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:

ABITIBI BOWATER INC.,

and

ABITIBI-CONSOLIDATED INC.,

and

BOWATER CANADIAN HOLDINGS INC., and the other Petitioners listed on Schedules A, B. and C

Petitioners

and

ERNST & YOUNG INC.

Monitor

and

NPOWER COGEN LIMITED

Moving Party

MEMORANDUM OF LAW AND ARGUMENT OF NPOWER COGEN LIMITED

PART I – OVERVIEW

A. The Motion

A.1 The Essence of the Motion

1. The key issue in the case is the responsibility of a CCAA debtor for acts committed after it has already filed for CCAA protection. As a matter of principle, Cogen respectfully submits that, apart from compromising liabilities arising from repudiating contracts and similar such arrangements using validly exercised CCAA powers, the CCAA affords no power to compromise liability for acts committed or liabilities undertaken after the CCAA filing. This is reflected in limits on the definition of the term "Claim" in standard CCAA Orders.

2. Cogen asserts that the liability of Abitibi (defined below) which survives the restructuring arises from three sources:

   (a) liability for oppressive conduct under s 241 of the *Canada Business Corporations Act* (CBCA) pertaining to the manner in which Cogen (defined below) was caused, after Abitibi filed for CCAA protection, to provide energy supply services without payment by BPCL (defined below) and Abitibi while they orchestrated the shutdown of BPCL;

   (b) Abitibi undertakings to pay the trade liabilities incurred by BPCL in the course of its operations of which Cogen is entitled to rely as a third party beneficiary; and

   (c) an Abitibi guarantee of the liabilities incurred by BPCL to Cogen, which was not effectively repudiated during the restructuring and hence remains in force post CCAA emergence. The liability under the guarantee arose from events that occurred post-filing and, as such, are outside the scope of Abitibi's Plan of Arrangement.

3. The relief sought in a nutshell is a declaration that the liabilities of Abitibi to Cogen are unaffected by the Plan of Arrangement, and either leave for Cogen to pursue them or an immediate order that they be paid.

A.2 Overview of the Factual Narrative

4. **The Contract:** Npower Cogen Limited ("**Cogen**") was a supplier of electricity and steam to Bridgewater Paper Company Limited ("**BPCL**"), a UK based member of the Abitibi group of companies ("**Abitibi**"), pursuant to a long term energy supply contract dated August 3, 1998 (the "**ESC**"). The contract contemplated that Cogen would construct a combined heat (steam) and electrical power generation facility ("CHP") solely dedicated to BPCL's steam and power requirements, on land owned by BPCL and leased to Cogen, and that BPCL would source its power requirements solely from that facility at a specified price set out in the contract. The facility was constructed and went into operation in 2000.

Cogen Motion Concerning Post-Filing Supply Claim ("Cogen Motion"), Exhibit 1

5. **The Guarantee**: Abitibi (specifically Abitibi-Consolidated Inc.) provided a written unlimited guarantee of BPCL's obligations to Cogen under the ESC dated February 22, 1999 (the **"ESC Guarantee"**). Abitibi purported to repudiate that Guarantee during the CCAA process on July 7, 2009 and Cogen advised on August 11, 2009 that the purported repudiation was invalid because of Abitibi's failure to comply with the preconditions in the court order for the exercise of that power. The status of the Guarantee is one of the issues in this motion.

   Cogen Motion, Exhibit 2

6. **Cogen was an Involuntary Supplier:** Abitibi's Contestation neglects a key fact about the ESC - that Cogen was an involuntary supplier of energy to BPCL once it entered into the ESC for as long as the contract remained in force. Unless it had a right to terminate, Cogen was required throughout the life of the contract to make the facility exclusively available to service BPCL's requirements 24/7, and BPCL was entitled to continue draw energy from the facility whenever it wanted. A monthly payment default or BPCL's insolvency were the only relevant circumstances in which Cogen could terminate the ESC. Unless those occurred, the decision as to whether to draw energy rested in BPCL's hands, as its decision each day to use power determined whether and how much power was supplied. BPCL's rights to power were like a light switch which it could turn on and off at will. Abitibi was aware of these facts from the outset of the Cogen/BPCL/Abitibi relationship.

