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 herein

Debtors

and

ERNST & YOUNG INC.,

Monitor

and

NPOWER COGEN LIMITED

Petitioner

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

TO THE HONOURABLE CLÉMENT GASCON J.S.C., SITTING IN COMMERCIAL DIVISION IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE DEBTORS RESPECTFULLY SUBMIT THE FOLLOWING:

*Unless otherwise indicated, all capitalized terms herein shall have the meaning attributed to them in the Motion for an Order Concerning the Status of the Post-Filing Supply Claim of NPower Cogen Limited and Related Relief dated September 24, 2010 (the "**Cogen Motion**") filed by NPower Cogen Limited ("**Cogen**") or in the Initial Order issued by this Court on April 17, 2009, as amended (the "**Initial Order**"). The term "**Abitibi**" shall refer to the Debtors (singularly or collectively as the context may require) and any reference to the "**CCAA**" shall refer to the version of the Creditors' Companies Arrangement Act R.S.C., 1985, c. C-36 in force prior to the amendments which came into force on September 18, 2009.*

I. OVERVIEW

1. The Cogen Motion seeks a superpriority payment of £9,447,548.00 from Abitibi (the "**Cogen Claim**") representing payments allegedly due "for energy supplied" between November 1, 2009 and February 2, 2010 by Cogen to Bridgewater Paper Company Limited ("**Bridgewater**" or "**BPCL**"), a United Kingdom ("**UK**") subsidiary of Abitibi-Consolidated Company of Canada ("**ACCC**"), itself a wholly-owned subsidiary of Abitibi Consolidated Inc. ("**ACI**"), in the months before Bridgewater was placed under Administration in the UK.

2. The Cogen Motion is noteworthy as much for what is said as what is omitted. In particular, the following key facts appear to have been left out of the Cogen Motion:

   - Cogen and Bridgewater management had openly discussed the consequences of ACI's proceedings under the CCAA, the difficulties associated with obtaining material financial assistance from Bridgewater's parent company in the circumstances and steps that could be taken to reduce Cogen's potential for exposure to Bridgewater should insolvency proceedings occur in the UK;

   - Cogen was aware of BPCL's difficult financial situation and in particular, it knew that (a) only a speedy restructuring of the *Energy Supply Contract* (the "**ESC**") and the implementation of vital energy cost savings would allow Bridgewater to remain in operation; (b) the pricing environment in Europe for Bridgewater's products had deteriorated in the third and especially fourth quarters of 2009; and (c) ACI had determined to decline any further financial support of Bridgewater in December, 2009, and accordingly, Cogen knew by December, 2009 that it was increasingly likely that some form of restructuring proceedings would ensue;

   - Cogen was aware that Ernst & Young LLP ("**EYI UK**"), the eventual Administrators and then-financial advisors to Bridgewater, were meeting with secured creditors in January, 2010 to determine whether they would provide support for a restructuring of Bridgewater and the ESC; and

   - Cogen was actively monitoring the dockets at the Court Office and was already aware of the Bridgewater filing on or shortly after January 25, 2010 and *prior* to the actual commencement of Administration on February 2, 2010.

3. In addition to contesting Cogen's proposition that its claim is entitled to benefit from an excluded, secured or superpriority status in Abitibi's CCAA proceedings, Abitibi also contests the quantum of the Cogen Claim on several counts:

   - Cogen has *already* claimed the full £9,477,548 from ACI in the claims process and been awarded this amount *in full* by the Claims Officer as an affected unsecured claim against ACI – this motion is, in effect, seeking a *double* claim for the *same amount* from the *same party* (but in this case on a "super-priority" basis);

   - Cogen is seeking to apply the April, 2009 CCAA rate of exchange stipulated in Abitibi's claims process to its claim for November, 2009-February, 2010 unpaid invoices despite the fact that the C$/£ exchange rate was materially lower in 2010 when the actual payment default occurred (on February 2, 2010, the Bank of Canada noon spot rate was 1£ = C$1.69);

   - While allegedly seeking compensation for "*energy supplied to BPCL under the ESC during the period from November 1, 2009 to February 2, 2010*" Cogen neglects to note that it was paid in FULL for energy consumed in November, 2009 and its invoices include fixed monthly charges which, while accruing under the ESC, are unrelated to actual energy supply or consumption totalling £5,567,339 million; and

   - While purportedly seeking payment as a "post-filing supplier" of Abitibi (even though Bridgewater is not and never was a filing entity under these CCAA proceedings), Cogen in fact received substantial post-ACI filing payments from Bridgewater in respect of the pre-ACI filing period which actual trade suppliers of the filing entities (as opposed to non-filing Bridgewater) did not receive. In fact, it is estimated that Cogen received payment of £5,673,170 in respect of the pre-April 17, 2009 obligations due or accruing due.

4. Far from having been disadvantaged by the April, 2009 decision to exclude Bridgewater from the filings made by other Abitibi-related entities in the United States and Canada, Cogen was by far the single largest beneficiary of the fact that Bridgewater continued to operate and was kept out of insolvency proceedings while it sought to restructure itself. Indeed, under the ESC, BPCL was contractually obligated to pay a monthly amount in respect of (a) energy and steam actually consumed during the month; plus (b) standing fees and other fixed charges which were levied monthly regardless of the amount of energy consumed and on a basis unrelated to actual energy use.

5. The fixed charges referenced above are mainly composed of "standing charges" which were designed to amortize the original construction cost of the Cogen power generation plant on Bridgewater's land under a contract which would have seen the plant transferred at expiry to BPCL for a relatively nominal charge absent default. These standing charges were in turn indexed in part to other items, some (such as the price of oil) unrelated to the cost of actual production. Based upon this indexation factor, the fixed charges, although originally anticipated to have been much lower (approximately £450,000 when the ESC was originally negotiated), varied between £1.0 - £1.5 million per month in recent months.

6. In the period after April 17, 2009, it is estimated that BPCL paid approximately £10.68 million in fixed charges unrelated to its actual operations (including approximately £9.38 million for the invoice periods between the months of April and November 2009 and approximately £1.3 millio n for the March fixed charges, which were paid in April). Had Bridgewater ceased operating in April, 2009, Cogen would have been denied this important source of income which, as noted, was not dependent upon actual production and in respect of which it incurred no incremental costs.

7. To the extent that it is possible to discern the confusing theories advanced by Cogen in its motion, it would appear to be founded, at least in part, on the alleged survival of a guarantee given by ACI of Bridgewater's obligations under the ESC (the "**Guarantee**") which Guarantee (i) was repudiated with the consent of the Monitor in full compliance with the Initial Order; (ii) although the repudiation was challenged by correspondence in August, 2009 by Cogen, it took no steps to challenge the repudiation by motion before this Court in over a year; (iii) has crystallized in any event with the liquidation of Bridgewater; and (iv) is the object of a claim voluntarily filed by Cogen and accepted by the Claims Officer on September 28, 2010 after a contested hearing.

8. The second alleged foundation of the Cogen Claim is the attempt to appropriate for its own benefit undertakings of support given to Bridgewater's Board and ultimately to its Administrators. In this regard, Cogen's claim is entirely derivative and is advanced without even an attempt at complying with the law in such matters (for the very good reason that Bridgewater is in Administration and its Administrators have every capacity and interest in enforcing valid rights on their own were there a shred of legitimacy to the alleged claims). The attempt to co-claim the sole benefit of this alleged *stipulation pour autrui* ignores, among other things, (a) the fact that the undertaking was not and cannot be construed as a stipulation for the benefit of Cogen (as opposed to Bridgewater and its directors); (b) the fact that the undertaking has been fully performed; and (c) the fact that Cogen is one of literally hundreds of creditors of Bridgewater and cannot in any manner, shape or form arrogate to itself the sole right to enforce or benefit from the undertaking in any event.

9. Finally, Cogen seeks to require a priority payment on the basis of an oppression remedy resting on what it alleges to be the wrongful conduct by ACI. In seeking to invoke the oppression remedy, Cogen ignores key facts and seeks to bootstrap itself into the CBCA by virtue of the Guarantee although virtually all of the acts complained

of as instances of oppression occurred *after* the Guarantee had been repudiated, are unrelated to any steps taken by ACI either as guarantor or as indirect shareholder of Bridgewater and in fact rely almost entirely upon a transaction undertaken with Monitor and Court approval that was done on notice to Cogen who chose not to oppose it. It is to be noted that the actual shareholder of BPCL is a Quebec corporation (ACCC) in respect of which the oppression remedy is not in any event applicable.

10. The transaction for the restructuring of Abitibi's European sale structure which was approved by this Court on November 10, 2009 had the effect of ensuring that all of Abitibi's post-filing sales and the resulting receivables were in the hands of entities under this Court's control. This transaction was financially neutral to Bridgewater whose inventory and receivables were already fully charged to the Term Lenders. In any event, said transaction cannot be made the object of a collateral attack by the medium of the oppression remedy.

II. BACKGROUND

The Bridgewater Group

11. Before entering Administration proceedings in the UK, BPCL and its subsidiaries (the "**Bridgewater Group**") were part of the larger AbitibiBowater Inc. group of companies. The core operations of the Bridgewater Group were the production of recycled newsprint for the UK and European markets and the collection of paper and recyclable wastes from the UK.

