CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

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 Schedules A, B. and C

Debtors

And

ERNST & YOUNG INC.

Monitor

And

NPOWER COGEN LIMITED

MOTION FOR AN ORDER CONCERNING THE STATUS OF THE POST-FILING SUPPLY CLAIM OF NPOWER COGEN LIMITED AND RELATED RELIEF

Petitioner

TO JUSTICE GASCON OR ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTREAL, THE PETITIONER RESPECTFULLY SUBMITS THE FOLLOWING:

A. Background

1. On April 17, 2009, Abitibi Consolidated Inc. ("**Abitibi**" or "**ACI**") and other listed petitioners (collectively the "**Abitibi Group**") were granted an Order (the "**Initial CCAA Order**") for protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**"). The Initial CCAA Order was subsequently amended on May 6, 2009.

2. Npower Cogen Limited ("**Cogen**") until February 2010, was a supplier of electricity and steam to Bridgewater Paper Company Limited ("**BPCL**"), a UK based member of the Abitibi group of companies, pursuant to a long term energy supply contract dated August 3, 1998 (the "**ESC**").

3. BPCL is liable to pay Cogen for energy supplied to BPCL under the ESC during the period November 1, 2009 to February 2, 2010 (i.e. during Abitibi's post CCAA filing period), the invoices in respect of which total £9,447,548 (the "**Outstanding Post-Filing Cogen Payable**"). (Cogen claims that this amount is convertible to Canadian dollars at the rate of 1 UK pound = 1.8791 Cdn dollars, such that the Cdn dollar equivalent claimed is Cdn$ 17,752,887.00). BPCL has not paid this amount and it remains outstanding. Interest is claimed on that amount by Cogen at the rate of 3% from February 2, 2010.

4. By way of two (2) separate and distinct guarantees,

    a) one a written unlimited guarantee dated February 22, 1999 (the "**ESC Guarantee**"), and

    b) the other being a commitment to payment and support made to the directors of BPCL of which Cogen claims status to enforce as a third party beneficiary, as described in further detail below (the "**Post Filing Support Commitment**"),

    Abitibi guaranteed and committed to pay inter alia certain post-filing obligations arising after Initial CCAA Order which are owed by BPCL to Cogen, including the Outstanding Post-Filing Cogen Payable.

5. In addition, Abitibi and its directors and officers through their conduct have incurred separate direct liability to Cogen for the Outstanding Post-Filing Cogen Payable as further particularized below **(the "Oppression Claim")**.

6. On February 2, 2010, BPCL entered administration in the United Kingdom pursuant to the *Insolvency Act* 1986 and on February 8, 2010, Cogen terminated the ESC for breach of contract on the basis that BPCL was insolvent, had not paid its invoices for the Abitibi post-filing period noted below, had entered administration, and because a few hours prior to termination, BPCL instructed Cogen to cease all steam supplies to the paper mill.

7. BPCL and Abitibi have failed, despite requests, to pay the Outstanding Post-Filing

Cogen Payable. BPCL being insolvent and in formal insolvency administration in the United Kingdom, is unable to pay.

8. Cogen therefore brings this motion, for the relief as stated in F. below in this Notice of Motion in connection with the ESC Guarantee, the Post Filing Support Commitment, the Oppression Claim, as they pertain to the failure of BPCL and Abitibi to pay the Outstanding Post-Filing Cogen Payable and the interest accruing thereon, including for an order directing payment of same by Abitibi.

B. The Energy Supply Contract, Guarantee and the Purported Repudiation

B.1 <u>The Energy Supply Contract and Guarantee</u>

9. Pursuant to the ESC, National Power PLC ("**National Power**"), agreed to build a power plant next to BPCL's paper mill on land owned by BPCL and supply the mill with steam and electricity for a period of 15 years. At the end of this 15 year term, BPCL had an option to purchase the plant for a nominal sum. The ESC was assigned by National Power to Cogen on November 22, 2000. Attached as **Exhibit 1** is the ESC.

10. As part of National Power's agreement to enter into the ESC and as a condition precedent to National Power entering into the ESC, Abitibi, BPCL's parent, was required to provide the "ESC Guarantee" of BPCL's obligations under the ESC - ostensibly because it was National Power's view that BPCL was not creditworthy on its own, and that National Power would not have otherwise entered into the ESC if a guarantee by Abitibi was not provided. The ESC Guarantee, which was signed and dated February 22, 1999, provided, amongst other things, that:

> *"the Guarantor [Abitibi] hereby agrees to indemnify NP [National Power] against all losses, damages, costs, charges and expenses that it may suffer by reason of or in consequence of any breach by the Contractor [BPCL] of its obligations, commitments, warranties or undertakings under or pursuant to the Contract."*

Attached as **Exhibit 2** is a copy of the ESC Guarantee.

11. The ESC Guarantee was assigned by National Power to Cogen on May 26, 2005. Attached as **Exhibit 3** is a copy of the assignment.

B.2 <u>The Purported Repudiation</u>

12. By letter dated July 7, 2009, Abitibi purported to repudiate the Energy Supply Contract Guarantee (the "**Purported Repudiation**"). Attached as **Exhibit 4** is a copy of the Purported Repudiation letter.

13. No meaningful reason for the Purported Repudiation was provided, nor was the required approval of the Monitor noted or provided. The only "reason" or explanation given was set out as follows from the Purported Repudiation letter:

> "Pursuant to paragraph 46(f) of the Initial Order, the Petitioners have the right, subject to the approval of Ernst & Young Inc., the Court Appointed Monitor, to repudiate such of their agreements, contracts or arrangements of any nature whatsoever, whether oral or written, as they deem appropriate, in order to facilitate the orderly restructuring of their business and financial affairs.
>
> ...
>
> Abitibi-Consolidated Inc. hereby gives you notice that it is repudiating the Guarantee effective immediately.",

which in effect was nothing more than a recitation of paragraph 46(f) of the Initial CCAA Order.

14. Moreover, the Purported Repudiation came without warning or prior discussion with Cogen. Cogen was never contacted regarding the plan to repudiate or ever canvassed as to whether there were other business alternatives to the Purported Repudiation.

15. Cogen objected to the Purported Repudiation by way of letter dated August 11, 2009, noting, *inter alia,* that the Purported Repudiation did not comply with paragraph 46(f) of the Second Amended Initial Order (the "**Objection Letter**"). No response to the Objection Letter was ever received. Attached as **Exhibit 5** is a copy of the Objection Letter.

16. Cogen has repeatedly advised Abitibi since of its position that the repudiation is not effective in law, and that the Guarantee remains an outstanding unrepudiated contractual obligation of Abitibi which is not, will not be and cannot be compromised by Abitibi's CCAA Plan.

