

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Commercial Division)

(Sitting as a Court designated pursuant to
the *Companies' Creditors Arrangement Act*,
R.S.C., c. C-36, as amended)

No. 500-11-036133-094

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 BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA
IN RESPONSE TO THE PETITIONERS' MOTION FOR SANCTION OF THE
PLAN OF COMPROMISE AND ARRANGEMENT

1. OVERVIEW

1. The Petitioners seek an order sanctioning their plan of compromise and arrangement and releasing them, their directors and officers, and others from all obligations based on facts in existence before the date on which these proceedings commenced.
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), as well as other statutory decision-makers under other British Columbia laws of general application.
3. AGBC also represents the government of British Columbia in ensuring that the policy objectives of provincial legislation continue to be met.
4. 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.
5. AGBC objects to the proposed Plan Sanction Order insofar as it contains provisions that give effect to sections 6.10(b) and 6.11 of the Plan. In particular, but without limitation, AGBC objects to sections 20, 21, 22(b), 23, 27 and 28 of the proposed Plan Sanction Order, for the following reasons.
6. AGBC contests the sanctioning of a Plan which purports to compromise statutory public obligations of the Petitioners which do not constitute a “claim” as defined in or as may be applicable for purposes of the *Companies’ Creditors Arrangement Act*.

7. AGBC further contests the making of an order which purports to extinguish Claims which are not “claims” as so defined, or release the Petitioners or their directors and officers, or provide injunctive or declaratory relief, from or respecting Obligations other than those by reason of which the Petitioners, directors or officers are now, or may by the plan implementation date become, subject to a “claim” in that sense.
8. In those respects, AGBC reiterates all the points made in the contestation and cross-motion in response to the Petitioners’ Amended Second Motion for the Issuance of Various Orders Authorizing the Sale of Non-Core Properties (the Motion for Vesting Orders) and in argument at the hearing of that contestation and cross-motion, and does so not only with respect to the non-core properties but also to
 - any British Columbia properties of which the Petitioners will remain owner or operator post-restructuring;
 - other British Columbia properties previously owned by the Petitioners disposed of during or through these proceedings,
 - British Columbia properties the Petitioners ceased to own before these proceedings commenced, and
 - British Columbia properties the Petitioners never owned but simply used at some point in the course of their business.
9. AGBC further contends that section 11.8(9) of the CCAA, alone or together with any other provision of that Act or the *Bankruptcy and Insolvency Act*, cannot constitutionally be interpreted to treat statutory public obligations for the cost of environmental clean-up, which are not otherwise within the definition of “claim”, as a Claim which is subject to compromise or an Obligation which is subject to release, injunction or other declaratory relief.

10. In the alternative, and following the filing of a notice under section 95 of the *Quebec Code of Civil Procedure*, AGBC will contend that Parliament lacks constitutional authority to enact a provision with any such effect and this court lacks jurisdictional authority to make an order in these proceedings based in whole or part on any such provision or provisions.

11. For those reasons, AGBC now seeks either

(a) an amendment to the proposed Plan Sanction Order enabling AGBC to address those issues in future proceedings, in the form set out below; or

(b) an order and declaration that the court lacks jurisdiction to approve the Plan or grant the extinguishment, release and other relief on the terms sought by the Petitioners in the proposed Plan Sanction Order.

BASIS FOR CONTESTATION

Introduction

12. AGBC is concerned about the over-breadth of the definition of Claim as used in the Claims Procedure Order, carried forward into the Plan and subject to extinguishment under the proposed Plan Sanction Order. That definition is beyond what is contemplated in the CCAA, even given a broad and purposive interpretation of that Act.

13. Compounding that overbreadth, the Petitioners now seek a release and other relief respecting not only Claims as defined in that order and the obligations by reason of which they arise, but also of every other Obligation of any sort whatsoever.

14. AGBC's contestation is based on the adjudicative facts placed before the court with respect to the Petitioners' environmental obligations in British Columbia, including but not limited to those in connection with the Highway 28 Property, and on the lack of evidence of adjudicative facts warranting the overbreadth of the impugned provisions of the proposed Plan Sanction Order in that regard.
15. AGBC's concerns also relate to any and every kind of public obligation of the Petitioners or their directors and officers which is not within the definition of "claim" under the CCAA.

When can public obligations be "claims?"