7. **Abitibi Control of BPCL:** BPCL is controlled by Abitibi, which indirectly owns 100% of BPCL's shares, and which exercised its control by placing two senior Abitibi officers on the BPCL board (one of whom, Jon Melkerson manages the entire Abitibi division of which BPCL was a part), by requiring BPCL to report to Abitibi senior management on a regular basis, through its role as BPCL's sole banker, and through its role in controlling BPCL's treasury operations (All BPCL cash concentrated into Abitibi's bank accounts, from which BPCL disbursements were then funded). Abitibi caused directed and is responsible in law for BPCL's conduct as related in this motion.

   Cogen Motion at paras 50-51, Exhibits 19 & 20

8. **Abitibi Support Commitment:** By 2008, BPCL had become a money losing operation solely reliant on Abitibi for funding; Abitibi was in essence BPCL's only banker. Without assurance of its ability to pay its ongoing trade liabilities which it incurred by continuing to operate, BPCL would have been unable to continue trading under UK law and would have had to shut down. As a result, Abitibi undertook, on April 9, 2009 (on the eve of its CCAA filing), to fund BPCL's liabilities by providing the financial support necessary for its continuing operations. This undertaking was continued on August 18, 2009, November 1, 2009, December 15, 2009, January 15, 2010 until terminated on January 22, 2010 (the **"Post-Filing Support Commitment"**). Such support was necessary to keep BPCL in a position to pay its ongoing trade suppliers, in order to avoid wrongful trading liability under the *UK Insolvency Act, 1986*. This undertaking induced BPCL to continue operating.

Cogen Motion at paras 18-46, Exhibits 6-16

Affidavit of Ben Mathew Valentin ("Valentin Affidavit") at paras 6-9

9. **Cogen Wrongfully Induced to Continue Supply:** Cogen was by far the single largest recurring trade supplier of BPCL and BPCL would have been immediately unable to operate without the energy supplied to it by Cogen. As Cogen was entitled to terminate upon BPCL being unable to pay its debts as they come due (the liquidity test for insolvency), absent Abitibi's financial support, Cogen could and would have immediately terminated the ESC. For this reason, Cogen was advised by Abitibi and then BPCL of Abitibi's **Post-Filing Support Commitment** on repeated occasions, including April 23, 2009, September 25, 2009, on or about November 5, 2009, and on or about December 4, 2009, in order to keep Cogen locked into supplying energy and making its energy generation facility continuously available to BPCL. The representations were misleading as they did not disclose the limitations on the commitments, and did not disclose that Abitibi was planning to terminate the commitment. Cogen was not advised of any time of any limits on that support and believed that Abitibi was by those undertakings committed to fully funding BPCL's trading requirements.

10. **ESC Restructure**: BPCL was an uneconomic facility in part because of its power costs and in part due to market factors and obsolescence. For that reason, Abitibi initiated negotiations with Cogen starting in 2008 to effect a managed shutdown of BPCL, the premise of which discussions was that Cogen's supply of energy to Cogen during the shut down process would be fully funded by Abitibi and Cogen would acquire the land on which its CHP facility was situated. Those negotiations paused while Abitibi filed for CCAA protection, and then restarted following the filing. The post-filing negotiations aimed to avoid the need for a managed shutdown by restructuring the ESC to lower BPCL's energy cost while eliminating the Abitibi Guarantee; in return for certain concessions to BPCL including the transfer from BPCL of the land on which Cogen's energy generation facility was constructed. A tentative deal was reached on August 5, 2009 which was intended to be put into force as soon as Abitibi sought and obtained the support of its lenders. It was represented to Cogen on August 12 that Abitibi was seeking that support but that the process was complicated by difficulties with the lenders. Cogen was also told at that time that if the ESC restructure did not proceed that Abitibi would conduct a managed shutdown, a reference to the process discussed in 2008 to shut down BPCL while protecting Cogen in respect of its ongoing supply.