17. As a result, Cogen asserts that the amounts owing to Cogen in respect of the post filing supply to BPCL of power and steam remain liabilities of Abitibi under its Guarantee and are unaffected by the CCAA Plan and the releases contained therein, or by the releases in the CCAA Plan Sanction Order.

C. Post Filing Conduct of Abitibi/BPCL Inducing Cogen to Supply BPCL

18. In addition to the Guarantee of BPCL's liabilities, Abitibi incurred further obligations to Cogen through its actions and conduct post-filing which also oblige Abitibi to pay the Outstanding Post-Filing Cogen Payable owing to Cogen.

19. By 2008, BPCL was not financially viable without continuing Abitibi financial support. In 2008 (i.e. before Abitibi and its affiliates filed for CCAA protection), Jon Melkerson and Thor Thorstenstein, officers of Abitibi, contacted Cogen on behalf of Abitibi and requested that Cogen enter into preliminary discussions with Abitibi about the possibility of a "managed shutdown" of BPCL's facility owing to concerns over the long term economic viability of the BPCL operation and the resultant cash demands on Abitibi to continue to support the operation. Abiitbi advised that it could

not conduct a managed shutdown without Cogen's assistance and asked what Cogen would require to assist. Cogen inidcated that one of its key requirements would be that its continuing supply during the shutdown process would be paid for in full. Accordingly the premise of the discussion was that if Cogen would continue to supply power during that process (i) Abitibi would ensure that the shutdown process would be fair and orderly, and (ii) that Abitibi would continue to support BPCL to ensure it would continue to pay in full for all power and steam supplied by Cogen to BPCL throughout the shutdown process. One of the concerns expressed by Abitibi in that discussion was its exposure to guarantee liability for the transfer charge if it shut down BPCL and hence the discussions also dealt with how that obligation would be handled in a managed shutdown.

20. Abitibi required Cogen to enter into a non disclosure agreement (the "2008 NDA") as a precondition of those discussions, which agreement included as a condition that the discussions be kept secret from BPCL and its management. Such an agreement was indeed signed. An unsigned version of the agreement that was signed, together with email correspondence with Abitibi generated in the course of thos discussions, is attached hereto as **Exhibit 6.**

21. These managed shutdown discussions were not concluded before Abitibi filed for CCAA protection. Shortly before the Abitibi CCAA filing, Abitibi through Mr. John Melkerson, and then through its vice president and treasurer, Mr. Allan Dea, advised that the discussions would not be able to continue as Abitibi was working on other issues relating to wider financial difficulties of the Abitibi group of companies, and requested that, in lieu of a managed shutdown, that Cogen, BPCL and Abitibi work on a deal to restructure the Cogen/BPCL relationship, with the assistance of UK based Close Brothers - financial advisors used by BPCL and Abitibi. Such discussions were in fact commenced before the CCAA filing.

22. Abitibi and various affiliates then filed for CCAA protection on April 17, 2009. For reasons not explained in the filing, BPCL was not included as one of the foreign Abitibi group companies which filed for protection under the CCAA.

23. It is reasonable and should be inferred from the facts set out herein that by the time of the filing, Abitibi and its affiliates had in fact concluded internally that BPCL was a non-core asset which would be shed through the restructuring and that Abitibi never had any intention to keep BPCL operating long term. However, Abitibi and its affiliates did not disclose that publicly until 2010 after BPCL had been shut down. Attached hereto and marked as **Exhibit 7** is April 2010 letter to shareholders from the Abitibi group management characterizing BPCL as a non core asset which it grouped with other assets to be liquidated through its restructuring.

24. Immediately after the granting of the Initial CCAA Order on April 17, 2009 to Abitibi and its affiliates, Cogen sought assurances that Abitibi would continue to pay for post-filing electricity and steam supplied by Cogen since BPCL was unable to pay Cogen from its own resources and funding for payments up to that point had come from Abitibi. Specifically, by letter dated April 22, 2009, Cogen wrote to BPCL for

its and Abitibi's confirmation that post filing invoices of Cogen would continue to be paid by Abitibi given BPCL's precarious state, failing which Cogen would exercise its entitlements to discontinue to supply energy to BPCL and seek to take such other enforcement steps as it deemed appropriate. The April 22, 2009 letter is attached as **Exhibit 8**. BPCL's response, attached as **Exhibit 9** indicated that BPCL "has not entered or intends to enter into insolvency procedure" and that it would honour then current invoice.

25. Further discussions ensued between Cogen and BPCL, and particularly with BPCL's Chief Financial Officer, Barry Benson, and General Manager, Jean-Francois Guillot, wherein Cogen sought assurances as to BPCL's ability to continue to pay for the power and steam Cogen was supplying, and expressed concern with the BPCL's ability to do so given BPCL's reliance on Abitibi for financial support. Cogen raised the question in those discussions as to how the directors of BPCL would satisfy their fiduciary duties given that state of affairs.

26. In subsequent discussions in 2009 between Cogen and BPCL, Mr. Benson advised that the directors of BPCL were responding to the concerns raised by Cogen by taking legal advice as to their obligations, and that in consequence of such advice, they had asked Abitibi to issue a support commitment to the BPCL directors committing Abitibi to ensure that Cogen and other continuing suppliers would be paid in full.

27. BPCL assured Cogen at various times thereafter Abitibi filed for CCAA protection that it was not insolvent and could pay its ongoing power and steam supply bills because it had a payment support commitment issued by Abitibi to fund the payment of post-filing goods and services incurred by BPCL, including those supplied by Cogen (the **"Post Filing Support Commitment"**). Had Abitibi not done so, BPCL would have been insolvent and Cogen would have been entitled to discontinue supply and terminate the ESC, which would have caused BPCL to have to shut down immediately, and to enter administration before Abitibi had completed its strategy as to how to deal with BPCL. Because of and in reliance upon the representations of Abitibi ongoing financial support for BPCL, Cogen did not terminate the ESC and continued supplying energy to BPCL.

28. Following the Abitibi group CCAA filing, BPCL and Abitibi renewed discussions with Cogen purportedly with a view to restructuring the ESC terms to assist the viability of BPCL.

29. On July 7, 2009, Abitibi purported to repudiate the Guarantee, to which Cogen responded on August 11, 2009 that the repudiation was invalid, all as described above. However, BPCL thereafter continued to assure Cogen that Abitibi would provide the financial support necessary to ensure Cogen was paid in respect of Cogen's ongoing post filing supply of energy to BPCL.