12. The Bridgewater Group was composed of BPCL, a direct subsidiary of ACCC (itself a direct subsidiary of ACI), and three subsidiaries, namely: (i) Abitibi Consolidated Europe ("**ACE**"), a Belgian entity through which sales were made by Abitibi to customers located in the UK and in certain European countries; (ii) Bridgewater Paper Leasing Ltd., an inactive tax vehicle; and (iii) Cheshire Recycling Limited ("**Recycling**"), a subsidiary involved in the collection of paper and other recyclable waste from across the UK used by BPCL in its operations.

13. The Bridgewater Group owned and operated, through BPCL, a newsprint mill situated in North Road Industrial Estate in Ellesmere Port, Cheshire (UK). ACE had offices in Brussels and Madrid.

14. The Bridgewater Group's critical internal suppliers included ACI, which supplied newsprint for sale to BPCL's UK and European customers, and Recycling, who supplied waste paper as the raw material for producing newsprint. The Bridgewater Group's critical external suppliers included Cogen, who supplied energy to the mill, as well as suppliers of chemicals used in the de-inking process and hauliers for the collection of waste paper and delivery of newsprint.

15. In lieu of direct bank financing, BPCL was funded by intercompany advances from its parent and, in return, granted guarantees of certain of its parent's indebtedness including the Term Loan and the Senior Secured Notes. The guarantees in favour of

these two secured credit facilities were similarly secured by fixed and floating charge security interests on, among other things, the inventory, accounts receivable and fixed assets of BPCL.

16. Prior to November, 2009, European sales of ACCC's Canadian plants were directed via ACI to BPCL whose receivables thus included its own sales plus the European sales of its parent. As is noted further below, this arrangement was altered in November 2009 in order to separate sales and collections from the CCAA-filed entities subject to DIP financing arrangements from the sales and collections made by BPCL of its own production.

17. By the end of 2009, the Bridgewater Group had been making gross losses over the past three and a half years and the forecast trading outlook remained challenging as a result of downward price pressure from customers and a number of upward cost pressures relating to energy prices, the cost of waste paper.

18. Having exhausted efforts at effecting a restructuring out of court or securing financing from third party sources, the Bridgewater Group entered into Administration proceedings in the UK on February 2, 2010 pursuant to a notice given to the Supreme Court of Judicature in London on January 28, 2010. Its operations ceased shortly thereafter following steps taken by Cogen to interrupt energy supplies to the operation. A copy of the Notice dated January 28, 2010 is attached as Exhibit 16 to the Cogen Motion. It is Cogen, not BPCL, that terminated the ESC by way of letter of termination attached as Exhibit JFG-11 to the Detailed Affidavit of Jean-François Guillot filed in support of the present Contestation.

<u>The Energy Supply Contract</u>

19. On August 3, 1998, National Power PLC ("**NP**") executed an agreement with BPCL (the "**ESC**", Exhibit 1 to the Cogen Motion) that included the building and operation of a CHP plant (the "**CHP Plant**") for the supply of electricity and steam to the BPCL mill. The ESC was for a period of fifteen years. It was envisaged that this contract would result in BPCL paying less than market rates for its electricity and steam.

20. Pursuant to the ESC, the CHP Plant was owned by Cogen but situated on lands that were owned by BPCL (the "**CHP Land**") and leased to Cogen for a nominal sum for the duration of the ESC. The lease of the land to Cogen also included a lease of the steam condensate pipeline that supplied steam from the CHP Plant to the mill.

21. Part of the CHP Land was charged as security granted under the Senior Secured Notes to Wells Fargo Bank, National Association, which was later replaced in its capacity as trustee and collateral trustee under the relevant indentures and agreements by U.S. Bank, National Association (the "**Senior Secured Noteholders**").

22. On February 22, 1999, ACI executed a document entitled *Parent Company Guarantee* (the "**Guarantee**", Exhibit 2 to the Cogen Motion) in which it agreed, among other

things, to indemnify NP against all losses that it may suffer as a result of BPCL's failure to live up to its obligations under the ESC.

23. On November 22, 2000 and May 26, 2005, respectively, the ESC and Guarantee were assigned by NP to Cogen.

24. Pursuant to the terms of the ESC, BPCL paid Cogen total energy costs in accordance with the contract tariff, which was based on a charge for steam and electricity and a standing charge related to the costs of the construction of the CHP plant. Steam charges were indexed to gas market prices, while electricity and the standing charge were indexed to a basket of gas, electricity, producer price index, gas oil and heavy fuel oil market prices.

25. It was unusual for BPCL to have indexed both the variable costs of production of the steam and gas it purchased and the payment in respect of the fixed initial costs of construction to the price of energy. At the time, this exposure had been hedged but that protection fell away with the insolvency of Enron in late 2001. The result was that BPCL's combined energy costs (fixed plus variable costs) were significantly higher than its competitors. The single biggest reason for the ultimate failure of BPCL was its fundamentally uncompetitive energy contract with Cogen.

26. In the years preceding the Bridgewater Group's Administration proceedings, this tariff resulted in extremely onerous energy charges on BPCL as the indexing of electricity and standing charge to market commodity prices resulted in significantly higher than market rates being paid by BPCL for the electricity supplied and the interest charged on CHP plan construction costs.

27. At peak commodity prices in 2008 and 2009, BPCL was incurring circa £2.2 million in energy costs per month. In addition to constituting the largest recurring supplier payment for the Bridgewater Group, this energy payment from BCPL to Cogen, which was significantly above market value, contributed directly to the gross losses incurred by the Bridgewater Group (see p. 195 of the Administrator's statement of proposals, Exhibit 11 to the Cogen Motion).

<u>Events Following the Abitibi Filing</u>

28. On April 17, 2009, ACI and ACCC filed for court protection under the CCAA. BPCL was not included in the list of entities that filed under the CCAA.

29. BPCL did not determine to file for Administration at the same time as its parent sought protection under the CCAA. Although 2008 had been a challenging year for BPCL, particularly due to the fact that its energy costs were heavily impacted by sharply increasing prices under the ESC relative to the market, the price environment for BPCL's products in 2009 was more favourable. Accordingly, BPCL was able to operate on an essentially cash neutral basis, requiring little by way of active financial assistance beyond the working capital that it accessed via existing arrangements between ACI and BPCL.

30. On April 22, 2009, Cogen sent BPCL a letter (Exhibit 8 to the Cogen Motion) noting the CCAA filing of ACI and that "*[w]e are concerned, therefore, that BPCL will be unable to pay our invoice dated 8 April 2009 on its due date (28 April) and will similarly be unable to pay our future invoices.*" The April 22 letter requested BPCL to confirm it would be able to pay Cogen's invoices, failing which Cogen would consider taking steps to terminate the ESC under the non-payment clause thereof and taking such other enforcement steps as Cogen may deem appropriate, including the commencement of insolvency proceedings against BPCL.

31. Had BPCL determined to file for Administration on April 17, 2009 coincident with the filing by its parent, it would have been required to give five days notice of such intent. It is estimated by Jean-François Guillot, who was Managing Director of Bridgewater at the time, that BPCL had a £5,673,170 approximate balance due and accruing due to Cogen as of April 22, 2009.

32. On April 23, 2009, BPCL responded to Cogen's April 22 letter (Exhibit 9 to the Cogen Motion), confirming its intention to make the payment for the invoice dated April 8, 2009, and its lack of intention to enter into insolvency proceedings. BPCL paid its March and April billings from Cogen although Abitibi's trade creditors were not so treated in respect of their pre-filing supplies. BPCL voluntarily took steps to reduce Cogen's potential exposure by eliminating the practice of forward hedging its gas purchases shortly afterwards, at some cost to its own operations in terms of greater exposure to price volatility.

33. Indeed, until November 2009 Cogen received payment in full of all of its billings, both for fixed charges related to the original cost of the plant construction (which had been fully paid by reason of the unforeseen impact of the indexing of the fixed charges to energy costs by this time) and for variable charges related to the actual cost of producing electricity and steam supplied to BPCL.

34. Abitibi has sought confirmation from Cogen in respect of the quantum received from March 2009, however Cogen has failed to provide this information to date. Nevertheless, it is estimated by Jean-François Guillot that £21,145,860 were paid to Cogen for the invoice period between April and November 2009, including a total of £9,379,573 in fixed charges and £11,766,287 in variable charges. In addition, Cogen also received a payment of £3,192,189 after April 17, 2009 for Bridgewater's March consumption, an amount that included an estimated £1.3 million in fixed charges.

According to these estimates, the total amount that would have been paid to Cogen for fixed charges unrelated to actual energy consumption after ACI filed for Court protection in Canada would therefore be approximately £10,68 million.

35. On July 7, 2009, ACI sent Cogen a *Notice of Repudiation* of the Guarantee (Exhibit 4 to the Cogen Motion). The Monitor fully consented to this repudiation and the Notice of Repudiation was sent after a period of two months of negotiations undertaken directly between Cogen and BPCL had failed to produce a viable restructuring proposal from Cogen.

