SCC No.: 33797

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN

HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND AND LABRADOR

APPLICANT
(Appellant)

- and -

ABITIBIBOWATER INC., ABITIBI-CONSOLIDATED INC.,
BOWATER CANADIAN HOLDINGS INC., THE AD HOC COMMITTEE OF
BONDHOLDERS, THE AD HOC COMMITTEE OF SENIOR SECURED
NOTEHOLDERS, AND U.S. BANK NATIONAL ASSOCIATION, INDENTURE
TRUSTEE FOR THE SENIOR SECURED NOTEHOLDERS

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(Respondents)

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1. There is no dispute between the parties over the facts of this case. Abitibi has badly polluted the lands and waters of the Province. The Province's environmental protection legislation does require Abitibi to clean up this pollution. The Province has ordered Abitibi to clean up this pollution. These orders do remain in effect under the laws of the Province (even if Abitibi no longer owns the affected property). The CCAA Court has made an order which permanently extinguishes Abitibi's duty to perform the clean up work ordered by the Province.

2. There is no dispute over the consequence of the CCAA Court's decision. The cost of cleaning up the pollution caused by Abitibi has been shifted from Abitibi (at the ultimate expense of its creditors and shareholders) to the Province (at the ultimate expense of the taxpayers) contrary to the "polluter-pay" principle of the Province's environmental law. There is no dispute that the "polluter-pay" principle applies in every jurisdiction in Canada.

3. There is no dispute over the legal issue raised by the case. Does the CCAA give the court the power permanently to bar and extinguish a debtor company's statutory duties under provincial law, in this case the duty to comply with the environmental law of the Province?

4. The only point of disagreement is whether this legal issue is of public importance warranting consideration by this Court.

5. Abitibi advances two arguments in its Response as to why this issue is not of public importance: **(1)** there are no conflicting decisions on this issue given certain amendments to the CCAA; and **(2)** the appeal would be academic and unduly hinder

Abitibi's restructuring efforts. Neither argument is sound. Nevertheless, these arguments serve to highlight the public importance of this case.

6. Abitibi implicitly accepts that the *Panamericana* line of authority relied upon by the Province conflicts with the decision of the CCAA Court in this case. Abitibi's argument is that this conflict has been resolved by Parliament through amendments to the CCAA that overturned *Panamericana*. Abitibi's argument is incorrect.

7. First, the relevant amendments did not overturn *Panamericana*. Underlying the Alberta Court of Appeal's decision in *Panamericana*, along with all of the subsequent decisions that follow *Panamericana*, is the distinction between **(i)** a government seeking to enforce a debtor's compliance with the general law (i.e., where the government is acting as a regulator), in which case the government is not advancing a claim; versus **(ii)** the state seeking the direct payment of money from a debtor (i.e., where the state is a creditor), in which case the state is advancing a claim.

8. There is nothing in the amendments to the CCAA relied upon by Abitibi, namely, sections 11.8(3) to (9), that undermines this distinction, or otherwise overturns *Panamericana*. Those sections of the CCAA (which mirror similar provisions in the BIA applicable to bankruptcy trustees and receivers) limit a CCAA monitor's personal liability for environmental matters, and grant the state a secured charge over the debtor's property for any claim (i.e., demand for the direct payment of money) advanced by the government for the costs of remedying any environmental damage affecting the property. In other words, the amendments are limited to situations where the state is a

creditor and thus are inapplicable to the case at bar because the Province is not seeking a direct payment of money to it from Abitibi.

9. Second, Abitibi argues that the enactment of sections 11.8(3) to (9) of the CCAA represents a careful consideration by Parliament of who should bear the cost of environmental compliance in the insolvency context. The language used (and not used) by Parliament in the new sections negates Abitibi's assertion that the amendments overturned *Panamericana*, however.

10. The new sections were enacted after *Panamericana* was decided. Parliament was thus aware of the distinction that grounds the decision in *Panamericana* between a government acting as a regulator versus the state being a creditor. If Parliament had intended that the new provisions were to overturn *Panamericana*, it surely would have used language in sections 11.8(3) to (9) and elsewhere in the CCAA to ensure this result. Yet Parliament did the opposite. It left intact the CCAA definition of claim and used language in the new sections that is consistent with *Panamericana*.

11. Third, several of the cases relied upon by the Province in the courts below that followed *Panamericana* were decided after the enactment of sections 11.8(3) to (9) of the CCAA (see the cases cited in the Province's Memorandum of Argument, para. 40). None of these decisions are addressed by Abitibi in its Response.

12. Fourth, Abitibi's statutory interpretation argument is really an unexpressed policy argument about how regulatory orders issued under provincial law should be treated in relation to debtors operating under CCAA protection. Abitibi's position, adopted by the CCAA Court below, is that the CCAA Court has the power to decide

whether a debtor is required to comply with a provincial regulatory order either by "characterising" the regulatory order as a claim or by forcing the state into becoming a creditor.

13. The Court gave itself the power "to characterise" as a claim under the CCAA a regulatory order that imposes an economic cost on the debtor, but which does not require the debtor to pay money to the state. The Court also gave itself the power to force the state into the position of being a creditor by extinguishing the debtor's duty to comply with a regulatory order, thereby forcing the state to fulfil the debtor's regulatory obligations at the state's expense which then creates a claim.

14. As illustrated by this case, the power to force the state into becoming a creditor requires the CCAA Court to pull itself up by its bootstraps. In this case, the Court used the "inevitable" consequence of its own order extinguishing the debtor's regulatory obligations to justify making the order extinguishing those very obligations.

15. Thus, the CCAA Court has interpreted the CCAA as a Catch-22 for provincial regulators. If the regulatory regime creates a debt owing to the state then the debt may be compromised. If the regulatory regime does not create a debt then the Court may still treat the regulatory order as a debt based on the economic effects of the regulatory order on the debtor. And if the regulatory regime permits the state to create a debt then the Court may by its own order force the state to become a creditor and then use that fact to hold that the regulatory order may be compromised. In other words, there is no regulatory regime that can escape the CCAA Court's ability to compromise regulatory obligations.

16. Whether the CCAA can be interpreted and used in such a manner is a matter of public importance warranting consideration by this Court.

17. Finally, Abitibi asserts the leave to appeal should be denied because granting leave will undermine its restructuring efforts on the alleged basis that its creditors will not agree to a restructuring plan that requires Abitibi to comply with the Province's environmental laws.

18. This argument amounts to the proposition that a company being restructured may negotiate with its creditors whether the company will comply with provincial law after it is restructured. Such a proposition is obviously contrary to the laws and public policy of Canada. If Abitibi is required to comply with the public laws of Canada, including the EPA in this case, then it is required to comply with those laws. This is not a matter of prejudice. It is the law.

19. In any event, Abitibi expects to generate approximately $1.5 billion of profits in the four years following its restructuring.[1] In light of these projected profits, complying with the Province's environmental laws can hardly be construed as a "Sword of Damocles" over its post-restructuring fate as Abitibi claims in its Response.[2]

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1 Fifty-Seventh Report of the Monitor, dated 7 September 2010, paragraph 33.

2 Abitibi's estimate of the cost to comply with the EPA Orders is $100 million. The actual cost is unknown.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Toronto in the Province of Ontario, this 27th day of September 2010.

SIGNED BY:

David R. Wingfield

David R. Wingfield

Paul D. Guy

Paul D. Guy

Of counsel for Her Majesty The Queen In Right of the Province of Newfoundland and Labrador