30. On or about July 16, 2009, BPCL engaged the UK arm of Ernst & Young ("EY UK") on a confidential basis to conduct a review and report to the BPCL board and Abitibi by September 2009 on restructuring options for BPCL. It is reasonable to infer based

on the facts set out herein and it should be inferred that Abitibi caused BPCL to engage EY UK for this purpose, which prior to that point had no business connection with BPCL, and that the review was motivated by Abitibi's plans to withdraw financial support for BPCL and trigger its shutdown , facts which can and should be inferred from the statement of BPCL's Proposed Administrator dated January 28, 2010 (particularly the page numbered 185) which forms part of the notice of the appointment of the joint administrators of BPCL, a copy of which notice is attached below as **Exhibit 10**, and the March 5, 2010 Proposals of the Administrator (particularly at the pages numbered 195-197) a copy of which is attached below as **Exhibit 11**, and from the other facts recited herein. Cogen was not informed of this exercise or of Abitibi's plans to withdraw support. Subsequent to BPCL filing for administration, the Administrator confirmed to Cogen, in a meeting shortly after the filing, that EY UK had been working on inter alia, planning for the shutdown of BPCL since July 2009.

31. Around the same time as EY UK was engaged to review BPCL restructuring options, the directors of BPCL sought a legal opinion from UK counsel as to their obligations under UK law with respect to liabilities being incurred to, *inter alia,* continuing suppliers to BPCL, and an opinion dated August 11, 2009 was received by the BPCL directors, as noted in the January 25, 2009 Minutes of the meeting of the BPCL Board of Directors, a copy of which minutes are attached as **Exhibit 12**. As further explained below, under the *UK Insolvency Act 1986*, directors who permit a company to incur obligations knowing that the company will be unable to satisfy them are exposed to liability under UK law.

32. Restructuring discussions between BPCL/Abitibi and Cogen continued while this confidential legal opinion was being sought by BPCL, and while the undisclosed EY UK review of BPCL's future was ongoing. Those discussions resulted in a draft agreement in September 2009 between BPCL, Abitibi and Cogen, which was subject to a condition that Abitibi seek the consent of its senior lenders to the proposed restructure of the BPCL/Cogen relationship. Attached as **Exhibit 13** is a copy of the draft BPCL/Cogen restructuring agreement entitled "*Heads of Agreement*". BPCL advised Cogen that based on the heads of agreement, BPCL believed it had a viable plan to keep its mill running.

33. However, Abitibi failed to seek or obtain such consent to the restructuring agreement with Cogen. The failure to conclude these negotiations is noted in the Administrators' March 5, 2010 Proposals (see **Exhibit 11**) at the page numbered 195.

34. Instead, following BPCL's receipt in September 2009 of the confidential UK report on restructuring options for BPCL, BPCL and Abitibi proceeded to orchestrate the transfer of key BPCL assets to other Abitibi affiliates and then the shutdown of BPCL.

35. Following the receipt of the EY UK report in September 2009, BPCL once again confirmed Abitibi's support commitment, in order to induce Cogen to continue supplying power and steam. Specifically, on September 25, 2009, BPCL assured

Cogen that Abitibi had issued a support commitment to the board of BPCL committing Abitibi to provide the financial support necessary to ensure BPCL would meet its obligations to suppliers until at least the end of 2009. Cogen was further led to believe in this discussion that BPCL would continue normal operations in 2010. Cogen was led by Abitibi's representations to believe and conclude ***"that it seemed clear to assume that the mill would continue into 2010 on the current contract"*** and on that basis continued to supply BPCL until Feb 2, 2010. Further particulars of these assurances are set out further below and the underlying document is attached below as **Exhibit 18**. Had Cogen known that Abitibi was about to shut down BPCL, and that Abitibi and BPCL were not planning to honour the post filing supply obligations incurred by BPCL to Cogen, Cogen would not have been obliged to continue supplying BPCL, and would have terminated the ESC.

36. By this time, it was becoming apparent from further discussions with BPCL that Abitibi was dragging its heels on approving the Heads of Agreement, which BPCL indicated was due to Abitibi not having made decisions on prioritizing which mills it would keep and which mills it would close. As Cogen was concerned about the delay and about BPCL's financial situation, Philip Piddington, Head of Asset Management for Cogen, contacted Andrew Cunningham of Close Brothers, the financial advisor to Abitibi and BPCL in respect of the BPCL project who had been assisting Abitibi with the managed shutdown discussion with Cogen pre filing, and assisting BPCL with the restructuring discussions with Cogen post-filing. Mr. Piddington inquired of Mr. Cunningham as to what was really happening with the mill. Mr. Cunningham said he would inquire of Abitibi.

37. Mr. Cunningham phoned back Mr. Piddington in late September to advise that Abitibi still had not made a decision on the BPCL restructure, but said that even if they closed it, they would continue to financially support it and pay Cogen because they wanted a planned managed and orderly shutdown if it was not to be restructured.

38. As Cogen was still concerned about continuing to supply BPCL in these circumstances, Mr. Piddington phoned Allan Dea in October, the vice president and treasurer of Abitibi. He told Mr. Dea that Cogen just wanted to know what was going on as they had put a lot of work into the restructuring process, and that they were nervous about BPCL's position and ability to pay for ongoing supply. Mr. Dea advised on behalf of Abitibi in response as follows:

a) It was not possible to say what the final outcome would be of their assessment as to whether to approve the BPCL restructure

b) That Abitibi group management had not prioritized which mills to close, so Abitibi could not make a final decision about BPCL's proposed restructure;

c) That Cogen and BPCL management should continue working on the restructure of BPCL;

d) That whatever was decided,. that Abitibi would ensure, just as it planned to in the discussions pre its CCAA filing, if BPCL was shutdown that it would be a managed shutdown in which Cogen would be fully financially protected ion respect of its continuing supply;

e) That Abitibi was financially supporting BPCL, and would continue to financially support BPCL no matter what was decided, and would ensure there was a managed shutdown in which Cogen would be fully financially protected for its continuing supply.

Cogen relied on and was further induced by these representations of Abitibi to continue supply from November 2009 through February 2, 2010.

39. It is reasonable to infer and should be inferred that:

a) The Abitibi Post-Filing Support Commitment was issued to the BPCL directors as a result of their concern that they might, by continuing to allow BPCL to operate post filing (particularly when Abitibi's continuing financial support was in question), incur liability for wrongful trading under the *UK Insolvency Act 1986*.

b) The issue of the Post-Filing Support Commitment induced BPCL to continue trading until February 2, 2010, and that BPCL would have had to shut down long before November 2009 had such commitment not been issued.

c) One purpose of the commitment was to induce Cogen to continue supplying the energy necessary for BPCL to operate and that it was intended that BPCL communicate the fact of that commitment to Cogen to induce it to continue to supply energy

d) BPCL's communication of the fact of the commitment was made by BPCL on behalf of not only itself but on behalf of and as agent for Abitibi;

e) Abitibi directly made a separate representation as to the existence and reliability of the Abitibi Post-Filing Support Commitment directly to Cogen with the intention of inducing Cogen to induce it to continue supplying power and steam in the belief that it would be paid in full for same by Abitibi in the event BPCL was shut down.