36. On August 11, 2009, Cogen sent a letter to ACI's counsel disputing the validity of the repudiation of the ACI Guarantee (Exhibit 5 to the Cogen Motion). Other than writing a single letter and adding its lawyer to the Abitibi Service List, Cogen took no steps to challenge the repudiation and in fact filed a proof of claim for damages arising from such repudiation, which claim was determined by the Claims Officer on September 28, 2010, a copy of which determination is communicated as **Exhibit D-1**.

37. Following ACI's decision to repudiate the Guarantee, BPCL and Cogen resumed negotiations. During the months of July - August, 2009, Cogen and BPCL negotiated a tentative restructuring of the ESC on terms that would secure BPCL's long-term viability, getting to the point of exchanging a draft "Heads of Agreement" in August, 2009 (Exhibit 5 to the Cogen Motion).

38. The essence of the proposed restructuing of the ESC was a swap of the CHP Land for a lower energy cost (closer to actual market rates) for BPCL's plant to enable it to be competitive. However, both parties recognized that the CHP Land was charged to Abitibi's secured creditors (the Senior Secured Noteholders) and the secured creditors could not be expected to consent to a gratuitous surrender of their security while Abitibi's restructuring was still uncertain. Both parties understood that there was the likelihood of significant delay in obtaining consent. Delay was to the detriment of BPCL however, since the delay deferred the timing of the implementation of the reduction of the fixed charge portion of its energy costs by an estimated £1.2 million per month.

39. On November 10, 2009, this Court, after hearing Abitibi's *Motion for the Filing of an Additional Petitioner and for an Authorization to Enter into Transactions for the Restructuring of the Petitioners European Sales Structure* (the "**European Sale Structure Motion**") issued an order (the "**November 10 Order**") in which the Court, *inter alia*:

(a) authorized the addition of Abitibi-Consolidated UK Inc. ("**ACUK**") as a Petitioner to Abitibi's CCAA proceedings;

(b) authorized ACUK and ACI to enter into a *Deed of Amendment to Paper Supply Agreement and Assignment* with BPCL, pursuant to which BPCL assigned to ACUK the accounts receivables generated by the sale of ACI's products in Europe; and

(c) ordered that the receivables assigned pursuant to the transaction were to remain at all times subject to the liens created thereon in favour of the Term Lenders.

as appears from the European Sale Structure Motion and November 10 Order communicated as Exhibit 14 to the Cogen Motion.

40. On November 12, 2009, Cogen filed its original Proof of Claim (Exhibit 24 to the Cogen Motion) and on April 6, 2010, a Revised Proof of Claim (Exhibit 25 to the Cogen Motion).

41. By the end of 2009, the restructuring transaction contemplated by the draft Heads of Agreement could not be finalized, as noted by BPCL's Administrator in its initial report to creditors (Exhibit 11 to the Cogen Motion).

42. On February 2, 2010, BPCL entered into Administration proceedings in the UK and shortly thereafter ceased operations following Cogen's determination to interrupt energy supplies, thereby eliminating any prospect of a going-concern restructuring.

43. As BPCL's major stakeholder, Cogen was aware of BPCL's financial situation throughout 2009, up to the February 2010 commencement of Administration Proceedings in the UK. Cogen had retained counsel to address a potential proceeding and was monitoring the Court docket in respect of potential commencement of proceedings. Cogen had commenced its contingency planning, and its planning for the proposed acquisition of the BPCL Plant, which Cogen sought to use as a "peaking plant" as part of its own operations.

44. In addition, Exhibit 24 to the Cogen Motion is an apparently incomplete copy of the Proof of Claim filed by Cogen with the Monitor in respect of the repudiation of the Guarantee on November 12, 2009 (the "**November Proof of Claim**"). A complete copy of the November Proof of Claim dated November 11, 2009 is communicated as **Exhibit D-2**.

45. As appears from paragraph 10 of the complete copy of the November Proof of Claim, Cogen was then of the view that "*the probability of Cogen needing to call on the Guarantee is very high to 100%. BPCL's tenuous financial position is recognized by Abitibi itself throughout its motion materials filed in support of its Motion for Authorization to enter into Transactions for the Restructuring of the Petitioners' European Sale Structure*". Despite having sworn to these facts in its November Proof of Claim, Cogen contradictorily alleges today that it was reasonably expecting things to happen differently than as alleged at that time.

46. Despite being aware on November 11, 2009 of virtually *all* of the facts which are alleged in Cogen's Motion, save and except the actual fact of Administration having been filed in February, the November 12 Proof of Claim makes none of the allegations of oppression (beyond reserving Cogen's right to deny the validity of the repudiation of the guarantee on the grounds mentioned in its August 11, 2009 letter and repeated

therein) nor did Cogen make any contemporary allegations of direct undertakings or agreements of financial support of the sort now being attributed to the Petitioners in the Cogen Motion.

47. Cogen has filed a claim into the UK Proceedings in respect of supplies alleged to have been provided to BPCL ("**Cogen's UK Claim**"), a copy of which was communicated as Exhibit JFG-12 to the Detailed Affidavit of Jean-François Guillot. Cogen's UK Claim is made on an unsecured / no priority basis against Bridgewater only. The UK Claim does not include any allegations in respect of the wrongful trading, negligent or fraudulent misrepresentation or oppression allegations found in Cogen's Amended Claim in the CCAA Proceedings.

48. The UK Administrator has not commenced any claims against the BPCL Directors, or as against Abitibi on grounds outlined in the Cogen Claim.

III. GROUNDS FOR THIS MOTION

The Repudiation of the Guarantee

49. No serious issue can be raised regarding the effectiveness of the repudiation of the Guarantee. The Monitor consented to the repudiation before the notice of repudiation was sent to Cogen. There is no requirement stipulated in the Initial Order for the agreement of the contract counterparty as a condition precedent to any repudiation.

50. In addition, should Cogen be of the view that there was a defect in the repudiation, its remedy lay in bringing an application under the "come back" provisions of the Initial Order and, if necessary, to protect itself in the event its position was not upheld, by filing a claim. Cogen was well aware of this, as appears from Cogen's letter of August 11, 2009 (Exhibit 5 to the Cogen Motion), in which Cogen's counsel reserved Cogen's right "*to further object to the purported repudiation and to seek to have the issue determined by the Court*". Despite the foregoing, Cogen did not challenge the repudiation before this Court until it filed the Cogen Motion, over one year later.

51. Cogen has chosen to file a proof of claim in respect of the guarantee which proof of claim has now been adjudicated upon resulting in a final order of the Claim Officer from which neither party has taken an appeal. The allegation of survival of the Guarantee is thus *res judicata*.

52. Finally, since the Guarantee was repudiated, BPCL was placed into Administration proceedings in the UK in February, 2010, thereby crystallizing the claim of BPCL under the Guarantee in any event. The dispute, if any, is thus moot.

The Claims Procedure Order Applies

53. The Cogen claim fails within the definition of "Claim" as defined in the Claims Procedure Orders granted by this Court on August 26, 2009, January 18, 2010 and

February 23, 2010. In fact, Cogen filed two proofs of claim into the CCAA proceedings, and those claims have been accepted in respect of November 2009 to February 2010 invoices now in issue before the Court (see the Claims Officer's decision of September 28, 2010, Exhibit D-1).

Applicable Law Issues

54. Cogen seeks to rely on various jurisdictions and various legislation and common law, as it suits them, in pursuing the various allegations outlined in their Claim. For example, Cogen asks the Court to apply UK law in terms of Wrongful Trading under the UK *Insolvency Act* or negligent or fraudulent misrepresentation claims or third party beneficiaries to a contract. However, in light of the lack of oppression remedies under UK legislation, Cogen asks the Court to apply CBCA Oppression remedies as against the ultimate Abitibi parent thereby ignoring ACCC, an intervening Quebec Abitibi entity (presumably because Quebec civil law also does not provide for Oppression relief).

55. Cogen must "pick a jurisdiction"; they cannot "cherry pick" the jurisdiction that suits them and ask this Court to follow along applying federal, Ontario or foreign law as Cogen deems appropriate.

The Support Commitment

56. There is simply no basis for making a claim in ACI's CCAA proceedings for supplies of goods or services to BPCL, an entity which is not a Petitioner. Despite being a wholly-owned subsidiary of ACCC, itself an ACI subsidiary, BPCL was a separate and distinct corporation and Cogen was at all times well aware of that fact, having determined to enter into a long-term contract with BPCL with a distinct parent company guarantee. The financial assurances that were provided by ACI to BPCL's directors were limited in quantum and time.

57. Cogen neither sought nor did ACI give any assurances that ACI would be responsible for Cogen's accounts receivable from BPCL or any other party. To the contrary, Cogen received a very explicit disclaimer of such liability in the form of the repudiation of the Guarantee on July 7, 2009.

58. Cogen was not a party to any assurances given by ACI to BPCL or its Board and as a mere unsecured creditor of BPCL in its Administration proceedings has neither standing nor capacity to claim the benefit thereof. It is a matter of public record that ACI has agreed to provide funding to the Administrator to the extent of £2 million.