Cogen Motion at paras 32-35

11. **BPCL Liquidation Planning:** However, instead of seeking lender support for the ESC restructure, Abitibi chose instead to secretly lay the groundwork for BPCL's liquidation, starting on July 16, 2009 with the engagement of Ernst & Young to assess its restructuring and liquidation options, followed on August 18, 2009 by Abitibi demanding that BPCL assign its principal source of working capital – certain European receivables, to another Abitibi entity, failing which Abitibi would cut off BPCL's financial support. BPCL complied. This was done because BPCL's receivables were pledged to Abitibi's lenders, and

once Abitibi pushed BPCL into liquidation by cutting off its support, its lenders' collateral could be entangled in a long and costly liquidation process, which could affect Abitibi's ability to access credit from those lenders. So Abitibi sought to extricate them first and push BPCL under once that was done.

Cogen Motion at paras 31 & 32

12. **Transfer of BPCL Assets:** Having threatened BPCL into agreeing to surrender its principal source of liquidity to benefit Abitibi's lenders, Abitibi issued the August 18, 2009 support commitment to induce BPCL to continue operating while Ernst & Young performed its assessment. Ernst & Young reported in September on BPCL's options and then were engaged in October to prepare detailed plans to put BPCL into administration. Abitibi extended its support Commitment for another 45 days to December 15 while that was being done. On November 10, 2009, during the period of the Second Ernst & Young review, Abitibi sought court approval of its participation in the transfer of BPCL's key liquid assets to another Abitibi entity, but did not disclose to the court or Cogen that BPCL's liquidation was being planned or that the receivables transfer transaction rendered BPCL insolvent unless Abitibi agreed to continue to fully fund BPCL's operations.

Cogen Motion at paras 40-41, Exhibit 14

13. **Cessation of Payment:** Shortly after obtaining the Court Order transferring the receivables, BPCL stopped paying Cogen, but Cogen was not told this was happening. BPCL kept operating and drawing power until February 2, 2010, while Abitibi put the finishing touches on the process to liquidate BPCL. But instead of fairly paying the costs of going that route, Abitibi ceased funding payment of Cogen's bills to BPCL. Cogen was not informed that this was happening and had no idea that Abitibi was not doing a managed shut down which would see it paid for providing power while Cogen was being shutdown.

14. **Final Liquidation Steps:** Ernst & Young reported on the process to put BPCL under in December and then was asked to prepare a further detailed Options Paper on how to implement the liquidation, which was tabled in January 2009. On January 22, 2009 Abitibi terminated financial support for BPCL, forcing it into administration on February 2, 2010.

15. **Amount Outstanding:** From November 1, 2009 to February 2, 2010, BPCL racked up a liability to Cogen of £9,447,548 which it had no ability to pay on its own (the "**Outstanding Post-Filing Cogen Payable**") and which Abitibi selectively chose not to fund while funding other BPCL payables. Interest is claimed on that amount by Cogen at the rate of 3% per annum from February 2, 2010 (namely, approximately £222,858.60 to date and further accruals thereafter).

16. **Relief:** Cogen claims payment from Abitibi on 3 grounds:

    (a) **Refusal to Pay:** After BPCL entered formal insolvency administration proceedings in the United Kingdom, Abitibi refused to honour its Post-Filing Commitment to fund the Outstanding Post Filing Cogen Accounts Payable; Cogen seeks to enforce it.

(b) **Oppression Claim**: Abitibi has incurred separate direct liability to Cogen for the Outstanding Post-Filing Cogen Payable, as the circumstances recited above constitute oppressive and unfair disregard for the interests of Cogen under s.241 of the CBCA (the "**Oppression Remedy Claim**").

(c) **ESC Guarantee Claim:** Abitibi purported to repudiate its ESC Guarantee, but this purported repudiation is asserted by Cogen to be ineffective as it did not comply with the requirements of s 46(f) of the Initial CCAA Order.