40. In October 2009, and without informing Cogen, Abitibi caused BPCL to initiate steps to prepare for the shut down of BPCL, which steps included:

a) planning for the assignment without consideration, to a new UK subsidiary of Abitibi formed for the purpose of receiving them, of certain key receivables and contracts of BPCL, which can and should be inferred from the motion to this effect served in late October in this proceeding returnable November 10, 2009 to that effect, a copy of which motion and the November 10, 2010 Order resulting therefrom are attached as **Exhibit 14**

b) instructing the EY UK restructuring team on October 22, 2009 to carry out a contingency planning exercise on the considerations and steps required to place BPCL into administration in the event Abitibi withdrew its financial support for BPCL, which fact is noted on the page numbered 185 in the statement of the proposed administrator of BPCL dated January 28, 2010 (part of **Exhibit 10** attached above).

41. Further thereto, Abitibi initiated a motion on October 28, 2009 returnable before the CCAA Court on November 10, 2009 with respect to facilitating the transfer by BPCL of receivables and contracts to a new UK affiliate (ACI UK) formed for the purpose of receiving same. Paragraph 10 of the motion represented to the Court in that the consideration for the assignment was Abitibi's continued willingness to supply paper to BPCL. However, there was in fact no consideration, as it can and should be inferred from the facts set out herein that Abitibi was already planning to withdraw its financial support and force BPCL's shutdown (and hence had in fact no willingness at all to continue supply paper to BPCL, the capacity to purchase same by BPCL being entirely dependent on Abitibi financially supporting BPCL).. In fact, no mention was made in the motion of the ongoing analysis by BPCL and EY UK of options to place BPCL into administration or of Abitibi plans to discontinue funding for BPCL and shutdown BPCL. While ACI UK was added to the CCAA process through this motion, BPCL was not, and no ratification of BPCL's conduct in entering into this transaction was sought or obtained from the CCAA Court.

42. It is reasonable to and should be inferred from the facts set out herein and particularly paragraphs 4, 5, 6, 7, 21 and 25 of the November 10 motion (**Exhibit 14**), that the transfer proposed was in fact a step in the process to shutdown BPCL, which aimed to channel to a new shell Abitibi company (i.e. ACI-UK), BPCL receivables accruing at the rate of 15-20 million dollars a month (which amounts BPCL had been collecting and then paying over to Abitibi on an unsecured basis) in order to try to prevent the stream of receivables from being entangled in the forthcoming administration filing of BPCL once Abitibi cut off funding (and thereby subject to potential challenges and set offs etc).

43. On or about October 30, 2009, BPCL's CFO, Barry Benson, assured Cogen that the proposed transfer would not affect the ongoing operations of BPCL. The email from Mr. Benson to Cogen confirming a call to Cogen making these assurances is attached as **<u>Exhibit 15</u>**. The email failed to make any mention of plans for Abitibi to discontinue funding for BPCL or of the ongoing development of a plan to shutdown BPCL. Instead, the email confirmed that payment for Cogen's September invoice was forthcoming that day while providing no indication that Cogen should be concerned that in 2 days, BPCL would start accepting power and steam for which it would never pay. The October 30, 2009 email, and the material omissions from it, further induced Cogen to continue supplying on credit despite the non-ordinary course conveyance of a significant part of the liquid assets of BPCL for no consideration.

44. Contrary to the October 30, 2010 representation, once the CCAA Court approved the transfer of BPCL assets to Abitibi's new UK affiliate, BPCL did not carry on business as usual, but rather took a confidential series of steps to shut down while continuing to draw supply of energy from Cogen, which Cogen supplied in the belief that BPCL would continue operating and that its obligations would be financially supported by Abitibi. In particular:

a) BPCL commenced on November 1, 2009 to accept energy supply for which it would never pay. Although it continued accepting power and steam from Cogen under the ESC from November 1 2009 through February 2, 2010, it never paid anything to Cogen on account thereof, nor did it advise of its incapacity to do so;

b) Abitibi similarly failed to honour the Post-Filing Support Commitment by not paying for those amounts from November 2009 onwards;

c) EY UK proceeded to prepare the report commissioned October 22, 2009 by BPCL on recommended contingency plans to shut down BPCL triggered by Abitibi's withdrawal of financial support (see **Exhibit 10** at page 185). It presented the report, entitled *"Project Bark – Contingency Planning"* to the BPCL board on or about December 10, 2009, as noted in the January 25 Board Minutes of BPCL (**Exhibit 12**);

d) On or about December 10, 2009, the BPCL board asked EY UK to prepare a further options paper on strategic matters regarding the solvency position of BPCL and the process of appointing administrators (the "Options Paper") (as is noted in the Statement of the Proposed Administrator of BPCL -see **Exhibit 10** - at page 185), which Options Paper was available to the BPCL board on or before January 25, 2010 (as noted in **Exhibit 12**);

e) Abitibi formally advised the BPCL board at some point prior to January 22, 2010 that it would not provide financial support for BPCL beyond January 22, 2010 (as noted in the Board Minutes at **Exhibit 12**);

f) The BPCL board met on January 25, 2010 and resolved to place BPCL into administration. Not only were the two Abitibi officers on the board of BPCL in attendance (Messrs. Melkerson and Vachon), but so was Sophie Rossignol, an Abitibi in house lawyer, as well as Barry Benson, the BPCL CFO as noted above, all of which is apparent from the BPCL board minutes of January 25 2010 (see **Exhibit 12**).

g) BPCL filed for administration on Feb 2, 2010, a copy of which filing is attached as **<u>Exhibit 16</u>**.

h) No steps were taken by the BPCL directors at any time to require Abitibi to honour the Post-Filing Support Commitment, and in particular none were taken to ensure Cogen was paid, and Abitibi took no steps on its own to honour the commitment generally or in regard to Cogen.

i) Instead, Abitibi agreed at some point before January 25, 2010 to provide 2 million UK pounds to fund the UK insolvency administration process for BPCL (as can be seen from section 6.3.2 of **Exhibit 12**) rather than honour, as it should have, its much larger Post-Filing Support Commitment to fund the liabilities incurred to creditors (including Cogen) from BPCL's continuing to operate while its shutdown was being planned.