59. There is no basis for Cogen to pursue the derivative claim in respect of the financial assurances on behalf of BPCL, its directors or Administrator. The claim is simply not Cogen's to bring, under theories of Wrongful Trading, negligent or fraudulent misrepresentation, third party beneficiaries or otherwise.

<u>The Oppression Remedy</u>

60. The claim advanced under the rubric of the oppression remedy is said to arise from the post-filing actions of ACI on the theory that Cogen had the reasonable expectation that ACI and its directors and officers would not act in a manner oppressive or unfairly prejudicial to creditors of BPCL.

61. Although Cogen took the trouble to place itself on the Petitioners Service List for the CCAA Proceedings, they did not seek to bring any motion before the Court which supervised ACI's proceedings complaining of any allegedly oppressive conduct.

62. Under the rubric of "oppression" Cogen seeks to claim an award of damages not from the corporation with which it did business (i.e. BPCL), but its indirect parent (ACI) based on matters in no way made the subject of undertakings either in the ESC or the Guarantee. In so doing, the alleged "oppression" claim primarily duplicates matters that it raises elsewhere, including:

    (d) the alleged wrongful termination of the Guarantee;

    (e) the "stripping of assets" from BPCL which transaction was no such thing and was done by this Court's November 10 Order, on notice to Cogen and unchallenged by them (or by BPCL's Administrator) before or since; and

    (f) the non-payment of post ACI CCAA-filing amounts due from BPCL (including "take or pay" and unpaid supply invoices) which are either included in Cogen's claim under the Guarantee or would be included in its guaranty claim if Cogen's position - which it has raised but not pursued since August, 2009 - were correct.

63. In short, without conceding that an oppression claim can be advanced in CCAA proceedings in the first place, this oppression claim effectively adds nothing to Cogen's central claim that the repudiation of the Guarantee is ineffective apart from a baseless collateral attack on this Court's November 10 Order.

64. In fact, Cogen's "reasonable expectations" regarding ACI's conduct vis-à-vis creditors of BPCL was at all times contradicted by the fact that:

    (g) It knew of ACI's CCAA filing at or about the time it occurred on April 17, 2009;

    (h) On April 22, 2009 it wrote to BPCL indicating that it was aware that ACI "*may no longer provide funds for the payment of our invoices*";

    (i) Cogen's dealings were directly with BPCL at all material times and Cogen neither sought nor received direct assurances or guarantees from ACI regarding its future dealings with BPCL;

(j) Cogen neither received nor was made a party to any financial assurances given by ACI to BPCL and there is no evidence that ACI has failed to abide by any such assurance (or that the Administrator of BPCL has made any such complaint);

(k) Cogen received ACI's repudiation of its guarantee obligations regarding BPCL in July, 2009 and was aware thereafter that ACI had repudiated any obligation to make Cogen whole in relation to its dealings with BPCL;

(l) Cogen voluntarily engaged in restructuring negotiations with management and financial advisors of BPCL which reached the stage of a tentative Heads of Agreement. It was the failure of such negotiations shortly before BPCL determined to file for Administration in February, 2010 coupled with the significantly over-market cost of Cogen's supply contract with BPCL which were the primary causes cited by the Administrator for the filing by BPCL in February, 2010;

(m) As a key stakeholder of BPCL, Cogen was aware of BPCL's financial situation and the possibility that restructuring proceedings may be required, particularly if the ESC was unable to be restructured;

(n) Cogen received payment in full of its invoices (at the above-market prices noted by the Administrator) from BPCL long past the insolvency of ACI (including those pre-dating ACI's filing for CCAA protection on April 17, 2009 - unlike ACI's direct creditors who received no such payment) and accordingly was in a markedly better position on February 2, 2010 than it would have been in on April 18, 2009 had operations ceased at that time; and

(o) Cogen had commenced contingency planning in advance of any formal decision to commence administration proceedings.

65. The facts regarding "reasonable expectations" above apply equally to dispute any suggestion that Cogen "relied upon" or was "induced" by alleged financial assurances or representations by ACI or BPCL.

66. There is no evidence that ACI or any officers of ACI (acting in such capacity) may have "induced" Cogen to continue to supply electricity and steam, nor is there any evidence that Cogen had any contractual rights in its contract with BPCL that it waived or otherwise altered on the strength of any alleged representations. The termination of the ESC, which occurred six months after repudiation of the Guarantee, was for non-payment of invoices and the filing for Administration by BPCL - defaults that did not occur until 2010.

67. To the contrary, from and after July, 2009, Cogen had a clear and unambiguous statement that ACI disclaimed responsibility for the obligations of BPCL. Cogen can have had no reasonable expectation that ACI would be responsible for the very things that it said it would not.

68. The attempt to include an allegation relating to "stripping" of assets from BPCL as a further instance of "oppressive" conduct is nonsensical. The transaction in question – involving the transfer of assets subject to the security of the Term Lenders – was specifically approved by the CCAA Court on notice to the Service List including Cogen. BPCL – who is in Administration and has its own representatives – has made no such complaint. Cogen cannot seek to launch a derivative collateral challenge to the Court's approval of that transaction by lumping it into a catch-all "oppression" application, still less a disguised derivative action on behalf of BPCL for whom Cogen does not speak.

69. Furthermore, as the Administrator notes, the assets affected were all subject to the Term Lender's security. Conspicuously absent from the Cogen claim is any allegation – still less any evidence – that the transfer of the assets from BPCL made any difference whatsoever to the position of Cogen as unsecured creditor of BPCL.

<u>Quantum of Priority Claim Sought</u>

70. The quantum alleged to be outstanding in respect of the November 2009 to February 2010 timeframe, which Cogen seeks to be paid on a priority basis is denied entirely. In any event the amount sought in respect of any potential priority claim is inflated in that:

(a) Cogen seeks amounts for standing charges and fixed charges from November 2009 to February 2010;

(b) at best, actual net cost to Cogen of actual energy consumed by BPCL during the November 2009 to February 8, 2010 timeframe would be chargeable under a priority type claim;

(c) Cogen seeks hedging costs in November 2009; notwithstanding the hedge agreement having been terminated months earlier; and

(d) Cogen fails to set off the additional amounts earned by Cogen in respect of pre-filing amounts paid prior to Abitibi's CCAA proceedings and standing and fixed charges paid to Cogen during the March to October 2009 timeframe.

IV. ORDERS SOUGHT

71. Abitibi respectfully submits that the Cogen Motion should be dismissed with costs.

72. The present contestation is well founded in fact and in law.

WHEREFORE, MAY THIS COURT:

[1] **DISMISS** the *Motion for an Order Concerning the Status of the Post-Filing Supply Claim of NPower Cogen Limited and Related Relief* dated September 24, 2010.

WITH COSTS.

Montreal, October 27, 2010

Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP
Attorneys for the Petitioners

AFFIDAVIT

I, the undersigned, Allen Dea, having my principal place of business at Suite 800, 1155 Metcalfe Street, Montréal, Quebec, H3B 5H2 solemnly declare the following:

1. I am the Vice-President and Treasurer of AbitibiBowater Inc.;

2. All the facts alleged in the *Contestation of the Motion for the Issuance of an Order to Provide the Financial Information on Certain Petitioners* are true.

AND I HAVE SIGNED

ALLEN DEA

Solemnly declared before me at Montréal, on the 27th day of October, 2010

Danielle Beauchesne

Notary Public

Commissioner of Oaths
Districts of Longueuil and **Montréal**
 # 142 518

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

N°. 500-11-036133-094

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

In the matter of Plan of Compromise or Arrangement of:

ABITIBIBOWATER INC. *& al*
Petitioners

- and -

ERNST & YOUNG INC.
Monitor

- and -

NPOWER COGEN LIMITED
Petitioner

BS0350 n/dos.: 041053-1170

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

ORIGINAL

Me Guy P. Martel (514) 397-3163
Fax : (514) 397-3493

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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., et al.

Debtors

and

ERNST & YOUNG INC.,

Monitor

and

NPOWER COGEN LIMITED

Petitioner

LIST OF EXHIBITS

EXHIBITS:	DESCRIPTION:	TAB:
Exhibit D-1:	Copy of the determination of Cogen's claim dated September 28, 2010	1
Exhibit D-2:	Copy of Cogen's November Proof of Claim dated November 11, 2010	2

MONTREAL, October 27, 2010

Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP
Attorneys for Petitioners

#10610995 v1

EXHIBIT D-1

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Woods

The Honourable Joseph R. Nuss, Q.C.
Direct line: (514) 982-5010
E-mail: jnuss@woods.qc.ca

BY E-MAIL

Montreal, Quebec, September 28, 2010

Me Christopher W. Besant and
Me Lydia Salvi
Baker & McKenzie LLP
Brookfield Place, Suite 2100
181 Bay Street, P.O. Box 874
Toronto, ON M5J 2T3

Me Sean F. Dunphy and
Me Elizabeth Pillon
Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Abitibi-Consolidated Inc.
1155 Metcalfe bureau 800
Montreal, QC H3B 5H2
Attention: Me Sophie Rossignol

NPower Cogen Limited
Windmill Hill Business Park
Whitehill Way
Swindon, Wiltshire UK 5N5 6PB
Attention: Mr. Phillip Piddington

Ernst & Young Inc.
800 René-Lévesque Blvd. West, Suite 1900
Montreal, QC H3B 1X9
Attention: Mr. Martin Daigneault

Re: The Proof of Claim filed by NPower Cogen Limited against Abitibi-Consolidated Inc.
Claim Reference: 4311
In the Matter of the Plan of Compromise or Arrangement of Abitibi Bowater Inc. *et al.*
Superior Court, Province of Quebec, District of Montreal, No. 500-11-036133-094 (the "**Court**")

Please find enclosed my Determination in the above-captioned matter.

