C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

**S U P E R I O R   C O U R T**
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 Schedules A, B. and C**

Debtors

And

**ERNST & YOUNG INC.**

Monitor

And

**NPOWER COGEN LIMITED**

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## AFFIDAVIT OF BEN MATTHEW VALENTIN

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I, **BEN MATTHEW VALENTIN**, residing and domiciled in London, U.K., hereby make the following solemn declaration:

1. At the request of Npower Cogen Ltd. ("Cogen"), I have reviewed Cogen's "Motion for an Order Concerning the Status of the Post-filing Supply of NPower Cogen

Limited and Related Relief" dated 24 September 2010 (the "**Motion**"), in order to acquaint myself with the background to the principal issues in this proceeding and to prepare this affidavit. I have no knowledge or understanding of the background facts to this matter beyond that which I have derived from my review of the Motion. I make this Affidavit at Cogen's request in order to state the law of England and Wales in relation to two discrete issues of English law to which reference is made in the Motion and which are identified below.

2. I am a Barrister called to the Bar of England and Wales in 1995. I received my BA (Honours) degree in Jurisprudence from Oxford University in 1992, a BCL (Bachelor of Civil Law) from Oxford in 1993 and an LLM from Cornell University Law School in 1994. I have practiced as a Barrister at the English Bar since 1996 and have a broad commercial practice with extensive experience of substantial and complete litigation. In addition to corporate insolvency and restructuring, my principal practice areas are commercial litigation, banking and finance, corporate law and civil fraud. In addition to my qualifications in England, I am also admitted to practice to the Bar in the State of New York (1998) and the British Virgin Islands (2007). I am a member of the Commercial Bar Association and Chancery Bar Association in London, as well as the New York State Bar Association and the London Court of International Arbitration. A copy of my curriculum vitae is at Exhibit 1.

3. I have personal knowledge of the facts below or where I am advised by others, I truly believe the same to be true.

4. Capitalised terms have the meanings given to them in the Motion, unless otherwise defined in this Affidavit.

A. <u>Paragraphs 68 to 70 of the Motion: wrongful trading and directors' disqualification</u>

5. Paragraphs 68 to 70 of the Motion state as follows:

> "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).
>
> <u>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:</u>
>
> <u>a) the company has gone insolvent;</u>

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."

(emphasis added)

6. The underlined sentences of these paragraphs of the Motion describe the English law relating to wrongful trading and directors' disqualification. Liability for wrongful trading arises under section 214 of the Insolvency Act 1986 (as amended), and further provisions relating to this form of liability appear in section 215. Copies of sections 214 and 215 together with notes, taken from Volume 1 of *Sealy & Milman: Annotated Guide to the Insolvency Legislation* (13th Ed., 2010) are at Exhibit 2. Sealy & Milman is a leading textbook for English insolvency lawyers. Disqualification of directors by reason of their having participated in wrongful trading is governed by section 10 of the Company Directors Disqualification Act 1986. A copy of section 10, taken from Volume 2 of Sealy & Milman, is at Exhibit 3.

7. Paragraph 69 of the Motion, together with the first underlined sentence of paragraph 70, reflect sub-sections 214(1) and 214(2) of the Insolvency Act 1986, and set out the basis for liability in wrongful trading. Any liability under section 214 is personal liability on the part of the director concerned. An additional (and shorter) summary of wrongful trading appears in the second paragraph (highlighted) of section O3033 of *Tolley's Insolvency Law Service*, a copy of which is at Exhibit 4. (Tolley's is also a leading looseleaf textbook for English insolvency lawyers.)

8. Similarly, the final sentence of paragraph 70 of the Motion accurately summarises the law on directors' disqualification in the context of wrongful trading: if a person is found liable in wrongful trading, the English court can make an order against that person disqualifying him from holding office as a director of any company for such

period as it thinks fit (up to a maximum of 15 years). Provision to this effect is made in section 10 of the Company Directors Disqualification Act 1986.