17. Unless otherwise provided, all capitalized terms in this Memorandum of Argument shall have the meanings ascribed to them in the Cogen's Motion dated September 23, 2010 and supporting Affidavits.

B. Relevant Facts in Detail

B.1 The Amounts owing under the ESC and the ESC Guarantee

18. Cogen is owed, in the principal amount £9,447,548, as a result of four (4) unpaid invoices as follows:

Energy Supply Invoice	**Amount (£)**
November 2009	2,616,437.93
December 2009	2,747,019.06
January 2010	3,140,524.92
February 2010	1,943,566.09
Partial Payment for November 2009	(500,000)
Partial Payment for November 2009	(500,000)
Total Amount Outstanding **(without interest)**	£9,447,458.00

19. Interest of £222,858.60 has accumulated to November 16, 2010 at a rate of 3% per annum. The total obligation owing continues to increase.

Reply Affidavit of Phillip Piddington ("Piddington Reply") at para 7

20. Notwithstanding Abitibi's contestation of the quantum at issue, there is no serious dispute in connection with the outstanding amount:

(a) each Cogen invoice, including in connection with the periods in question, was accompanied by a letter from Cogen stipulating that BPCL had a prescribed period of time within which to dispute the quantum of such invoice.

(b) no disputes relating to the invoices were ever received by Cogen; and

(c) the quantum was acknowledged by the Monitor during the Abitibi claims process, confirmed by the claims officer as part of an appeal by Cogen on other matters, and not appealed by Abitibi in either decision rendering the point at this juncture *res judicata.*

First Affidavit of Phillip Piddington ("First Piddington Affidavit") at paras 8 & 48

Moreover, and in any event, Abitibi has not produced any evidence to challenge the quantum of the Outstanding Post-Filing Cogen Payable as being incorrect or otherwise not owing by BPCL in whole or in part.

21. Abitibi's efforts to argue that there should be some sort of set-off or claw back on account of previous payments made by BPCL to Cogen (on previous properly rendered invoices by Cogen to BPCL) equally fails both in law and in fact:

(a) no one at BPCL (or Abitibi, though fully aware of the payments, for that matter) ever disputed any of the payments made by BPCL to Cogen on account of past invoices rendered, or ever disputed the quantum (or components thereof) of any payments, nor ever disputed that the services rendered thereunder were provided or provided properly, either at the time they were provided, or made or any time thereafter;

(b) the amounts to which Abitibi refers in its contestation as being "post-filing" payments were in fact paid by BPCL, an Abitibi company not part of the Abitibi CCAA proceeding – hence any such payments are neither pre- or post-filing payments, nor subject the Abitibi CCAA regime, nor to be considered to be preferential payments in that context; and

(c) despite requests, Abitibi has provided no evidence to support a claim for set-off either in fact or law

22. There is, therefore no serious dispute that the quantum of the Outstanding Post-Filing Cogen Payable is £9,447,458 plus accruing interest on the unpaid account or that it is free of any set-off or preferential treatment.

B.2 The Post-Filing Support Commitment

23. There is no dispute that BPCL, as early as 2008, was not financially viable without continuing Abitibi financial support. In 2008 (i.e. before Abitibi and its affiliates filed for CCAA protection), Mr. Jon Melkerson and Mr. Thor Thorstenstein, officers of Abitibi, contacted Cogen on behalf of Abitibi and requested that Cogen enter into preliminary discussions with Abitibi about the possibility of a "managed shutdown" of BPCL's facility owing to concerns over the long term economic viability of the BPCL operation and the resultant cash demands on Abitibi to continue to support the operation.

Dea Affidavit at para 17

24. Abitibi advised that it could not conduct a managed shutdown without Cogen's assistance and asked what Cogen would require to assist. Cogen indicated that one of its key

requirements would be that its continuing supply during the shutdown process would be paid for in full. Accordingly, the premise of the discussion was that if Cogen would continue to supply power during that process (i) Abitibi would ensure that the shutdown process would be fair and orderly, and (ii) that Abitibi would continue to support BPCL to ensure it would continue to pay in full for all power and steam supplied by Cogen to BPCL throughout the shutdown process. The discussion about finding a managed solution to BPCL continued right up to Abitibi's CCAA filing in April 2009, all the while Abitibi committed to the financial support of BPCL, *inter alia*, in connection with the payment of Cogen for amounts coming due under the ESC.