Yours truly,

WOODS LLP

Joseph R. Nuss
Claims Officer

JHN/jh

Encl.

cc. Me Martin H. Scheim (*Fishman Flanz Meland Paquin LLP*)

Re: The Proof of Claim filed by NPower Cogen Limited against Abitibi-Consolidated Inc. Claim Reference: 4311

and

The Notice of Dispute of NPower Cogen Limited, dated June 29, 2010, of the Notice of Revision or Disallowance, dated June 16, 2010, issued by Ernst & Young Inc. in its capacity as Court-appointed monitor of Abitibi-Consolidated Inc. and Bowater Canadian Forest Products Inc., *et al.*

In the Matter of the Plan of Compromise or Arrangement of AbitibiBowater Inc. and Abitibi-Consolidated Inc. *et al.* Superior Court, Province of Quebec, District of Montreal, no. 500-11-036133-094

DETERMINATION
(September 28, 2010)

Joseph R. Nuss
Claims Officer

I. The Context

1. Bridgewater Paper Company Limited ("**BPCL**"), a subsidiary of Abitibi-Consolidated Inc. ("**ACI**") entered into a contract dated August 3, 1998 with National Power PLC[1], a predecessor of NPower Cogen Limited ("**Cogen**"). Both BPCL and Cogen are based in the United Kingdom (U.K.). The contract is referred to as the Energy Supply Contract ("**ESC**") and provides that Cogen would supply electricity and steam to BPCL generated from a power plant ("**Plant**") which Cogen was to build at the site of BPCL's paper mill in the U.K.;

2. ACI guaranteed the fulfillment of the obligations of BPCL by a document entitled Parent Company Guarantee ("**Guarantee**") dated February 22, 1999;

1 The name of the company was later changed to International Power PLC

3. On April 17, 2009, Gascon J. of the Superior Court, District of Montreal, issued an Initial Order[2] granting protection under the *Companies Creditors Arrangement Act* (CCAA) [3] to ACI and other companies of the AbitibiBowater group of companies. BPCL is not amongst the petitioners and is not included in the Order;

4. By letter dated July 7, 2009, ACI informed Cogen that it was repudiating the Guarantee;

5. By letter dated August 11, 2009, Cogen objected to the repudiation;

6. Cogen filed a Proof of Claim dated November 12, 2009 in the amount of £64,882.861;

7. On February 8, 2010, the ESC was terminated due to the insolvency of BPCL and its failure to make required payments to Cogen in the previous (approximately) three (3) months. BPCL, because of its insolvency, had entered Administration in the U.K. on February 2, 2010 pursuant to the *Insolvency Act 1986*;

8. On April 6, 2010, Cogen filed a revised and updated Proof of Claim in the amount of £70,160,658[4];

9. The monitor Ernst & Young Inc. ("**Monitor**") issued a Notice of Revision or Disallowance ("**Notice of Revision**") dated June 16, 2010. In this Notice of Revision, the Monitor disallowed the updated Claim in its entirety pending its being satisfied that an assignment, of the Guarantee to Cogen was valid, which it expressed in these terms:

> We have reviewed your April claim and are conditionally revising and otherwise disallowing your April claim for the following reasons. Please note until the conditions referenced in paragraph 4 below have been satisfied to the satisfaction of the Monitor, the April claim shall be considered as being disallowed in its entirety.
>
> (...)
>
> 4. No evidence has been tendered to establish (i) how International Power plc came to be the holder of the Guarantee as alleged; and (ii) the means by which ACI is alleged to have consented to this further assignment which is not contemplated by the provisions of Clause 9 referred to above (the Clause being restricted to a single assignment to a single named company). *We therefore require satisfactory evidence that International Power plc was the valid holder of the Guarantee at the time of the assignment to Cogen on May 26, 2005 and that ACI explicitly consented to the assignment thereof since Clause (does not provide the claimed authority for such assignment.*

---

2 Superior Court, District of Montreal, no. 500-11-036133-094

3 R.S.C. 1985 c. C-36

4 This amounts to CDN$131,838,892 according to the established rate of conversion (1.8791).

10. Subject to the validity of the assignment of the Guarantee to Cogen, the Claim would be revised and allowed in the amount of CDN$101,916,948. In this regard, the Notice of Revision issued by the Monitor reads in part:

> The Monitor has reviewed the portion of the April Claim regarding the indebtedness of the BPCL to Cogen under the ESC and the Guarantee as recited in paragraphs 31-35 of the April Claim. Subject to proof of the validity of the Guarantee as noted above, the Monitor is prepared to revise the April Claim and allow it in part in the amount of CND$101,916,948 for the following reasons:
>
> (...)

11. Cogen filed a Notice of Dispute dated June 29, 2010 contesting the Notice of Revision issued by the Monitor;

12. The Monitor has since June 29, 2010, satisfied itself as to the validity of the assignment of the Guarantee to Cogen. Consequently it agrees to the modification of the Notice of Revision to establish the Proof of Claim at CDN$101,916,948;

13. The hearing before me took place on August 26, 2010;

II. ANALYSIS

14. It is common ground that I have two (2) issues to determine:

    1. Whether the revised amount of the Proof of Claim should be increased by £1,223,551 claimed by Cogen under the section in the ESC described by the parties as "Take or Pay" and;

    2. Whether the amount of the Transfer Charge provided by the ESC should be increased by £14,700,000 (or some other amount), which was deducted by the Monitor as representing the value of the Plant which remains the property of Cogen.

Take or Pay

15. The ESC provides that BPCL must, each year, take and pay for a stipulated minimum quantity of steam (770,000 Tonnes) and if it does not do so, it must nonetheless pay for that minimum quantity. The yearly amount is calculated from June 1 of a given year to May 31 of the subsequent year;

16. Cogen has calculated that as at February 8, 2010, the date on which the ESC was terminated, the minimum amount which BPCL should have paid on a pro rata basis up to that date was not attained. The payments were £1,223,551 short of that pro rated amount. Thus, it submits the amount of the Revised Claim should be increased by £1,223,551;

17. The Monitor disallowed that part of Cogen's Claim for the following reason:

> 9. (b) With respect to the take or pay liability, the amount of £1,223,551, which represents the 2009/2010 liability, has been disallowed on the basis that any claim for unpaid steam "take or pay" can only arise as at the anniversary of the CHP Phase Commencement Date (June 1, 2000) or June 1, 2010.

18. ACI accepts that a consequence its repudiation of the Guarantee is that there is to be an assessment of the damages resulting therefrom incurred by Cogen. It contends however that the entire year commencing June 1, 2009 had not elapsed and therefore no minimum amount is due;

19. The insolvency of BPCL and its failure to make monthly payments to Cogen from December 2009, and its insolvency, brought about the termination of the ESC. This resulted in the impossibility of the contract running for the entire year ending May 31, 2010. ACI was obliged under the Guarantee to make good the obligation of BPCL to pay the minimum amount. Furthermore, BPCL had not attained the minimum in any of the previous four (4) years and the Monitor accepted the Claim for those years. Establishing the damages for this item, which flow from the repudiation, on a pro rata basis, is fair and reasonable in these circumstances. The accuracy of the arithmetical calculation whereby the shortfall, on a pro rata basis, is established at £1,223,551 is not in dispute;

20. I conclude that the Claim of Cogen for this item (Take or Pay) should be allowed in the amount of £1,223,551, which at the established rate of conversion (1.8791), amounts to CDN$2,299,174.68 (hereafter rounded to CDN$2,299,174);

<u>The Transfer Charge</u>

21. The ESC provides that if it is terminated prior to the fifteen (15) year term, a stipulated amount, depending on the cause of termination and the time elapsed since the beginning of term, is to be paid by BPCL to Cogen. It is common ground that, according to the provisions of the ESC, the amount of the Transfer Charge is £49,633,937;

22. The ESC also provides that upon payment of the stipulated amount, the Plant is transferred, for a nominal amount, to BPCL or one of its affiliates;

23. The Monitor accepts that an amount for this item is due under the Guarantee. However, it evaluates it at £34,933,937 because it deducts £14,700,000 on the basis that it is the value of the Plant which remains the property of Cogen;

24. It expresses the reason for the disallowance in the Notice of Revision as follows:

> "The amount of £14,700,000 has been disallowed on the basis that this amount represents an estimate of the value of the heat and power station that is being retained by Cogen".