9. Paragraph 68 of the Motion refers to the ability of the BPCL directors to remain in office in reliance on Abitibi's Post Filing Support Commitment. In circumstances where a subsidiary company within a group of companies is loss making and/or insolvent and may be vulnerable to insolvent liquidation, it is not uncommon for a parent company to provide some form of financial support to the subsidiary such that the directors of the subsidiary can cause it to continue to trade without incurring the risk of personal liability for wrongful trading. The existence of such financial support provides the subsidiary's directors with comfort that they can cause the company to continue trading without incurring personal liability. This is because the existence of the financial support can mean that:

(a) there is a reasonable prospect that the company will avoid an insolvent liquidation, and consequently the pre-requisite to liability in sub-section 214(2)(b) of the Insolvency Act 1986 that they "knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation" is not met; or, at the very least,

(b) the position of the company's creditors will be made no worse by the continuation of trading, and consequently potential liability for wrongful trading is eliminated or reduced by reason of sub-section 214(3) of the Insolvency Act 1986, which prevents the English court from making a declaration under section 214 if the relevant director "took every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken."

B. <u>Paragraphs 79 and 80 of the Motion: negligent misrepresentation and deceit</u>

10. Paragraphs 79 and 80 of the Motion state as follows:

"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 (sic) 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." (emphasis added)

11. An extract from the section on misrepresentation and fraud in Volume 31 (2003 Reissue) of *Halsbury's Laws of England* ("**Halsbury**") is at Exhibit 5. This extract was taken from Lexis Nexis online, which is updated monthly (albeit that the updates are inserted separately beneath each paragraph). Halsbury is a highly respected English legal text.

12. There are several different causes of action that may arise from a misrepresentation in English law, depending on the context. Perhaps the most common context is where Party A has made a false statement of fact to Party B and, on the basis of that misrepresentation, Party B has been induced to enter into a contract with Party A (see paragraph 701 of Volume 31 of Halsbury on page 1 of Exhibit 5). Liability in these circumstances can arise under the Misrepresentation Act 1967 and the innocent party can, in certain circumstances, rescind the contract which he has been induced to enter into in reliance on the misrepresentation.

13. A party can, however, be liable for a misrepresentation without there being any resulting contractual relationship between the representor and the representee. This is the case if it can be established that the representor has made either a negligent misrepresentation or a fraudulent misrepresentation.

*Negligent misrepresentation*

14. If a defendant makes a statement which is reasonably relied upon by a claimant in the way intended by the defendant, there may be an assumption of responsibility sufficient to give rise to liability for economic loss flowing from the reliance. Liability in such circumstances forms part of the tort of negligence, and is usually described as negligent misrepresentation or negligent misstatement. The section on negligence in Volume 78 (5th edition, 2010) of Halsbury is at Exhibit 6. The three essential elements of a claim in negligence are:

(a) the existence of a duty of care;

(b) breach of that duty;

(c) damage, caused by the breach, which is not so unforeseeable as to be too remote.

15. A key area for debate in the English courts has been the existence (or otherwise) of a duty of care not to make a negligent misrepresentation in any given situation. It is now clear that there is no need for a fiduciary or contractual relationship between

the claimant and the defendant. A summary of the law in this area is at paragraph 14 of Volume 78 of Halsbury (page 19 of Exhibit 6). The leading case in this area is the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (a copy of the judgment is at Exhibit 7). Lord Reid explained the position at page 486 of his speech as follows:

> "This passage makes it clear that Lord Haldane did not think that a duty to take care must be limited to cases of fiduciary relationship in the narrow sense of relationships which had been recognised by the Court of Chancery as being of a fiduciary character. He speaks of other special relationships, and I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. I say "ought to have known" because in questions of negligence we now apply the objective standard of what the reasonable man would have done.
>
> A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require." (emphasis added)

16. In the subsequent case of *Caparo Industries v Dickman* [1990] 2 AC 605, the House of Lords revisited the question of the duty of care (a copy of the judgment is at Exhibit 8). Their Lordships concluded that liability for economic loss due to negligent misrepresentation was confined to cases where the statement or advice had been given to a known recipient for a specific purpose of which the maker was aware and upon which the recipient had relied and acted to his detriment. At pages 617H to 618B, Lord Bridge stated the factors which would lead an English court to conclude that a duty of care existed:

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law

should impose a duty of a given scope upon the one party for the benefit of the other."

