - b) **The Motion for Vesting Orders purports to reduce the Minister’s statutory powers under the Clean Environment Act to the status of a “claim” under the Companies Creditors Arrangement Act R.S.C., c. C-36, as amended.**
 4. The Minister relies on the evidence deposed in the affidavit of Mr. John Stubbart P. Eng., sworn in the Province of New Brunswick on August 27th, 2010, filed in support of this Contestation.
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B. BASIS FOR CONTESTATION

- a) **The Motion for Vesting Orders compromises the Minister's right to liberally and fully apply the Clean Environment Act, R.S.N.B. 1973, c. C-6;**
5. The Baker Brook Property constitutes an Industrial facility which is regulated under the Clean Environment Act.
6. Regulation 82-126 of the Clean Environment Act, also known as the "Water Quality Regulation", allows the Minister to establish the basic terms and conditions which are required to be met in order to address potential environmental impacts associated with the current and past operation of an Industrial facility.
7. The Clean Environment Act, also allows the Minister unrestricted powers to compel any individual, group or company to comply with a ministerial order for clean-up of the site.
8. The Water Quality Regulation allows the Minister various powers including the right to issue certain approvals to operate for various structures including water treatment systems.
9. Through various pieces of legislation, including but not limited to the Clean Environment Act, the Minister is charged with protecting the environment for the use and benefit of all New Brunswick residents.
10. The Baker Brook Property has been subject to various approvals to operate issued by the Minister to the Petitioners (and/or companies related or preceding the Petitioners) since approximately 1995.
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11. The Baker Brook Property is currently subject to Approval I-7139 which was submitted to the Minister for approval in 2010 by Bowater Couturier Inc., who is listed as being a Petitioner in the Motion for Vesting Orders,
12. For the purposes of this Contestation, the term "Petitioners" shall be used as a representative term for Bowater Couturier Inc., who is the registered owner of the Baker Brook Property and also the applicant in Approval I-7139.
13. Approval I-7139 requires, *inter alia*, that the Petitioners remove all environmental discharge being generated and/or produced at the Baker Brook Property. Approval I-7139 also requires the Petitioners to submit a closure plan for the Baker Brook Property prior to August, 2011.

14. The Petitioners are currently treating ongoing leachate discharge from the Baker Brook Property by pumping excess leachate into a transport truck for disposal to a nearby municipal waste disposal facility.
15. The removal of the leachate is estimated, by the Petitioners, to cost approximately \$ 280,000 a year.
16. On other properties located within New Brunswick who have similar concerns, ongoing monitoring, electricity, inspection and maintenance costs are also incurred in the treatment of leachate discharge. It is not clear, from the materials presented in the Motion for Vesting Orders whether the amount of \$280,000 is inclusive of these costs.
17. At the date of the Petitioner's initial filing under the Companies Creditors Arrangement Act, recent amendments which now help guide the Courts with respect to appropriate considerations for the approval of the sale of assets and the sanctioning of Plans of compromise were not yet proclaimed.
18. Generally speaking however, it has been recognized in law that the Companies Creditors Arrangement Act should be interpreted using equitable principles which seek to balance the interest of all parties when considering whether to approve of the disposal of assets.
19. In recent amendments, a new subsection 36(3) of the Companies Creditors Arrangement Act now sets out factors to be considered in determining whether a Court ought to grant authorization for a proposed sale. Subsection 36(3) provides the following at paragraph (e)

...

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and (emphasis added)

...
20. It is the understanding of the Minister that the Motion for Vesting Orders contemplates the Petitioner being able to transfer certain non-core "troubled sites", such as the Baker Brook Property, currently held by the Petitioners to 4513541 Canada Inc (which is essentially a "shell company") for the purposes of creating a profitable new corporate structure for the Petitioners.
21. It is the position of the Minister that the Motion for Vesting Orders, as being proposed by the Petitioners, fails to take into account the effect of a transfer of the Baker Brook Property to 4513541 Canada Inc. on the environment and on the Minister's ability to protect the environment through application of his legislation.

22. The Minister submits that the goal of the Companies Creditors Arrangement Act is to allow a financially distressed company the opportunity to devise a plan of compromise with various creditors, not to abscond from ongoing statutory responsibilities.
23. The Minister takes the position that the transfer of the Baker Brook Property to the “shell company”, as proposed by the Petitioners, creates a legal fiction which allows the transfer of a legal responsibility, in name only, to a completely unresponsive (and possibly insolvent) company.
24. The sale of the Baker Brook Property also purports to allow the Petitioners to sever any ties it has to its obligations in Approval I-7139, which requires, at paragraph 20, that the Petitioners submit a closure plan for the Baker Brook Property prior to August, 2011.
25. Allowing the transfer of the Baker Brook Property to 4513541 Canada Inc. is effectively allowing the Petitioners to shed a recognized regulatory responsibility in the name of improving its bottom line at the restructuring table.
26. It is the Minister’s position that the Companies Creditors Arrangement Act does not contemplate allowing Petitioners the opportunity to extricate themselves from complex regulatory schemes and responsibilities.

b) **The Motion for Vesting Orders purports to reduce the Minister’s statutory powers under the Clean Environment Act to the status of a “claim” under the Companies Creditors Arrangement Act, R.S.C., c. C-36, as amended.**