25. Cogen submits that the ESC does not provide for any deductions for the value of the Plant from the amount set out as the Transfer Charge, and that it has not received and will never receive the £49,633,937. Furthermore, even if the payment where made, the Plant would not be transferred to ACI, the guarantor. If it where paid by BPCL, it would be transferred to the latter;

26. Cogen submits, subsidiarily, that if a deduction is to be made, it should not be in the amount of £14,700,000 but rather for approximately £1,000,000;

27. The parties, as mentioned above, agree that I am to determine the damages incurred by Cogen resulting from the repudiation;

28. I conclude that since Cogen will remain the owner of the Plant, it is fair and reasonable in assessing the value of the Guarantee, and in particular in assessing Cogen's damages with respect to the non-payment of the Transfer Charge by BPCL to deduct the value of the Plant, from the amount of the Transfer Charge as established in the ESC (£49,633,937);

What is the value of the Plant?

29. The parties agree that the value of the Plant is determined by the amount of revenue generated from its operation. They also agree that the treatment given to the availability of the free allocation of carbon credits ("**Carbon Credits**") is a crucial element in establishing the value of the Plant;

30. Carbon Credits are now available and will be available until 2012. It appears that without Carbon Credits, the operation of the Plant cannot be profitable. The system of Carbon Credits and their attribution is determined by the European Union and implemented by the Member States;

31. The Plant produced both steam and electricity but since there will no requirement for steam because the BPCL paper mill is not in operation, it will only be producing electricity for which no Carbon Credits, according to Cogen's contention, will be available after 2012;

32. Cogen also submits that the capacity of the Plant to produce electricity is of no value unless it can be transmitted to the U.K. National Grid System. This was previously possible because of an agreement, called a connection agreement, between BPCL and the National Grid System authorities. Due to the insolvency of BPCL, that agreement is now in the hands of the Administrator in the U.K. who is putting it up for auction as part of a bundle of BPCL assets;

33. A representative of Cogen, Mr. Kevin Ansell, its Head of Asset Management, testified at the hearing that it will bid for the rights under the connection agreement but only up to a certain amount, and he is not certain that it will be successful. He estimates the cost to obtain the agreement at between £2,000,000 and £2,500,000;

34. Cogen contends that the value of the Plant is approximately £1,000,000 if a connection agreement is obtained, based on the following assumptions:

1. There will be no Carbon Credits available after 2012 and the Plant will not be able to operate at a profit after that date;

2. The base value of the Plant is £3,263,000. Only projected revenues for 2011 and 2012 are taken into account for establishing this base value;

3. The cost of acquiring the connection agreement to transmit electricity to the National Grid System will be between £2,000,000 and £2,500,000;

Thus, according to Cogen, the value of the Plant is approximately £1,000,000;

35. ACI contends that the value of the Plant is £14,700,000 based on the following assumptions:

1. Unlike Cogen, it takes into account revenue for 2009 and anticipated revenues for 2010, 2011 and 2012. It arrives at a base value[5] of £6,000,000;

2. The second assumption of ACI is that Carbon Credits will be available after 2012. According to its calculation if there where certainty as to the availability of Carbon Credits after 2012, the Plant would be worth £20,500,000. However, because of the uncertainty as to that occurring, a probability factor has been attributed and the value of the Plant is set at £14,700,000;

36. Base value is the value of the Plant without consideration given to the availability of Carbon Credits after 2012, which if obtained would give the Plant additional value. The difference in base value between ACI (£3,263,000) and Cogen (£6,000,000) is the revenue for the years 2009 and 2010 amounting to £2,737,000;

37. ACI contends that it is proper to take into account the revenues for 2009 and 2010 because the assessment of the value of the Plant and the liability under the Guarantee is, in its view, to be made as at the date of the repudiation of the Guarantee, namely July 7, 2009. As at that date, it was not known that the ESC agreement would be terminated in February 2010 and that BPCL would be in the hands of an Administrator because of its insolvency;

38. I must first decide as at what date the value of the Plant is to be assessed. Is it as at the date of the letter of repudiation on July 7, 2009 or the date of the termination of the ESC on February 8, 2010, at which date BPCL had already entered Administration;

39. The parties agree that, without taking into consideration the revenues for 2009 and 2010, and adding them to the revenues for 2011 and 2012, the base value of the Plant is £3,263,000. The parties also agree that if 2009 and 2010 revenues are taken into consideration, along with 2011 and 2012 revenues, the base value is £6,000,000;

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5 This is referred to, at times in the documents, as the "base case".

40. The second matter I must determine is whether I should assess any value to the possibility of Carbon Credits being available after 2012 and if so, what amount should be attributed and added to the base value;

41. Thirdly, I am to assess what would be the cost for Cogen to acquire the connection agreement;

The date for assessing the value of the Plant

42. The amount of the Transfer Charge payable on the termination of the ESC diminishes progressively throughout the 15 year term of the contract until, at the end, no amount is due. Thus, in Cogen's Proof of Claim dated November 12, 2009, in which April 17, 2009[6] was taken as the date for calculating the amount of the Transfer Charge, Cogen claimed £51,168,669[7]. In the updated Proof of Claim dated April 6, 2010, Cogen calculated the Transfer Charge as at February 8, 2010 (the termination of the ESC) and claimed £49,633,937[8];

43. The Monitor's Notice of Revision deals with Cogen's April 6, 2010 Proof of Claim and states that it accepts the mathematical accuracy of the calculation of the Transfer Charge in the amount of £49,633,937;

44. This amount being the Transfer Charge on February 8, 2010, it follows that deductions, if there be any, must also be calculated as at that date. The deduction for the value of the Plant, therefore, is to be based on the value of the Plant on February 8, 2010, when the ESC was terminated and BCPL had just entered into Administration under the U.K. Insolvency Act. As at that date, the revenues for 2009 and 2010 should not be taken into account and I exclude them from the calculation of the base value because 2009 revenue is a matter of the past and in 2010 the Plant is not in operation as of February 8 of that year;

45. I thus conclude that the base value of the Plant is £3,263,000, composed of the revenue calculation for 2011 and 2012;

The Carbon Credits

46. It is common ground that the availability of Carbon Credits is crucial to determining whether the base value of the Plant should be increased, if so, the amount would depend on the degree of likelihood that they would be granted after 2012;

47. Cogen submits that it is a certainty that the Carbon Credits will not be available after 2012. It relies heavily on a discussion paper, prepared by an Austrian government agency, circulated amongst the members of the European Commission ("**Discussion Paper**") in which allocation rules, which would apply to the Member States of the European Union after 2012, are discussed.

---

6 The intial order of Gascon, J.
7 Between the 8th and 9th anniversary
8 Between the 9th and 10th anniversary

It reads, in part:

ENVIRONMENT
AGENCY AUSTRIA umwelt*bundesamt*

version 3.0 of 20.07.2010

Discussion paper

Allocation rules – EU ETS post 2012

Disclaimer

The views expressed in this paper represent only the views of the authors and not those of the European Commission. This discussion paper is intended to stimulate the discussion on allocation rules with Member States and can by no means be regarded as a final document

(Emphasis in original text, my underlining)

1 INTRODUCTION

The aim of this discussion paper is to outline the allocation rules to be applied by Competent Authorities to calculate the final total annual allocation for installations covered by the EU ETS.

The discussion paper has been elaborated by Umweltbundesamt GmbH (Austria) working in close contact with DG Climate Action on these issues. This discussion paper is intended to stimulate the discussion on allocation rules with Member States, to support pilot studies on allocation by Member States, to prepare for the legal text and to invite for contribution of proven best practices from earlier allocation exercises.

(My underlining)

48. At paragraph 3.3, the discussion paper states:

3.3 Eligibility for free allocation

The CA will have to assess whether free allocation can be granted

Installations only producing electricity are not eligible for free allocation, neither are installations for the capture of CO_2, pipelines for transport of CO_2 and CO_2 storage sites. (Footnotes 4, 5, 6 in original text have been omitted)

Installations producing heat – whether or not the installation is classified as "electricity generator" – are eligible for free allocation for the amount of heat produced to the extent it is used for purposes listed in the definition of "measureable heat (see section 4.4). For the exact calculation of the free allocation each installation has to be classified either as electricity generator pursuant to Article 3(u) of the revised EU ETS Directive or as non-electricity generator. The Commission's "Guidance paper to identify electricity generators" of 18 March 2010 is to be used for this purpose.

The eligibility for free allocation pursuant to Article 10c is outside the scope of this discussion paper.

In some cases the CA will come to a final decision only after detailed information such as from the baseline data collection has been provided by the operator of the installation.

(My underlining)

49. Cogen submits that the Plant would only be producing electricity, and does not fall within the exception mentioned in the Discussion Paper, hence it will not be receiving Carbon Credits;

50. A report by Energy Link in November 2008 prepared at the joint request of Cogen and BPCL entitled "Profitability of an Embedded CHP Facility at Bridgewater Paper" was referred to by both parties. The report mentions that it is likely that the Plant would not obtain free allocation of carbon allowances. Under the heading "Summary and Conclusions", it states:

5. Summary and Conclusions

5.1 Executive Summary

The analysis suggests that the profitability of the facility will be significantly different from 2013 onwards compared with the years prior to 2012. Up to and including 2012 the facility is likely to be able to make an operating profit, subject to operating costs being reduced as outlined in the technical analysis section, However, the bulk of this operating profit, and around two third of revenue, sources from sales receipts from unused carbon credits, resulting from significantly reduced load factors.