17. At pages 620H to 621G, he held:

> "The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it. The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J. to "liability in an indeterminate amount for an indeterminate time to an indeterminate class:" see *Ultramares Corporation v. Touche* (1931) 174 N.E. 441, 444; it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement. Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the "limit or control mechanism ... imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence" rested in the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the "proximity" between the plaintiff and the defendant, that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (e.g. in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind." (emphasis added)

*Fraudulent misrepresentation – liability in deceit*

18. A second way in which a misrepresentation can give rise to a claim in damages, in the absence of a resulting contractual relationship between claimant and defendant, is if the misrepresentation is made fraudulently. Fraudulent misrepresentation gives rise to a claim for deceit. A description of what is meant by "fraud" in these circumstances is found at paragraphs 756 and 757 of Volume 31 of Halsbury at page 37 of Exhibit 5. An outline of the cause of action for damages for deceit is at paragraphs 789 to 797 of Volume 31 of Halsbury (pages 61 to 68 of Exhibit 5). The constituent elements of a claim for deceit are set out at paragraph 790 of Halsbury:

> "790. Constituent elements of the claim for deceit.
>
> In any proceedings for deceit the burden is on the representee of alleging and (except in so far as any of them are either expressly or impliedly admitted before or at the trial) proving all of the following matters: (1) that the alleged representation consisted of something said, written or done which amounts in law to a representation; (2) that the defendant was the representor; (3) that the claimant was the representee; (4) that the representation was false; (5) inducement and materiality; (6) alteration of position; (7) fraud; and (8) damage. Of these matters, the first six are common to all forms of proceeding for misrepresentation. In proceedings for deceit, the concurrence of fraud and damage is essential if damages are to be recovered, and neither is sufficient without the other."

19. A more detailed description of the tort of deceit is set out in Chapter 18 of *Clerk & Lindsell on Torts* (19th Ed., 2006), another respected English legal textbook. A copy of that chapter is at Exhibit 9 and a copy of the fourth supplement to that chapter, bringing it up to date as at August 2009, is at Exhibit 10.

C. <u>Documents</u>

20. The Exhibits to this Affidavit are:

a) my CV (Exhibit 1);

b) copies of sections 214 and 215 of the Insolvency Act 1986, together with notes, taken from Volume 1 of *Sealy & Milman: Annotated Guide to the Insolvency Legislation* (13th Ed., 2010) (Exhibit 2);

c) a copy of section 10 of the Company Directors Disqualification Act 1986, taken from Volume 2 of Sealy & Milman (Exhibit 3);

d) section O3033 of *Tolley's Insolvency Law Service* (Exhibit 4);

e) extract from the section on misrepresentation and fraud in Volume 31 (2003 Reissue) of *Halsbury's Laws of England* (Exhibit 5);

f) the section on negligence in Volume 78 of *Halsbury's Laws of England* (5th edition, 2010) (Exhibit 6);

g) *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (Exhibit 7);

h) *Caparo Industries v Dickman* [1990] 2 AC 605 (Exhibit 8);

i) Chapter 18 of *Clerk & Lindsell on Torts* (19th Ed., 2006) (Exhibit 9); and

j) the Fourth Supplement to Chapter 18 of *Clerk & Lindsell on Torts*, bringing it up to date as at August 2009 (Exhibit 10).

21. All the facts alleged in the present affidavit are true to my personal knowledge.

AND I HAVE SIGNED:

Ben Valentin

NAME: BEN MATTHEW VALENTIN

SOLEMNLY DECLARED before me at
~~London~~, England, this 13 th day of October 2010

D. FLYNN

Solicitor of the Senior Courts of England and Wales

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