Guillot Affidavit at paras 23, 28 & 29

25. Immediately after the granting of the Initial CCAA Order on April 17, 2009 to Abitibi and its filing affiliates, Cogen sought assurances that Abitibi would continue to support BPCL to the extent BPCL was unable to pay Cogen from its own resources and funding for the amounts coming due under the ESC. On April 22, 2009, Cogen wrote to BPCL for its and Abitibi's confirmation that post Abitibi filing invoices of Cogen to BPCL would continue to be paid by BPCL and funded by Abitibi, failing which Cogen would exercise its entitlements to discontinue to supply energy to BPCL and seek to take such other enforcement steps as it deemed appropriate.

Abitibi Contestation at para 30

Cogen Motion at para 24, Exhibits 8 & 9

Dea Affidavit at paras 12-15 & 23-25

26. From BPCL's perspective, this post filing support commitment from Abitibi was necessary, *inter alia*, 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). Under U.K. law, liability for wrongful trading can arise if 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, which was clearly the case with BPCL.

Valentin Affidavit at paras 6-9

27. From Cogen's perspective, the support commitment was necessary as Cogen had serious concerns about being paid going forward by BPCL alone.

28. BPCL assured Cogen at various times after Abitibi filed for CCAA protection that it was not insolvent and could pay its ongoing power and steam supply bills because it had a written payment support commitment issued by Abitibi to fund the payment of post-filing goods and services incurred by BPCL, including those supplied by Cogen, to the extent BPCL could not pay directly from its own resources. Because of and in reliance upon the representations of Abitibi's ongoing financial support for BPCL, Cogen did not terminate the ESC and

continued supplying energy to BPCL.

Abitibi Contestation at paras 11-15 & 32

Dea Affidavit at paras 24-30

29. As Cogen was still concerned about continuing to supply BPCL in these circumstances, Mr. Piddington phoned Mr. Allan Dea in August 2009, the vice-president and treasurer of Abitibi. He told Mr. Dea that Cogen wanted to know what was going on as Cogen had put a lot of work into the restructuring process, and that Cogen was nervous about BPCL's position and ability to pay for ongoing supply. Mr. Dea advised on behalf of Abitibi as follows:

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

(b) Cogen and BPCL management should continue working on the restructuring of BPCL;

(c) Abitibi was financially supporting BPCL, and would continue to financially support BPCL no matter what was decided; and

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

Cogen Motion at para 38

First Paddington Affidavit at paras 40-44

The above was consistent with what Cogen was told by BPCL. Subsequently, in September 2009 BPCL's Mr. Barry Benson, reaffirmed that Abitibi would continue to support BPCL and had issued a written commitment to that effect. This commitment (now a rolling monthly one) was again reaffirmed in November of 2009 by BPCL.

Cogen Motion at paras 34-35

Dea Affidavit at para 29

30. At no relevant time was Cogen ever advised by anyone at Abitibi or BPCL that the Post-Filing Support Commitment was ever capped, limited or otherwise cancelled.

First Piddington Affidavit para 19

31. Cogen relied on and was induced by these representations of Abitibi and BPCL and as a result continued to supply through February 2, 2010.

32. On October 27, 2010, Abitibi finally admitted in its Contestation, the Dea Affidavit and the Guillot Affidavit, the existence of the written Post-Filing Support Commitment and that it was in effect from Abitibi's filing right up to the eve of BPCL's entering administration in

February 2010 – to wit – the support commitment was in effect during the period that BPCL failed to pay Cogen.