27. It is the position of the Petitioners that any and all expenses related to the remediation of the non-core properties, such as the Baker Brook Property, can be compromised and crystallized into a monetary claim and may form the basis for an unsecured “claim” under the Companies Creditors Arrangement Act.
28. The Minister objects to this position on the basis that environmental responsibilities do not meet the definition for “claims” as found in the Companies Creditors Arrangement Act.
29. Under the Clean Environment Act the Minister disposes of a wide variety of options with respect to the management of pollution and/or contaminants. The Minister’s prescribed powers include, but are not limited to, supervision, monitoring, issuing orders, issuing approvals, commencing investigations, making designations and establishing maximum amounts, levels or concentrations for the release of a contaminant.
30. The Minister has a positive obligation to oversee all environmental concerns related to real property located in New Brunswick. While some of various remedies contained in

New Brunswick's environmental legislation can be quantified and/or monetized other remedies and responsibilities may not

31. The various responsibilities contained in the Clean Environment Act make up a complete scheme for regulating environmental issues. They are inter-dependant and cannot be severed, compromised or cleaved out into a monetary claim.
 32. The Minister's complete and unfettered authority to regulate any environmental issues on land located in the Province of New Brunswick is born of provincial statute which cannot be framed into the narrow confines of a "claim" as defined by the Companies Creditors Arrangement Act.
 33. In the particular case of the Baker Brook Property, evidence put forward by the Petitioners, suggests that there are ongoing annual cost of pumping and transportation of the leachate as well as possible cost associated with monitoring, electricity and supervision of the leachate management.
 34. The Motion for Vesting Orders put forward by the Petitioners makes no allowances for the closure of the Baker Brook Property nor does it provide for a realistic positive obligation to be maintained with respect to the property.
 35. If the Petitioners are allowed to crystallize and/or monetize the environmental responsibilities associated with the Baker Brook Property into a "claim" the ultimate impact would be twofold:
 - 1) the environment would be sacrificed; and
 - 2) the taxpayers of the Province of New Brunswick will be required to assume responsibility for the remediation of the Baker Brook Property, at a cost of millions of dollars, while the Petitioners are permitted to operate a viable (albeit differently structured) company.
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C. SUMMARY OF THE MINISTER'S CONTESTATION AND ALTERNATIVE REQUEST FOR RELIEF

Summary

36. The Minister's basis for contestation of the Motion for Vesting Orders is based on the following two issues:
 - a) **The Motion for Vesting Orders compromises the Minister's right to liberally and fully apply the Clean Environment Act, R.S.N.B. 1973, c. C-6;**

- b) The Motion for Vesting Orders purports to reduce the Minister's statutory powers under the Clean Environment Act to the status of a "claim" under the Companies Creditors Arrangement Act R.S.C., c. C-36, as amended.

37. In general terms, it is the Minister's position that it is inequitable and inappropriate to use the Companies Creditors Arrangement Act as a vehicle to transfer or vest-out environmental responsibilities to the benefit of a company who has a strong chance at profitability and ongoing corporate success.
38. The crystallization of the environmental responsibilities, as it relates to the Baker Brook Property, does not fit into the definition of a "claim" as defined in the Companies Creditors Arrangement Act, and moreover; a positive finding to this effect also eliminates the Minister's ability to comply with the broad public policy objectives of the Clean Environment Act.

Alternative request for relief

39. As a separate albeit important matter, The Minister also remains concerned, for the same reasons outlined by the Attorney General for British Columbia in their filed Contestation and Cross Motion, that the effect of the proposed vesting order is that the new purchaser of the non-core assets, specifically the Baker Brook Property, by 4513541 Canada Inc. any other shell company, or its receiver taking the position, would not, on a practical basis, be held responsible for any environmental responsibilities.
40. The Minister adopts the submissions of the Attorney General for British Columbia in its Contestation and Cross Motion and requests that the proposed vesting order be amended with the insertion of the following paragraph:
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Order and declare that

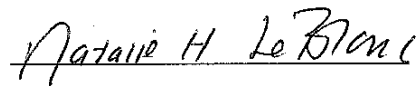
- (a) there is no "claim" within the meaning of that term under the CCAA by reason of any environmental obligations of the Petitioners with respect to the Baker Brook Property or the statutory provisions relating to them;
- (b) neither the vesting order with respect to the Baker Brook Property nor any 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 which may raised or to be raised by the Minister in these proceedings, as such questions apply to

the Petitioners' obligations under any enactment of the province of New Brunswick;

41. The Minister also seeks a further amendment to the Approval and Vesting Order as it relates to the Baker Brook Property with the insertion of the following paragraph:

ORDERS AND DECLARES that subject to any other or further order of this Court, nothing in this Order reduces or makes inapplicable (i) any obligation under any enactment of the Province of New Brunswick 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 New Brunswick relating to the transfer of the Purchased Assets or any of them.

All of which is respectfully submitted and dated at Fredericton, New Brunswick, this 27th day of August 2010.



Natalie H. LeBlanc
Solicitor

OFFICE OF THE ATTORNEY GENERAL
FOR THE PROVINCE OF NEW
BRUNSWICK

SOLICITOR FOR THE RESPONDENT
PROVINCE OF NEW BRUNSWICK

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