45. It is reasonable to and should be inferred from the facts recited herein that:

a) Abitibi wanted from the time of its filing to shut down BPCL;

b) Abitibi wanted to avoid paying the costs of that shutdown and particularly the Transfer Charge Liability which would be owing under the Guarantee;

c) Abitibi wanted to ensure Cogen continued to supply power and steam to BPCL until Abitibi made up its mind as to how to effect the shutdown;

d) Abitibi's objective in repudiating the Guarantee in July 2009 was to attempt to avoid its exposure to guarantee the transfer charge liability under the ESC, by seeking to convert it into an unsecured claim which would be worth pennies on the dollar;

e) Abitibi despite purporting to repudiate the Guarantee, which would put Cogen in a position to immediately terminate the ESC; had to find an alternate way to induce Cogen not to terminate the ESC prematurely and thereby prevent it from completing the process it planned for the shutdown of BPCL;

f) Abitibi and BPCL did not disclose their plans for shutting down BPCL to Cogen and led Cogen to believe Abitibi would fund the post filing supply obligations to Cogen it was incurring post filing so that Cogen would continue supplying;

g) Abitibi planned to cease providing financial support for the obligations that BPCL was incurring to Cogen once BPCL's assets had been transferred in November 2009;

h) Abitibi and BPCL chose to allow Cogen to continue to supply BPCL from November 2009 to February 2, 2010:

   i. without informing Cogen of the impending shutdown and insolvency of BPCL;

   ii. knowing that Cogen supplied in reliance on the representation of financial support for BPCL by Abitibi;

   iii. knowing that Abitibi was planning to withdraw financial support for BPCL without making arrangements for Cogen to be paid for the energy it was supplying while the financial support obligation was in place.

C.1 **Documetation of Abitibi's Support Commitment to BPCL**

46. Abitibi has been requested to produce a copy of the written Post Filing Support Commitment, but has declined to do so. (A copy of Cogen's request, Abitibi's refusal, and Cogen's reply is attached hereto as **Exhibit 17**.)

47. However, documentary evidence of the Post Filing Support Commitment includes the following:

(a) the Post Filing Support Commitment is evidenced in the Report of the BPCL's Administrator, dated March 5, 2010, wherein Ernst &Young LLP, as Administrator, noted the following:

(i) *"The Group has been trading at a gross loss for a number of years, prior to the appointment of the Joint Administrators, with operations being funded by ACI..."* [The Group is the term used in the report to refer to BPCL and its 3 subsidiary companies; the defined term ACI is used in the report to refer to Abitibi]; (see **Exhibit 11** p 196)

(ii) *"the only source of funding available to support the ongoing operations of the Group was from its insolvent parents";* (see **Exhibit 10,** p 185); and

(iii) *"The continued operations of the Group were solely reliant on ACI funding, failing which the Group would be insolvent on a cash flow basis, as it had no external sources of funding"* (see **Exhibit 11,** p 196).

(**Exhibits 10, 11, 12 and 16** in general document BPCL's insolvency and reliance on Abitibi for funding throughout 2009 and into January 2010).

(b) During a meeting on or around September 25, 2009 (notes of which meeting were taken by Ian Wilkinson are attached as **Exhibit 18**), between Cogen and BPCL, Barry Benson, the Chief Financial Officer of BPCL, confirmed that BPCL had a "comfort letter" from Abitibi to the end of September assuring the board that Abitibi would continue to support the BPCL business should that be required and that BPCL assumed that a new letter would be provided for the remainder of 2009. The memo records that Cogen was led to assume from the meeting that BPCL would continue operations and honouring its bills with the financial support of Abitibi well into 2010. Subsequent to this meeting, Mr. Benson confirmed to Cogen that comfort letters were being issued and/or renewed each month through at least the end of December 2009.

(c) That Abitibi's Post Filing Support Commitment continued through 2009 until at least January 22, 2010 is reflected in the Minutes of the Board of Directors of BPCL dated January 25, 2010 (**Exhibit 12**) which provided, amongst other things as follows:

> *The Directors considered the Cash Flow Statement and the fact that its parent company, Abitibi had confirmed that it would not provide any further financial support to BPCL beyond January 22, 2010. The Chairman reported that, as a consequence, the Company is unable or is likely to become unable to pay its debts as they fall due.*

(d) Abitibi's Notice of Disallowance of Cogen's Proof of Claim and its subsequent responding submissions to Cogen's dispute of that Disallowance do not deny the existence of the Post-Filing Support Commitment, but rather assert that Cogen does not have privity of contract to enforce it (Cogen's right to do so as a third party beneficiary is dealt with further below).

C.2 Cogen is a Third Party Beneficiary of the Support Commitment

48. It is reasonable to infer and it should be inferred that Abitibi's Post Filing Support Commitment was made to the directors of BPCL with the intention of inducing BPCL to continue operating and to continue drawing supplies of energy from Cogen. Cogen claims status as a third party beneficiary of that commitment under English law, and as such asserts entitlement to enforce same directly against Abitibi.

49. As well, Abitibi having made direct representations to Cogen post CCAA filing that it would ensure Cogen's invoices were paid if it continued supplying BPCL, is directly liable to BPCL for the payment of those invoices once BPCL went into administration without paying them.

C.3 Abitibi is Responsible for BPCL's Post-Filing Conduct re Cogen

50. All representations made by BPCL to Cogen concerning Abitibi's financial support for BPCL were made by BPCL for and on behalf of and as agent for, with the knowledge and acquiescence of, and for the benefit of Abitibi and its parent company AbitibiBowater Inc.("ABI"). Abitibi and ABI oversaw and directed the management of the affairs of BPCL at all materials times. BPCL reported to its parent company Abitibi until its merger with Bowater in 2007 to form ABI. BPCL then reported to Abitibi and ABI, which were managed by a 9 member global management team which oversaw the affairs of the Abitibi/ABI Group of companies globally.

51. As part of the system by which this control and oversight was exercised, two (2) BPCL board members, Jacques Vachon and Jon Melkerson, were also senior officers of Abitibi until the 2007 Abitibi/Bowater merger, at which time they also became part

of the nine (9) member senior executive team of ABI. They remained in all of those roles right up to the time BPCL went into administration. In particular,

a) Mr. Vachon served as Senior Vice President, Corporate Affairs and Secretary of Abitibi from 1997 to October 2007 at which time he also became the Senior VP, Corporate Affairs and Chief Legal Officer of ABI.

b) Mr. Melkerson served as Senior Vice President Business and Corporate of Abitibi until October 2007 at which time he also became the Senior Vice President International and Business Development of ABI.

Attached as Exhibit 19 and Exhibit 20 are the 2008 Annual Report and 2009 10K filing of Abitibi and affiliates which discuss the composition of the senior executive team of the Abitibi group of companies.

