

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

OVERVIEW OF WRITTEN ARGUMENTS TO BE PRESENTED 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. FACTUAL BACKGROUND AND BASIS FOR ARGUMENT

1. 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.
2. The Minister has filed a Contestation with this Honourable Court on August 30th, 2010 which forms part of the Record on Motion for Court file 800-11-036133-094.
3. The Minister intends to rely on these written arguments as well as the above-referenced Contestation and the evidence contained in the sworn affidavit of John Stubbart, P. Eng. deposed on August 27th, 2010 which also forms part of the Record on Motion for Court File 800-11-036133-094.
4. The Contestation filed by the Minister contains the following two arguments as the basis for its objection to the Motion for Vesting Orders:
 - 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.**

B. APPLICABLE LEGAL PRINCIPLES

- 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. 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. The Petitioners also take the position that the ‘claims’, as crystallized, constitute “Claims” under a Claims Procedure which is required to approve a Plan of Compromise.

6. The Petitioners seek, by the filing of their Motion for Vesting Orders, to force the Minister to proceed to quantifying the cost of remediation of the Baker Brook Property and submit this cost as a “claim”.
7. It is the position of the Minister that a decision as to the appropriate course of action in the Baker Brook Property, including the question of when (if at all) to proceed to remediation, is not one which can be imposed on the Minister as it equates, in fact and law, to an order for *mandamus*.
8. Under New Brunswick’s 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.
9. In the case of *Ultramar v. PNB*, 299 N.B.R. (2d) 89, Justice Garnett of the Court of Queen’s Bench of New Brunswick reviewed the purpose of the *Clean Environment Act*. At paragraph 16, she held the following:

[16] The Minister issued her order pursuant to Section 5(1)(g) of the *Act*. New Brunswick Regulation 87-97, the *Petroleum Product Storage and Handling Regulation - Clean Environment Act* (the Petroleum Regulation), deals more specifically with situations involving petroleum products. A reading of the legislation and the Regulation reveals that their purpose is to protect the “environment” from “contaminants” [emphasis added]

10. In the case of *Mr. Shredding Waste Management v. New Brunswick (Minister of Environment and Local Government)* [2004] N.B.J. No. 353, Justice Deschênes, of the New Brunswick Court of Appeal, considered the expertise of the Minister of Environment in a case dealing with the applicable standard of review:

[...] There is no question that, in this Province, the Minister has been designated by the Legislature to have responsibility for the assessment of facilities that could have a negative impact on the environment. The Minister is supported by experts and advisors on environment issues and has been specifically entrusted by the Legislature to make decisions to protect citizens against the harmful effects of contaminants. The relevant provisions of the CAA and the CEA authorize the Minister to do what the Minister considers to be appropriate to manage and protect the environment with the help and advice of specialized personnel. In making the important decisions pertaining to the granting of a license to operate an undertaking such as MSWM, including the type of conditions and terms under which it should operate, the Minister is confronted with competing technical and

policy considerations. As the reviewing judge aptly put it at para. 32, the decision-making process "...involves the balancing of multiple sets of interests or considerations." [...] [emphasis added]

11. Given the broad discretion of the Minister and his statutory expertise with respect to regulation of the environment, it is submitted that the decision as to an appropriate course of action, with respect to any property including the Baker Brook Property, is completely discretionary and falls within the unfettered authority of the Minister.
12. In *Rocky Mountain Ecosystem Coalition v. Canada (National Energy Board)*, 174 F.T.R. 17, Prothonotary John Hargrove of the Federal Court reviewed the law on *mandamus* as follows:

Mandamus is a prerogative remedy which may be granted when a person who is delegated with a public duty is in the breach of that duty. It is, for example, exercised by Canadian courts in an application for judicial review against the Ministers of the Crown in respect of failure to fulfill their ministerial duty. *Mandamus* "compels the performance of a public legal duty" and therefore it is usually directed against the public official.¹ Given its coercive and discretionary nature, the circumstances in which the remedy may be granted is now very much circumscribed.

[15] There is a line of authority establishing the requisites for *mandamus*. In the decision of the Ontario Court of Appeal in *Karavos v. Toronto and Gillies*, [1948] 3 D.L.R. 294 at 297, Mr. Justice of Appeal Laidlaw set out the fundamental criteria for *mandamus*:

[*Mandamus*] is appropriate to overcome the inaction or misconduct of persons charged with the performance of duties of a public nature.