16. On the Motion for Vesting Orders, AGBC and the Attorneys General of Ontario and New Brunswick brought cross-motions seeking orders and declarations that the Petitioners' environmental obligations with respect to five particular properties were not "claims" as defined in the CCAA.
17. The Petitioners argued on the cross-motions that the statutory definition of "claim" was, on the contrary, broad enough to include any and every pre-filing environmental obligation. The proposed Plan Sanction Order is in fulfillment and, in section 28 seeks tacit approval, of that argument.
18. AGBC argued in response that the definition of "claim" in section 12 of the CCAA, together with the definition in section 121 of the BIA, did not apply to environmental obligations other than those by reason of which a debt or liability has arisen or is sufficiently certain to arise – namely, those in respect of which clean-up work has already been undertaken or else orders have been made the practical, intended and inescapable result of which is to create a debt.

19. AGBC further argued that section 11.8(9) of the CCAA was predicated on there being such a “claim”, and did not provide an independent basis to treat obligations referred to in section 12 of the CCAA as a claim provable in bankruptcy and thus submissible to compromise and release.

20. If the Petitioners’ environmental obligations which were the subject of the cross-motion do not constitute a “claim” as defined in the CCAA, AGBC submits that there is no legal basis or authority for the court in these proceedings to approve their compromise, extinguishment or release, or make them the subject of injunctive or declaratory relief, with respect to those five properties or any other British Columbia properties in evidence before the court.

Claims which are not “claims”

21. In particular, regardless of the public interest in a successful restructuring, and Parliament’s intention to facilitate restructurings through the processes and procedures established under the CCAA, and any broad, purposive interpretation of the CCAA to those ends, the court lacks jurisdiction to extend the reach of the Act by supplementing defined terms, as the Petitioners have sought to do by an expansive definition of Claim in the Claims Procedure Order and as carried forward for purposes of the proposed Plan Sanction Order. Defined statutory terms set the limits of the CCAA, and the court’s jurisdiction under the Act. They foreclose judicial gap-filling and preclude the exercise of inherent jurisdiction as a basis for recognizing the Petitioners’ expansive definition of Claim.

22. In short, there is no proper authority to compromise or extinguish Claims which are not “claims”.

Obligations which are not obligations

23. The same is true for the release of Obligations beyond those by reason of which the Petitioners and their directors and officers are subject to a “claim”, and for injunctive or declaratory relief in that regard.

Constitutional and jurisdictional issues

24. If, contrary to the foregoing, the CCAA could arguably be interpreted (a) to make any and every environmental obligation a contingent “claim”, even absent a debt or liability, present or future, to which the Petitioners are subject by reason of such obligation, or (b) to allow for the compromise and extinguishment of Claims which are not “claims” or the release of Obligations which are not the occasion for a “claim”, or injunctive or declaratory relief to that effect, then the constitutional questions raised on the application by Newfoundland and Labrador, and not yet decided (at least with respect to British Columbia), are now engaged.

(a) Presumption of constitutionality

25. All enactments are properly interpreted in accordance with the presumption of constitutionality.

26. The CCAA 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. That is, bankruptcy and insolvency in the “technical” sense: (a) in relation to the private law obligations of a bankrupt or insolvent corporation, and (b) to establish a process to facilitate the compromise of that corporation’s debts and liabilities rather than as a mandate to achieve or enhance the likelihood of a successful restructuring.

27. Further, the CCAA 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 the *Constitution Act 1867*.

28. It would be contrary to the presumption of constitutionality if the CCAA were interpreted 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 "claim" as defined in the CCAA.

29. In particular, 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 in those circumstances treat environmental obligations as "claims", or *a fortiori* Claims or Obligations, for the purpose of compromise, extinguishment, release or related relief.

30. If it is necessary to do so, AGBC will submit that, in keeping with the presumption of constitutionality, the court should "read down" the CCAA to avoid any such outcome.

(b) Constitutional law doctrines

31. In CCAA proceedings, the court's jurisdiction to override provincial enactments of general application, including without limitation the *Environmental Management Act* (B.C.) is predicated on the application of doctrines of constitutional law.

32. It would be contrary to those doctrines for the court (a) 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 (b) to apply the CCAA to impair or render inoperative legislative

schemes or provisions enacted pursuant to the powers granted to provinces under section 92 of the *Constitution Act 1867*.