Dea Affidavit at para 26, Exhibits AD-7 – AD-11

Piddington Reply at para 19

33. Abitibi curiously points to the fact in its materials that Cogen did not refer to the Post-Filing Support Commitment in its first proof of claim filed in November 2009. Given that BPCL was still paying Cogen's bills up until that point, and that the unpaid invoices in respect of supply in November 2009-January 2010 had not yet materialized, let alone dishonoured, the entire claim had not even arisen. However it had arisen by the time that Cogen filed its amended proof of claim in April 2010, two (2) months after BPCL failed, and the issue is accordingly quite front and centre in that amended proof of claim. Cogen has maintained since it filed its April 2010 proof of claim that a written Post-Filing Support Commitment existed. It specifically demanded production of same in July and August 2010 during the CCAA proceeding. Cogen referred again to the non-production of the Support Commitment when it filed its motion to this Court over the issue in September 2010, and reiterated its request for same in its production requests in this motion.

Piddington Reply at para 34

Abitibi Contestation at paras 44-46

34. Abitibi, instead of being forthright and admitting the existence of the written Post-Filing Support Commitment, hedged and failed for months to admit outright that any such written commitment existed. The inadequacy of Abitibi's disclosure about Abitibi's undertaking to fund BPCL's liabilities in the claims dispute parallels the problem giving rise to Cogen's post-filing supply claim in the first place, and from that reasonable inferences may be drawn.

Piddington Reply at para 35

B.3 Cogen was the Intended Beneficiary of Support Commitment

35. Abitibi's Contestation suggests that the Post-Filing Support Commitment was just a technical requirement. But it is quite the opposite. The U.K obligations on directors to ensure that companies do not trade when they can not pay their suppliers are intended to protect suppliers. When a support commitment is obtained, the point of the commitment is to fulfill the obligation not to prejudice the suppliers by trading without resources to pay them. The suppliers are by definition, the beneficiaries of that arrangement and the funding provided is specifically intended to flow to them. Abitibi's own commitment recognizes this fact by its wording which refers to Abitibi providing the amounts necessary to fund the operational commitments of BPCL. Abitibi knew that its support was primarily to pay BPCL's largest supplier and by definition intended that the support be used for that purpose.

Piddington Reply at para 39

Dea Affidavit 26-27 & 43, Exhibit AD-7

36. Both Abitibi and BPCL knew that by communicating the fact of that commitment to Cogen that Cogen would be induced to rely on the support being provided for its benefit with the express purpose of preventing Cogen from terminating the involuntary supply arrangement.

B.4 Abitibi's Oppressive Conduct

37. Abitibi's oppressive and unfairly prejudicial conduct includes:

(a) Abitibi's inducement of BPCL to continue to 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 and notwithstanding Abitibi's purported repudiation of the Guarantee;

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

(e) the invalid and improper 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 and when in fact Abitibi knew that the deferral of such accounts receivable collection were the only other source of cash flow for BPCL in addition to the Support Commitment;

(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;

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

(l) the lack of any notice to Cogen after Abitibi decided it would not continue to support BPCL also shows bad faith, given the long period of planning that preceded the decision.

38. It is not necessary to show bad faith or lack of probity in order to obtain relief. It is sufficient to show that the <u>effect</u> of the conduct of <u>either</u> Abitibi or its subsidiary BPCL was unfairly prejudicial or oppressive to Cogen.

B.5 Purported Termination of the ESC Guarantee

39. After Abitibi filed for CCAA protection, by letter dated July 7, 2009, Abitibi purported to repudiate the ESC Guarantee (the "**Purported Repudiation**").

Cogen Motion, Exhibit 4

40. No meaningful reason for the Purported Repudiation was provided, nor was the required approval of the Monitor noted or provided.

41. Cogen objected to the Purported Repudiation by way of letter dated August 11, 2009, noting, *inter alia,* that the Purported Repudiation did not comply with paragraph 46(f) of the Second Amended Initial Order. No response to the Objection Letter was ever received. Moreover, to date, Abitibi has produced neither evidence that the Monitor approved of the repudiation at the time of its making nor any other evidence to suggest that it complied with the requirements necessary for a proper termination.