...

Before the remedy can be given, the applicant for it must show

(1) "**a clear legal right** to have the thing sought by it done, and done in the manner and by the person sought to be coerced"...

(2) "**The duty whose performance it is sought to coerce by *mandamus* must be actually due** and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform"...

(3) **That duty must be purely ministerial in nature**, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary

powers" ...

(4) **There must be a demand and refusal** to perform the act which it is sought to coerce by legal remedy...

(emphasis added)

13. With respect to the Baker Brook Property, it is submitted that there is uncontested evidence that the Minister has not, as of the date of filing of these written submissions, issued any Order under the Clean Environment Act nor has he registered any other form of Judgment or Certificate against the Petitioners.
14. In other words, there is currently no debt owed to the Minister in respect of the Baker Brook Property.
15. There is however real and ongoing environmental responsibility associated with the Baker Brook Property. Leachate discharge continues on a daily basis and, if not attended to, forms a serious threat to the environment.
16. The Petitioners have presented evidence suggesting that 4513541 Canada Inc., the entity proposed as the purchaser of the Baker Brook Property, is a (possible insolvent) “shell company” who has been tasked with temporary care and maintenance until the Petitioners emerge from the CCAA proceedings as a new corporate entity.
17. The Court has also been advised that 4513541 Canada Inc. does not (nor will it ever have) have sufficient funds to assume any positive long term obligation with respect to the remediation of the Baker Brook Property.
18. In allowing the transfer of the Baker Brook Property to 4513541 Canada Inc., the Court will be allowing the Petitioner the right to require the Minister to proceed to quantifying the cost of remediation, bypassing any and all other options available under the Clean Environment Act, as no other practical options will remain at the end of the CCAA process.
19. It is the position of the Minister that the case at bar does not meet the legal test for *mandamus* and, as such, it is inappropriate to require the Minister to quantify his claim in the current proceeding.

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.**

20. It is the position of the Minister that the Crown'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.
21. It is the position of the Minister, that all material facts surrounding the Baker Brook Property suggest that the Minister's interest is not obviously financial and/or monetary, but rather, is concerned with the larger preoccupation of protecting the environment.
22. While the Minister accepts that certain situations may meet the criteria established by this Honorable Court in the case of *AbitibiBowater inc. (Arrangement relatif à)* Q.J. No. 4006 (S.C.), ("Newfoundland decision"), the property located in Baker Brook does not meet this test.
23. It is the position of the Minister that Baker Brook Property is distinguishable from the properties considered in the Newfoundland decision on the following bases:
- a) No Orders have been issued by the Minister on the Baker Brook Property;
 - b) The Petitioners still control and own the Baker Brook Property;
 - c) No allegation of bad faith has been made by the Petitioners against the Minister; and
 - d) The Minister has not reviewed the state of the Baker Brook Property, nor has he engaged a consultant to undertake this activity on his behalf;
24. In the present case, the Minister takes the position that the recognized environmental responsibilities associated with the Baker Brook Property are not "provable claims" as defined by the Companies Creditors Arrangement Act nor do they meet the test as established by this Honourable Court in the Newfoundland decision.

C. REQUEST FOR ALTERNATIVE RELIEF

25. The Minister remains concerned, that the effect of the proposed vesting order is that the new purchaser of the non-core assets 4513541 Canada Inc., or its receiver, would not, on a practical basis, be held responsible for any environmental responsibilities.
26. The Minister therefore requests the following Order from the Court:

Order and declare that

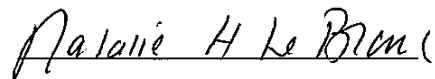
(a) there is no “claim” within the meaning of that term under the CCAA by reason of any environmental obligations of the Petitioners with respect to the Baker Brook Property or the statutory provisions relating to them;

(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;

27. 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 6th day of September 2010.



Natalie H. LeBlanc
Solicitor

OFFICE OF THE ATTORNEY GENERAL
FOR THE PROVINCE OF NEW
BRUNSWICK

SOLICITOR FOR THE RESPONDENT
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