52. Abitibi and BPCL officers met together at BPCL board meetings, which can and should be inferred from the January 25, 2010 BPCL Board Minutes (**Exhibit 12**), and the other facts set out herein. In fact, that exhibit indicates that BPCL's CFO Barry Benson, who made specific representations inducing Cogen's reliance, was present at board meetings with Messrs Vachon and Melkerson, and hence the means by which Abitibi's wishes would be conveyed and executed through the BPCL board and BPCL officers is evident and that such was the case can and should be inferred.

53. As a result, it is reasonable to and should be inferred that Abitibi, ABI and BPCL at all material times had common information about the financial status of BPCL, Abitibi's intentions with respect to supporting and discontinuing support for BPCL, Cogen's continuing supply relationship with BPCL from the date of the CCAA filing through to the beginning of February 2010, representations made to Cogen by BPCL concerning Abitibi's post filing support for BPCL, and Cogen's reliance on same to continue supplying energy to BPCL and to forbear from terminating the ESC on account of BPCL's insolvent condition absent Abitibi financial support.

D. BPCL's Insolvency and Inability to Pay the Outstanding Post-Filing Cogen Payable

54. On February 2, 2010, BPCL, on account of its insolvency and the failure of Abitibi to provide financial support, filed for administration under the *UK Insolvency Act 1986*. BPCL is incapable of paying the Outstanding Post-Filing Cogen Payable.

55. Accordingly Abitibi should be required to honour its Post Filing Support Commitment. As a third party beneficiary thereof, Cogen is entitled to enforce same and compel Abitibi to pay the amount owing.

E. Cogen's Post Filing Supply/Oppression Claims are Not Affected Claims in the CCAA Process

56. As events outlined above occurred post-filing, the Outstanding Post-Filing Cogen Payable is a post-filing liability of Abitibi under both its Guarantee and Post Filing

Support Commitment which does not result from the valid post filing termination of a contract or lease. This liability is not a "Claim" or "Subsequent Claim" or "Restructuring Claim" within the definition of those terms in the Claims Bar Orders, the amended CCAA Plan as approved by the creditors (**"CCAA Plan"**) or by the order of this Honourable Court sanctioning the CCAA Plan (**"Sanction Order"**), and hence cannot be lawfully released by any plan of compromise or arrangement of Abitibi and its affiliates or subsidiaries. Attached as **Exhibits 21, 22 and 23** respectively are the Claims Bar Orders, the Amended CCAA Plan and the latest form of amended Sanction Order sought by Abitibi at the CCAA Plan sanction hearing on September 20-21, 2010.

57. The Oppression Remedy Claim (defined below) is similarly unaffected for the same reasons, and for the same reasons cannot be lawfully released by any plan of compromise or arrangement of Abitibi and its affiliates or subsidiaries.

F. The Claims Procedure

58. Cogen initially filed a proof of claim in November 2009 (**"Initial Proof of Claim"**). In accordance with the Second Claims Procedure Order of the Honourable Mr. Justice Clement Gascon, dated February 23, 2010, on April 6, 2010, Cogen submitted a further and revised proof of claim in the amount of £70,160,658.13 (**"Revised Proof of Claim"**) in the Abitibi claims process, reserving its rights with respect to the purported repudiation. This amount consisted of amounts owing from BPCL to Cogen, as guaranteed by Abitibi under the ESC as follows:

(iv)	Supplies of electricity and steam:	£9,447,548.00
(v)	"Take or Pay" liability:	£9,986,380.01
(vi)	Transfer Charge Liability:	£49,633,937.00
(vii)	Other liabilities:	£1,092,793.13

The Initial Proof of Claim and the Revised Proof of Claim are attached as **Exhibit 24** and **Exhibit 25** respectively.

59. A Notice of Revision or Disallowance of a Claim or Subsequent Claim dated June 16, 2010 was delivered to Cogen by email on June 17, 2010 (the **"Notice of Revision"**) issued by Ernst & Young Inc. (the **"Monitor"**) and Abitibi. The Notice of Revision is attached as **Exhibit 26**.

60. Of Cogen's total claim of £70,160,658.13, the Notice of Revision:

(i) Allowed CDN$ 101,000,000 of Cogen's claims subject to receiving evidence of the assignment to Cogen, which was subsequently provided by Cogen, reviewed by the Monitor and accepted by the Monitor as satisfactory;

(ii) Disallowed Cogen's claim for "take or pay" liability in the amount of £1,223,551;

(iii) Disallowed part (£14,700,000) of Cogen's Transfer Charge claim; and

(iv) Disallowed Cogen's claim for unaffected, excluded, and/or secured status in respect of unpaid accounts receivables totaling £9,447,000 from December 2001 and January 2010 under Abitibi's Plan of Arrangement.

61. Cogen disputed the disallowances noted above and served:

a) a Notice of Dispute of the Notice of Revision dated June 29, 2010 setting out its position and response to the disallowances in a Notice of Dispute delivered in July 2010 ("**Notice of Dispute**");

b) an initial submission to the Claims Officer (the Hon. Joseph Nuss QC) dated August 10, 2010 ("**Initial Claims Submission**"); and

c) a reply submission to the Claims Officer dated August 24, 2010 ("**Reply Claims Submission**").

Cogen's Notice of Dispute, the Initial Claims Submission, and the Reply Claims Submission are attached as **Exhibit 27**, **Exhibit 28** and **Exhibit 29** respectively.

62. The Claims Officer heard submissions on August 26 and 27, 2010 and then reserved his decision.

63. During the hearing on August 27, 2010, Abitibi and Cogen agreed to refer the issue of the enhanced priority status for the Post Filing Supply Claim (i.e. the issues raised in this motion) to this Honourable Court for determination. The Claims Officers decision on the remaining issues not removed to this court is still under reserve - i.e. the dispute over the allowability of certain "Take or Pay Liability" amounts, and the "Transfer Charge Deduction" dispute.

G. Grounds for the Motion

G.1 The Purported Repudiation of the Energy Supply Contract Guarantee

64. Abitibi's Purported Termination is invalid as Abitibi failed to comply with the repudiation requirements of paragraph 46(f) of the Initial CCAA Order, specifically, the Purported Repudiation of the ESC Guarantee does not comply with the requirements in that:

a) the Purported Repudiation must have been necessary for the orderly restructuring of its business and affairs;

b) that the Purported Repudiation required the prior consent of the Monitor to be effective; and

c) that there must have been discussion or negotiation with Cogen prior to the Purported Repudiation.

65. There is no evidence that the Monitor provided its prior consent to the Purported Repudiation. There is no evidence that the Purported Repudiation was necessary for the restructuring. And most importantly, there was no discussion or negotiation with Cogen with respect to the ESC Guarantee prior to its purported repudiation.