Cogen Motion, Exhibit 5

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

43. While there is a court order permitting Abitibi to repudiate contracts, the letter sent by Abitibi purporting to do so is not a court order, but a private act of Abitibi purportedly under that power. Whether Abitibi succeeded in invoking that power by privately sending that letter is the issue.

44. Absent a replacement system for assuring BPCL was financially capable of performing, repudiation of the ESC Guarantee would effectively be a termination of the ESC. That is why a discussion was required between Abitibi and Cogen before any purported repudiation was attempted. When the repudiation was effected and BPCL continued to draw power under circumstances where Cogen was told that Abitibi was providing financial support, and where BPCL could not lawfully trade without it, Cogen had a reasonable expectation that the alternative arrangement was in force to protect it from financial exposure through the

continuance of the relationship. In that sense, the ESC Guarantee was not independently capable of being terminated without either admitting BPCL's insolvency, terminating the ESC, or providing equivalent financial protection.

B.6 Non Disclosure of Documents by Abitibi

45. The Court directed the parties to exchange requests to produce documents and then to respond to those requests. Cogen produced documents in response, but Abitibi has produced no documents in response beyond those upon which it seeks to rely in its affidavits. Similarly Abitibi has not put forward its own officers as deponents who sat on the BPCL board as witnesses and who have direct knowledge of the facts.

Piddington Reply at para 78

46. Abitibi sought an expedited schedule for this motion to try to coincide with its emergence from CCAA. That request implied a degree of cooperation in bringing forward the facts that Abitibi has not adequately fulfilled.

PART II – LEGAL ANALYSIS AND ARGUMENT

47. The following are the key legal issues raised by the motion:

(a) Is Abitibi liable to Cogen as third party beneficiary or otherwise to honour Post-Filing Support Commitment, and if so, should Abitibi be directed to make payment of the amount claimed?

(b) Does the conduct of Abitibi and BPCL in causing Cogen to continue supply energy to BPCL when BPCL was not able to pay for it warrant relief for Cogen under s 241 of the *CBCA* (the "oppression remedy")?

(c) Was the Purported Termination of the ESC Guarantee ineffective?

(d) Are Cogen's claims against Abitibi excluded from and unaffected by Abitibi's CCAA plan and Sanction Order (and if so, should Cogen be granted leave (if required) to initiate proceedings to pursue them?

A. <u>Abitibi's Post-Filing Support Commitment</u>

A.1 The Post-Filing Support Commitment

48. With respect to the Post-Filing Support Commitment, there is no serious dispute in this motion that:

(a) Post-CCAA filing, Abitibi provided the commitment to support BPCL financially with a view, *inter alia*, to keeping BPCL operating pending Abitibi's review of BPCL and its future;

(b) the commitment was necessary as BPCL was in financial difficulty and the commitment was necessary to keep BPCL operating (or rather in order to keep BPCL's suppliers from cutting supply and services and keeping its directors from resigning to avoid insolvent trading liability);

(c) said commitment (from time to time) was conveyed to Cogen (as a third party beneficiary of that commitment) by both Abitibi and BPCL;

(d) Cogen continued to honour its obligations under the ESC based on the ESC Guarantee and the Post-Filing Supply Commitment of Abitibi in reliance on those commitments;

(e) BPCL continued to draw down on electricity and otherwise avails itself of the benefits under the ESC;

(f) Abitibi and BPCL both benefited from Cogen's continuing to comply with the ESC:

(i) BPCL, by being able to continue to operate in difficult financial circumstances; and

(ii) Abitibi by being able to take the time to review the future of BPCL and ultimately make the decision to shut it down without any disruption during its consideration process; and

(g) Abitibi failed to make good on its post-filing commitment after garnering and enjoying the fruits of its benefit.

A.2 The Law

49. It is respectfully submitted that the governing law in this case is the Civil Code of Québec which provides as follows:

> **1387**. A contract is formed when and where acceptance is received by the offeror, regardless of the method of communication used, and even though the parties have agreed to reserve agreement as to secondary terms.
>
> ...
>
> **3134**. In the absence of any special provision, the Québec authorities have jurisdiction when the defendant is domiciled in Québec.