As a result of proposed changes to the EU ETS from 2013, it is likely that the facility will obtain no free allocation of carbon allowances. This will both reduce revenue from the sale of unused credits, and increase operating costs. It seems unlikely, without fundamental market change, that the facility will be able to make a material operating profit at this stage. The residual value of the facility from 2013 may therefore prudently be taken as the resale value of the major plant items in the second hand market.

(My underlining)

51. Mr. Ansell affirmed that he is familiar with the issue and the discussions surrounding the availability of Carbon Credits and that he has seen nothing that would indicate that they would be available after 2012 and he pointed in particular to the Discussion Paper;

52. ACI contends that there is a possibility for obtaining Carbon Credits after 2012. It does not however refer to any supporting material. Mr. Greg Adams, C.A., a Senior Vice President of the Monitor, stated at the hearing that he was informed by his colleagues in London of that possibility but was not aware of the underlying basis which leads to that opinion;

53. If the availability of Carbon Credits after 2012 where a certainty, ACI would value the Plant at £20,500,000. Since the base value in its calculation is £6,000,000, the additional value attributed to the certain availability of Carbon Credits is £14,500,000;

54. However, ACI does not regard the availability as a certainty and therefore it has assessed a probability factor which reduces the additional value for the availability of Carbon Credits to £8,700,000. This latter amount when added to its base value of £6,000,000 gives ACI the £14,700,000 which the Monitor deducts from the Transfer Charge as representing the value of the Plant;

55. I find that there is a more solid and convincing basis for the assumption of Cogen that there will be no Carbon Credits after 2012 than that advanced by ACI that they will be available. However, the final decision has not yet been made, the directive of the EU Commission has not been issued and 2013 is more than two (2) years away. It appears from the Discussion Paper that the issue is still open for discussion. Cogen's view of the matter accords absolute certainty to the outcome, and that is not the case;

56. In the absence of a final decision or directive by the EU authorities, I would attach a relatively modest value to the possibility that further discussion and debate over the next two (2) years would lead to the availability of Carbon Credits after 2012;

57. ACI, in estimating the value of the Plant at £14,700,000, added £8,700,000, for what it considered the probability of Carbon Credits being available, to its base value of £6,000,000. I do not consider the availability of Carbon Credits after 2012 as a probability but rather as a modest possibility;

58. I assess the possibility of the availability of Carbon Credits after 2012 at 20%;

59. I conclude that £2,900,000 (being 20% of £14,500,000) representing the possible availability of Carbon Credits, should be added to the base value of £3,263,000;

The cost for obtaining the connection agreement

60. As mentioned above, the connection agreement is necessary in order to transmit electricity from the Plant to the National Grid System. The Administrator of BPCL has put it up for auction as part

of a bundle which also includes some land. Cogen will attempt to obtain the connection agreement either as part of the bundle or in some other way. There is no way of knowing with certainty what it would cost. Mr. Ansell did mention in his testimony that Cogen is willing to go up to a certain amount. Although he had no way of knowing whether it could be acquired for that amount, he estimates the cost at between £2,000,000 and £2,500,000;

61. Thus, in the absence of other evidence, I attribute £2,250,000 (the midway point) for the cost of obtaining the connection agreement;

Summary of Conclusions Regarding the Transfer Charge

62.	a.	The value of the Plant as at February 8, 2010 is to be deducted from the Transfer Charge of £49,633,937	
	b.	The base value of the Plant consists of the revenues for 2011 and 2012 and amounts to:	£3,263,000
	c.	The possibility of Carbon Credits being available after 2012 is assessed at 20% (of £14,500,000) which provides an added value to the Plant in the amount of:	£2,900,000
	d.	An amount representing the cost of acquiring a connection agreement is deducted from the value of the Plant and is fixed at:	(£2,250,000)
		TOTAL VALUE:	£3,913,000

63. Thus, the deduction applied by the Monitor in its Notice of Revision is reduced from £14,700,000 to £3,913,000;

64. I conclude that the claim of Cogen for this item (Transfer Charge) should be allowed in the amount of £10,787,000 (£14,700,000 – £3,913,000) which, at the established rate of conversion (1.8791), amounts to CDN$20,269,851;

III. CONCLUSIONS

65. Cogen's contestation will be allowed in part and an additional amount of CDN$2,299,174 for the Take or Pay claim plus an additional amount of CDN$20,269,851 for the Transfer Charge claim shall be added to the CDN$101,916,948 accepted by the Monitor to establish the total amount of the Revised Proof of Claim at CDN$124,485,973.

FOR THE ABOVE REASONS:

66. NPower Cogen Limited's Notice of Dispute dated June 29, 2010 of the Monitor's Notice of Revision or Disallowance dated June 16, 2010 is allowed in part;

67. The said Notice of Revision or Disallowance of the Monitor dated June 16, 2010 is modified and the Revised Proof of Claim of NPower Cogen Limited against Abitibi-Consolidated Inc. is determined to be the amount of CDN$124,485,973.

Montreal, Quebec, September 28, 2010

Joseph R. Nuss
Claims Officer

Christopher W. Besant and Lydia Salvi
(Baker & McKenzie LLP)
for NPower Cogen Limited

Sean F. Dunphy and Elizabeth Pillon
(Stikeman Elliott LLP)
for Abitibi-Consolidated Inc.

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

N°. 500-11-036133-094

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

In the matter of Plan of Compromise or Arrangement of:

ABITIBIBOWATER INC. *& al*
Petitioners

- and -
ERNST & YOUNG INC.
Monitor

- and -
NPOWER COGEN LIMITED
Petitioner

BS0350 **n/dos.:** 041053-1170

EXHIBIT D-1

ORIGINAL

Me Guy P. Martel **(514) 397-3163**
Fax : (514) 397-3493

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Montréal, Québec H3B 3V2

EXHIBIT D-2

BAKER & McKENZIE

Baker & McKenzie LLP
Barristers & Solicitors
Brookfield Place
181 Bay Street, Suite 2100
P.O. Box 874
Toronto, Ontario, Canada M5J 2T3

Tel: +1 416 863 1221
Fax: +1 416 863 6275
www.bakernet.com

Reply to:
Lydia Salvi
+1 416 865 6944
Lydia.salvi@bakernet.com

BY FAX, E-MAIL AND BY COURIER

November 12, 2009

Ernst & Young Inc.
Monitor of Abitibi-Consolidated Inc.
Bowater Canadian Forest Products Inc., et al.
800 Rene-Levesque Blvd. West
Suite 1900
Montreal, QC H3B 1X9

Attention: Ms Donna Comerford
AbitibiBowater Claims
Fax number: 514-879-3992
E-mail: abitibibowater@ca.ey.com

Dear Sir / Madam,

RE: Canadian CCAA Proof of Claim re Abitibi-Consolidated Inc.

We represent Npower Cogen Limited.

Attached please find Proof of Claim together with supporting documentation in connection with Npower Cogen Limited's claims against Abitibi-Consolidated Inc.

Should you have any questions, please do not hesitate to contact me.

Regards,
BAKER & McKENZIE LLP

Lydia Salvi
LS/sf

Encl.

TORDMS-#400872-v1

CANADIAN CCAA Proof of Claim re: **AbitibiBowater Inc.** [YELLOW]

1 Name of Canadian Petitioner, Partnership or Cross-Border Petitioner (the "Petitioners")

Petitioner: Abitibi-Consolidated Inc.

2 Original Creditor Identification (the "Creditor")

Legal Name of Creditor: Npower Cogen Limited			Name of Contact: Mr Phillip Piddington
Address: Cogen Court, Cranmore Boulevard Shirley, Solihull West Midlands B90 4LN			Phone #: +44 (0)121 506 8041 Fax #: +44 (0)121 506 8050
City	Prov / State: England	Postal/Zip code	e-mail: Phillip.Piddington@RWEnPower.com

3 Assignee, if claim has been assigned

Full Legal Name of Assignee			Name of Contact
Address			Phone # Fax #
City	Prov / State	Postal/Zip code	e-mail

4 Amount of Claim

The Petitioner was and still is indebted to the Creditor as follows:

Currency	Original Currency Amount	Secured	Unsecured	Subsequent
£	64,882,861	☐	☒	☐
		☐	☐	☐
		☐	☐	☐
		☐	☐	☐
		☐	☐	☐
		☐	☐	☐

5 Documentation

Provide all particulars of the Claim including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor which has guaranteed the Claim, and amount of invoices, particulars of all credits, discounts, etc. claimed, description of the security, if any, granted by the affected Petitioner to the Creditor and estimated value of such security, particulars of any subsequent claim and any other supporting documentation.

6 Certification

I hereby certify that:

- I am the Creditor, or authorized Representative of the Creditor.
- I have knowledge of all the circumstances connected with this Claim.
- The Creditor asserts this claim against the Petitioner.
- Complete documentation in support of this claim is attached.