66. Moreover, the Purported Repudiation of the ESC Guarantee does not comply with the limits imposed by the case law interpreting the power of a CCAA petitioner to repudiate contracts as Abitibi has not met the test set out by the CCAA case law to exercise a power to repudiate namely, that:

i) the repudiation must be reasonably necessary to permit a viable plan, not simply a way to make the plan more profitable; and

ii) the repudiation must be fair and reasonable, including the terms of repudiation and the treatment of the claim upon repudiation.

677960 Alberta Ltd. v. Petrokazakhstan Inc. 2009 CarswellAlta 382 (Alta. Q.B.)

Doman Industries Ltd. (Re) [2004] B.C.J. No. 1149

9145-7978 Québec inc. (Arrangement relatif à) [2007] J.Q. no 3812 (Que. C.A.)

G.2 <u>The Post-Filing Energy Supply Commitment and the Outstanding Post-Filing Cogen Payable</u>

67. The Outstanding Post-Filing Cogen Payable is a post filing claim as defined under the CCAA Plan. Post Filing Claims remain unaffected obligations of Abitibi which are not released by the CCAA Plan (**Exhibit 22**) or the Sanction Order (**Exhibit 23**).

68. The Post Filing Support Commitment from Abitibi was necessary to ensure that the BPCL board of directors could continue in office because of the potentially severe penalties under UK law (such as for wrongful trading) that can be imposed on directors who permit companies to continue to incur liabilities knowing that such liabilities cannot be paid (as was the case with BPCL).

69. Under U.K. law, liability for wrongful trading under section 214 of the Insolvency Act 1986 can arise if, upon an application by the liquidator to a company, the court considers that a director or former director of the company at some time before it went into insolvent liquidation knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. In short, a person will be liable if:

a) the company has gone insolvent;

b) at some point before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and

c) that person was a director of the company at that time.

70. The BPCL Administrator's March 5, 2010 Proposals (see **Exhibit 11**) confirm that the administration of BPCL will be followed by either a voluntary liquidation or compulsory liquidation, both of which comprise an insolvent liquidation for the purpose of sub-paragraph (a) above (on the basis that there are insufficient assets to pay all of BPCL's liabilities). Hence the risks associated with wrongful trading were very real ones so far as the directors of BPCL were concerned. Should a UK court determine that a director is liable for wrongful trading, that director can be required to make such contribution to the company's assets as the court thinks proper. Conduct amounting to wrongful trading can also render the director vulnerable to being the subject of disqualification proceedings - to disqualify him from being a director of any company.

71. As noted, BPCL is controlled by Abitibi. The two companies share common officers and directors. In the circumstances, Abitibi knew or ought to have known that Cogen continued to supply energy based on statements made to it through BPCL about continued funding by Abitibi.

72. Abitibi in causing, inducing, permitting and acquiescing in the making of those incorrect representations to Cogen is liable under UK law for damages (equal to the Outstanding Post Filing Cogen Payable plus accrued interest), as party to conduct amounting to negligent misrepresentation, misrepresentation, and other similar tortious claims.

73. Cogen as third party beneficiary of the Post Filing Support Commitment, is entitled to enforce same and in particular to require Abitibi to pay to Cogen the full amount of the Outstanding Post Filing Cogen Payable (plus accrued interest).

74. Further, BPCL in advising Cogen that Abitibi had committed to provide financial support to enable the payment of inter alia Cogen's post-filing invoices, was acting as Abitibi's agent under English law . Abitibi never repudiated those statements (and in fact, complied with the commitment for many months) and is therefore bound by the statements and actions of BPCL.

> Great Northern Grain Terminals Ltd. v. Axley Agricultural Installations Ltd. 1990 CarswellAlta 152 (Alta. C.A)

75. As well, Abitibi having made direct representations to Cogen post CCAA filing that it would ensure Cogen's invoices were paid if it continued supplying BPCL, is directly liable to BPCL for the payment of those invoices once BPCL went into administration without paying them.

G.3 The Oppression Remedy Claim

76. Abitibi is a company governed by the *Canada Business Corporations Act.*

77. Cogen is a creditor of Abitibi and its affiliate BPCL and is a proper person to make an application in respect of oppressive conduct under s. 241 of the CBCA and "complainant" within the meaning of that term as used in section 242 of the CBCA.

78. Under s. 241 of the CBCA, a complainant may apply to the court for the relief set out in s. 241 where the conduct of the corporation or its affiliates and their respective directors is oppressive or unfairly prejudicial to the complainant.

79. The post-filing conduct of BPCL, Abitibi and their respective officers and directors (some of whom are directors and officers for both), namely:

a) Abitibi's inducement of BPCL to continue draw supply from Cogen in reliance on Abitibi's promise of continuing financial support, knowing that Cogen would be led to forebear from terminating the ESC and to continue supplying BPCL into 2010;

b) Abitibi's inducement of BPCL to represent to Cogen that all continuing supply of electricity and steam post filing would be paid in full with the assistance of Abitibi's financial support;

c) Abitibi and BPCL's inducement of Cogen to continue to supply electricity and steam to BPCL following Abitibi's CCAA filing by representing that supplies would be paid in full as a result of the Post-Filing Support Commitment;

d) Abitibi and BPCL's inducement of Cogen to continue to supply electricity and steam to BPCL following Abitibi's CCAA filing by representing that supplies would be paid in full notwithstanding Abitibi's purported repudiation of the Guarantee;

d) Abitibi and BPCL's conducting bad faith restructuring negotiations of their contractual arrangements with Cogen throughout 2009, which were not in fact intended to be concluded by Abitibi and BPCL with Cogen, but were rather were aimed at inducing Cogen to forebear from terminating the ESC in 2009 before Abitibi was ready to cause BPCL to shut down;

e) the invalid and improper termination of the ESC;

f) The invalid and improper attempt to repudiate the Guarantee;

f) the advice to Cogen that BPCL would not be shutdown in 2009 or 2010;

g) Abitibi and BPCL's failure to disclose its plans formulated in 2009 to shut down BPCL;

h) BPCL's representation to Cogen in October 2009, with Abitibi's knowledge and acquiescence, that the stripping of assets from BPCL would not result in BPCL ceasing business, when in fact it was part of a scheme to shut down BPCL;

i) the stripping of assets from BPCL without full disclosure to the court of the impending shutdown of BPCL or the lack of any true consideration therefor;

j) leaving BPCL without any realistic ability to pay for any services or goods acquired post-asset strip yet continuing to allow it to draw services from Cogen; and

k) the refusal of Abitibi to honour Post-Filing Support Commitment as soon as it had stripped the assets out of BPCL;

was and is oppressive and unfairly prejudicial to Cogen and has unfairly disregarded its interests to its detriment and gives rise to causes of action by Cogen under s 241 of the CBCA against Abitibi, BPCL, and their respective officers and directors (the "**Oppression Remedy Claim**"), including for the relief requested below.