33. Although the constitutional validity of the CCAA as a whole is well established, 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 constitutional invalidity argument).
34. Further or in the alternative, any federal legislation which impaired provincial regulatory authorities' ability to enforce public obligations under such provincial laws, and thereby impair provincial jurisdiction to make effective laws in that regard, would be unconstitutional for that reason, despite the doctrine of federal paramountcy (the interjurisdictional immunity argument).
35. 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, they may legitimately have incidental 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).
36. Parliament thus lacks constitutional authority to empower this court 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 "claim" as defined in the CCAA.

37. In particular, it would be unconstitutional if the CCAA allowed the court to approve a plan of compromise and arrangement or make any order which, alone or in combination with another order, would in those circumstances treat environmental obligations as "claims", or *a fortiori* Claims or Obligations, for the purpose of compromise, extinguishment, release or related relief.

38. If the CCAA in any of its provisions may be found to allow for any such order, and if it becomes necessary to do so, AGBC will move that the court rule the provision constitutionally invalid or inapplicable to that extent.

Relief sought on this contestation

39. For the foregoing reasons, the court should not approve a Plan Sanction Order which operates to any such effect without having heard and finally decided those questions of statutory interpretation, jurisdiction and constitutional law.

40. One option is to amend the proposed form of Plan Sanction Order to carve out and provide a means for ultimate resolution of those questions, post-emergence, if and when the practical need arises and without in any way prejudging the outcome of the issues.

41. The other option is to hear and decide those questions before issuing the Plan Sanction Order which confirms the compromise and extinguishment of Claims and the release of and other relief respecting Obligations, or before making that Order final.

42. AGBC understands and accepts the court's stated intention not to deal with such questions until it is necessary to do so.

43. On one view, that can wait until an environmental authority, in the exercise of a power which is *ex facie* enjoined, seeks to require the Petitioners to comply with an order with respect to Obligations which are *ex facie* released under the proposed Plan Sanction Order.
44. The ostensible reason for waiting is to have adjudicative facts before the court on the basis of which to determine the questions. However, the Petitioners by their proposed Plan and Order language, seek to have the court issue its approval based on an equal absence of specific adjudicative facts respecting the Claims they wish compromised and Obligations they wish released, and a complete lack of evidence supporting the need for such overbroad provisions.
45. Taking the other view, the proposed Plan and Order, which purportedly compromise and extinguish Claims which are not “claims” and release any and every obligation of anyone for anything which occurred pre-filing, and in particular the declaratory provisions of section 28, raise points of law which, absent an appropriate carve out, are now ripe for determination.

WHEREFORE, MAY THIS COURT

[1] **Amend** the Plan Sanction Order by adding the following:

THIS COURT ORDERS that the rights of any person to take the position in or with respect to any future proceedings of any kind, whether brought against the emerging entities including the Reorganized Debtors, AbiBow Canada Inc., or otherwise, pursuant to any environmental Laws of Ontario, New Brunswick, British Columbia or Canada in relation to properties upon which any Petitioner, Partnership or Applicant or any predecessor thereof conducted any operations (and whether or not those properties were transferred either before or during these CCAA proceedings by such Petitioner, Partnership, or Applicant or any predecessor thereof), that any such proceedings are not compromised, extinguished, released, enjoined or otherwise affected by this Order or any other order or the CCAA Plan on the grounds that they are not in relation to a claim within the meaning of the CCAA or should not be affected by these CCAA Proceedings or are otherwise beyond the jurisdiction of Parliament or a Court under the CCAA to compromise, extinguish, release or enjoin, and such rights are, despite any provision of this or any other order, fully reserved.

OR

[2] **Declare and order** that it is beyond the jurisdiction of this court in these proceedings to sanction the Plan as it compromises Claims other than those which are within the definition of "claim" under the CCAA, or to extinguish such Claims, or to release or grant injunctive or declaratory relief with respect to Obligations other than those by reason of which the Petitioners are subject to a "claim" within that definition.

AND

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

VICTORIA, BRITISH COLUMBIA
September 17, 2010

Jordana Kaptan Henderson LLP
For: _____

Ministry of Attorney General
(per Richard Butler, David Hatter and
Elizabeth Rowbotham)
Solicitors for AGBC