Signature: [signature]	Name: Mr Phillip Piddington Title: Head of Cogen Asset Management
Dated: 11 November 2009	Signed at: Shirley, Solihull, UK

7 Filing of Claim

This Proof of Claim must be received by the Monitor by no later than 4:00 p.m. (Eastern Standard Time) on November 13, 2009, by way of electronic mail, facsimile, courier, or registered mail at the following:

Ernst & Young Inc., Monitor of Abitibi-Consolidated Inc., Bowater Canadian Forest Products Inc., et al.
800 René-Levesque Blvd. West
Suite 1000
Montreal, QC H3B 1X9
Attention: Ms. Donna Comerford

Fax: 514-879-3992
Tel: 1-866-246-7889
e-mail: abitibibowater@ca.ey.com

An electronic version of this form is available at www.ey.com/ca/abitibibowater

Schedule "A" to Proof of Claim of Npower Cogen Limited

A. Energy Supply Arrangement Between Npower Cogen Limited ("Cogen"), Bridgewater Paper Company Limited ("BPCL") and Abitibi-Consolidated Inc. ("Abitibi ")

1. On August 3, 1998, National Power PLC ("**National Power**") and BPCL entered into an energy supply contract ("**ESC**") wherein National Power agreed to supply electricity and steam to BPCL. To the extent required and subject to confidentiality protections or consent by Cogen, the ESC can be provided upon request.

2. As a condition to enter into the ESC, Abitibi granted a guarantee to National Power pursuant to a Guarantee dated February 22, 1999 ("**Guarantee**") guaranteeing all obligations of BPCL (a wholly owned subsidiary of Abitibi) to National Power under the ESC. The Guarantee is attached as Exhibit 1.

3. The ESC was assigned on November 22, 2000 by National Power to Cogen. The Guarantee was subsequently assigned on 26 May 2005 by National Power (at that point named International Power plc) to Cogen. The letter of notice of assignment of the ESC, and the assignment agreement for the Guarantee, are attached as Exhibit 2.

B. Abitibi's Purported Repudiation of the Guarantee and Cogen's Reservation of Rights to Object

4. On April 17, 2009, this Honourable Court issued an Order (the "**Initial Order**") granting the protection of the *Companies' Creditors Arrangement Act* ("**CCAA**") to among others, Abitibi.

5. By letter dated July 7, 2009, Abitibi purported to repudiate the Guarantee pursuant to the Initial Order. The repudiation letter is attached as Exhibit 3.

6. By letter dated August 11 2009, Cogen objected to the purported repudiation by Abitibi on the basis that:

a) The purported repudiation of the Guarantee does not comply with Section 46(f) of the Second Amended Initial Order.

b) At no time was Cogen consulted with prior to being provided with said notice to try to negotiate terms of repudiation as contemplated by the Second Amended Initial Order.

c) The Guarantee is not capable of repudiation as based on CCAA case law, non-executory, financial contracts are not capable of repudiation.

d) Abitibi has not met the test set by CCAA case law to exercise its power to repudiate namely, that (i) the repudiation is necessary to permit a viable plan, not simply a way to make the plan more profitable; and (ii) the repudiation is fair and reasonable, including the terms of repudiation and the treatment of the claim upon repudiation. And

e) There is no evidence that the Monitor had approved the repudiation as required by paragraph 46(f) of the Second Amended Initial Order.

7. Neither Abitibi, nor the Monitor has responded to the letter of Cogen.

8. This Proof of Claim is filed in accordance with the Order of Justice Gascon, dated August 26, 2009, but Cogen reserves its rights to bring a motion for a determination of the purported repudiation of the Guarantee.

C. Cogen's Claim Against Abitibi under the Guarantee

9. As described below, BPCL is indebted to Cogen under the terms of the ESC for **£64,882,861** consisting of the following amounts:

(i) Cogen's estimated current claim against BPCL for supplies of electricity and steam, as at midnight on 13 November 2009, is £5,298,000. This estimate is calculated on the theoretical basis that BPCL enters liquidation and stops taking supplies on 13 November.The estimate is made up of:

- outstanding balance of September charges, invoiced in October, of £1,246,000;

- October charges, not yet invoiced, estimated to include Standing Charge of £1,200,000, Steam Charge of £506,000, and Electricity Charge of £472,000;
- November charges currently accruing on supplies taken, estimated as at midnight on 13 November to include Standing Charge of £1,300,000, Steam Charge of £289,000, and Electricity Charge of £225,000; and
- miscellaneous fixed charges for rates and engineering services, among other things, of £40,000 for October and £20,000 for the period to 13 November.

(ii) "Take or pay" liability under clause 9.7 of the ESC of **£8,416,192** The origins and nature of the "take or pay" liability are as follows. The pricing structure for energy and steam in the ESC was agreed on the basis that BPCL would purchase at least 770,000 Tonne of Steam (as defined in the ESC) each year. Under clause 9.7 of the ESC, if BPCL takes less than 770,000 Tonne of Steam in a 12 month period, BPCL must pay for steam it has not taken up to that amount. (Clause 9.7 also provides that such payments for steam not taken will be credited to BPCL in any of the following three years for steam taken in excess of 770,000 Tonne of Steam.) BPCL must pay for steam it has not taken at the Steam Charge, which is the price per Tonne of Steam calculated in accordance with clause 9.5 of the ESC. The Steam Charge was £5 when the ESC was first agreed, but was subsequently revised on a regular basis in accordance with clause 9.6 of the ESC and subsequently in accordance with the letter agreement dated 27 March 2003. A breakdown of the liability is attached as Exhibit 4. BPCL has not paid for this shortfall for the period of 2005 – 2009.

(iii) Transfer Charge liability under clause 9.11 of the ESC of **£51,168,669**. The origins and nature of the Transfer Charge liability are as follows. Under the ESC, Cogen built a combined heat and power plant next to BPCL's paper mill, on BPCL's land. The ESC provides that Cogen should then supply BPCL with electricity and steam from the plant for a period of 15 years. At the end of that period, BPCL is effectively entitled to purchase the plant for a nominal sum in accordance with clause 3.5 of the ESC. The reason for the nominal sum is that, over 15 years of supplies, Cogen was expected to recover the cost of building the plant through its regular charges under the ESC. If BPCL defaults on the ESC before or after entering an insolvency procedure, Cogen will be entitled to terminate the ESC pursuant to clause 17.3. If Cogen does so, BPCL will be liable to pay the Transfer Charge pursuant to clauses 17.4 and 9.11. The Transfer Charge is a liquidated damages amount intended to put Cogen in the position it would have been in if BPCL had continued to honour the ESC until its natural termination date, including compensation for building the plant. Upon payment of the Transfer Charge in full, the plant transfers to BPCL pursuant to clause 17.10 of the ESC. A breakdown of the calculation of the liability is attached as Exhibit 5.

10. BPCL's financial position is tenuous and the probability of it being able to meet its obligations under the ESC is nominal to zero. Accordingly, the probability of Cogen needing to call on the Guarantee is very high to 100%. BPCL's tenuous financial position is recognized by Abitibi itself throughout its motion materials filed in support of its

Motion for Authorization to enter into Transactions for the Restructuring of the Petitioners' European Sale Structure.

11. Pursuant to paragraph 6 of the Guarantee, Cogen is not obligated before taking any steps to enforce the Guarantee to take any action whatsoever or obtain judgement against BPCL, but can seek immediate recourse against Abitibi.

12. As such, pursuant to the terms of the Guarantee, Cogen submits this claim in the amount of **£64,882,861** against Abitibi.

D. Reservation of Cogen's Rights

13. Cogen hereby reserves its rights to amend, supplement or withdraw this Proof of Claim at any time and in any respect, including, without limitation, as necessary or appropriate to file additional claims, to reclassify its claim, to amend, quantify or correct amounts, change the priority, or to provide additional detail regarding the claims set forth herein.

14. Notwithstanding anything in this Proof of Claim, Cogen hereby reserves all of its rights, remedies and claims, to the extent permitted by law, including, but not limited to, any rights and claims against third parties in connection with the subject matter of this Proof of Claim and its right to challenge Abitibi's repudiation of the Guarantee.

15. By virtue of filing this Proof of Claim, Cogen does not, and the Proof of Claim shall not be deemed to be, consent to the jurisdiction of this Court. Cogen does not waive its respective rights to dispute the jurisdiction of this Court to hear any proceeding, motion

or other matter related to the Proof of Claim or any other rights it may have apart from the Proof of Claim.

16. Cogen reserves its right to seek additional claims for any and all other claims arising from the Petitioners legal obligations under any applicable law or contract.

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

N°. 500-11-036133-094

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

In the matter of Plan of Compromise or Arrangement of:

ABITIBIBOWATER INC. *& al*
Petitioners

- and -

ERNST & YOUNG INC.
Monitor

- and -

NPOWER COGEN LIMITED
Petitioner

BS0350 **n/dos.:** 041053-1170

EXHIBIT D-2

ORIGINAL

Me Guy P. Martel **(514) 397-3163**
Fax : (514) 397-3493

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Montréal, Québec H3B 3V2

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

N°. 500-11-036133-094

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BS0350 **n/dos.:** 041053-1170

LIST OF EXHBITS AND
EXHIBITS D-1 TO D-2

ORIGINAL

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