80. In addition, such conduct gives rise to causes of action in common law and equity under English law in respect of negligent misrepresentation and other related causes of actions for misstatements and misrepresentations inducing reliance.

81. As a creditor of Abitibi and BPCL, Cogen had the reasonable expectation that Abitibi, BPCL and their respective directors and officers would not act in a manner oppressive or unfairly prejudicial to their creditors.

> *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* 1988 CarswellAlta 103 (Alta. Q.B.) adjourned 1989 CarswellAlta 181 (Alta. C.A.)
>
> *1413910 Ontario Inc. v. McLennan* 2008 Carswell Ont 4147 (Ont.S.CJ). [Commercial List]) aff'd 2009 CarswellOnt 2444, (Ont. Div. Ct.)
>
> *SCI Systems, Inc. v. Gornitzki Thompson & Little Co. 1997* CarswellOnt 1769 (Ont.C.J). Gen. Div)
>
> *Canadian Opera Co. v. 670800 Ontario Inc.* 1989 CarswellOnt 890 (Ont. S.C.J) aff'd *Canadian Opera Co*

82. Since the events outlined above occurred post-filing and since they do not arise from the post filing repudiation, the Oppression Remedy Claim is a post-filing liability and to the extent damages are recoverable, said claim is unaffected by any plan of compromise or arrangement or any court order sanctioning such a plan. In particular, the Oppression Remedy Claim is not within the definition of Claim, Subsequent Claim or Restructuring Claim as those terms are used in the Plan, the Claims Bar Orders and the Sanction Order, and the CCAA does not confer any authority upon the Debtors to repudiate such an obligation. (The order sanctioning the amended CCAA

Plan of Abitibi and its affiliates contains an exception (s 32) carving out this motion and related relief from the releases in the CCAA Plan and Sanction Order.)

83. The directors and officers of Abitibi are likewise personally liable for authorizing and directing and permitting the oppressive conduct by Abitibi and BPCL.

84. This motion is well founded in fact and in law.

H. Relief Sought

Wherefore, may this court:

1. Grant this motion for declaratory and other relief.

2. Exempt, if applicable, the petitioner from having to serve this motion and from any notice or delay of presentation.

3. Declare that the Purported Repudiation of the ESC Guarantee was improper null and void, and of no force and effect, and order that the Energy Supply Contract Guarantee remains an obligation of Abitibi which is unaffected by the CCAA Plan or the Sanction Order, and that the Outstanding Post-Filing Cogen Payable is payable by Abitibi to Cogen forthwith under the Guarantee (the "Guarantee Claim");

4. Declare that the Outstanding Post-Filing Cogen Payable, the Guarantee Claim, Cogen's claim to enforce the Post Filing Supply Commitment including Cogen's right to enforce same), and the Oppression Remedy Claim (which term for the purposes of the relief sought herein shall include related claims enumerated above for negligent misrepresentation and other related causes of actions for misstatements and misrepresentations inducing reliance) are each unaffected claims which are not barred or affected by the CCAA process, the CCAA Plan, the Sanction Order, or any release to be granted in connection therewith;

5. In the alternative to 4, Order that the Outstanding Post-Filing Cogen Payable, the Guarantee Claim, Cogen's Claim on Post Filing Supply Commitment (including Cogen's right to enforce same), and the and the Oppression Remedy Claim, shall each be Excluded Claims (as that term is defined in the Claims Bar Orders and the CCAA Plan);

6. Declare in the alternative to 4 and 5 above, that the Outstanding Post-Filing Cogen Payable is a Secured Claim (as that term is defined in the Claims Bar Orders and the CCAA Plan) on the assets of Abitibi required by the CCAA Plan to be paid in full upon Abitibi's emergence from the CCAA process in October 2010;

7. Direct the payment by Abitibi forthwith of the full amount of Outstanding Post-Filing Cogen Payable plus interest from February 2, 2010 at the rate of 3% per annum;

8. Declare that, if necessary to determine any of the issues herein, proceedings, including under s 241 of the CBCA, to collect the amount of the Outstanding Post

Filing Cogen Payable, may be filed and pursued by Cogen against Abitbi and its directors and officers and if leave be required to do so, grant leave to do so;

9. Order Abitibi to produce the documents enumerated in **Exhibit 17**.

10. Grant such further and other interim and final relief as this court deems just and proper.

THE WHOLE WITHOUT COSTS, save and except in the case of contestation.

Toronto, Ontario, September 24, 2010

Baker & McKenzie LLP

Baker & McKenzie LLP
Attorneys for the Petitioner

AFFIDAVIT

I, the undersigned, Kevin Ansell , having my principal place of business at Swindon , in
(name)
the United Kingdom solemnly declare the following:

1. I am Head of Asset Management for Cogen.
(occupoation or position)

2. All the facts alleged in the *Motion for an Order Determining the Status of the Post-Filing Supply Claim of Npower Cogen Limited and Related Relief* are true.

AND I HAVE SIGNED

______________________.

Solemnly declared before at London,
United Kingdom, on the 14 day of September, 2010.

P. Fedchenko
____
Solicitor

WITHERS LLP
16 OLD BAILEY
LONDON EC4M 7EG

NOTICE OF PRESENTATION

TO: Service List

TAKE NOTICE that this Motion will be presented for adjudication before one of the Honourable Judges of the Superior Court, sitting in practice in and for the District of Montreal, in the Montreal Court House, 1 Notre-Dame St. East, at a date, time and in a Room to be announced to the Service List.

DO GOVERN YOURSELVES ACCORDINGLY.

Toronto, Ontario, September ___, 2010

Baker & McKenzie LLP

Baker & McKenzie LLP
Attorneys for the Petitioner

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*)

No. 500-11-036133-094

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

In the matter of Plan of Compromise or Arrangement of:
ABITIBIBOWATER INC. ***et al***
Debtors

and

ERNST & YOUNG INC.
Monitor

and

NPOWER COGEN LIMITED
Petitioner

BS0350 n/dos.: 041053-1170

MOTION FOR AN ORDER CONCERNING THE STATUS OF THE POST-FILING SUPPLY CLAIM OF NPOWER COGEN LIMITED AND RELATED RELIEF

Chris Besant Tel.: 416.865.2318
Fax: 416.863.6275

BAKER & McKENZIE LLP
Barristers and Solicitors
BCE Place, P.O. Box 874
181 Bay Street, Suite 2100
Toronto, ON M5J 2T3

Attorneys for Npower Cogen Limited