Both provisions as they relate to Abitibi suggest that Abitibi's location (domicile) in Québec make the Civil Code the governing law.

50. With respect to the rights of third party beneficiaries the Civil Code provides as follows:

> **1444.** A person may make a stipulation in a contract for the benefit of a third person.
>
> The stipulation gives the third person beneficiary the right to exact performance of the promised obligation directly from the promisor.

> **1445.** A third person beneficiary need not exist nor be determinate when the stipulation is made; he need only be determinable at that time and exist when the promisor is to perform the obligation for his benefit.
>
> 1446. The stipulation may be revoked as long as the third person beneficiary has not advised the stipulator or the promisor of his will to accept it.

51. It is respectfully submitted that in law, Cogen has the benefit of rights ascribed to third party beneficiaries. Both The Civil Code and case law both common and civil, provide that third party beneficiaries are entitled to pursue recovery on such rights.

52. In *Excavation Gabriel Gravel Inc. c. Entreprises Claude Chagnon Inc.*, a number of truckers continued to make deliveries on behalf of a subcontractor for a larger building project. These truckers continued to make deliveries on the strength of a promise by the general contractor that it would pay for the costs incurred for delivery of the materials. The promise was made to the scheduling company that hired truckers involved with the subcontractor generally, and not with any particular subcontractor. The Court concluded that the truckers were an easily determinable third party who continued to make deliveries on the strength of the guarantee of payment.

> *Excavation Gabriel Gravel Inc. c. Enterprises Claude Chagnon Inc., 2001 CanLII8647 (QC C.Q.), Cogen Brief of Authorities, Tab 1*

53. The Supreme Court of Canada interpreting common law principles has held that third parties may enforce a contract where the parties to the contract intended to extend a benefit to the third party and the activities performed by the third party seeking to rely on the contractual agreement are the very activities contemplated as coming within the scope of the contract.

> *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd. (1999), 1999 Carswell IIBC 1927 (S.C.C.), Cogen Brief of Authorities, Tab 2*

54. Moreover, BPCL in advising Cogen that Abitibi had committed to paying Cogen's post-filing invoices was in effect Abitibi's agent. Abitibi never repudiated those statements (and in fact, complied with the commitment for many months and subsequently confirmed its existence) and is therefore bound by the statements of BPCL.

> *Great Northern Grain Terminals Ltd. v. Axley Agricultural Installations Ltd. 1990 CarswellAlta 152 (Alta. C.A), Cogen Brief of Authorities, Tab 3*

B. The Oppression Remedy Claim

55. In addition to the direct enforceability of the Post-Filing Support Commitment by Cogen, it is respectfully submitted that Cogen has a valid oppression remedy claim under s 241 of the CBCA against Abitibi, as the effect of the conduct of Abitibi, BPCL and their officers and directors has been oppressive and unfairly prejudicial to Cogen. The scope of the s 241 power is very broad, and permits the court to make an order rectifying the matter complained of if either Abitibi or any of its affiliates, or their respective directors has acted in a way that <u>effects a result</u> that is oppressive or unfairly prejudicial to <u>or unfairly disregards</u> the interests of a creditor. BPCL is an affiliate of Abitibi within the definition of that term in s 2 (2 and 2(3) of the CBCA.

56. In the present case, both Abitibi and BPCL committed acts as set out in this memorandum, the effect of which is to unfairly disregard the interests of Cogen as a creditor of both Abitibi and BPCL. Abitibi focussed by July on shedding the burden of funding BPCL which is understandable, and both Abitibi and BPCL was interested to keep Cogen around as a supplier until its future unfolded, but they unfairly disregarded Cogen's interests by how they went about the shutdown. In the circumstances, the managed shutdown process was the only fair procedure, particularly given Cogen's involuntary status and the incomplete information it was provided about what Abitibi and BPCL were really doing from July 2009 through January 2010.

57. Once the court is satisfied that relief is warranted, the court has the power under the oppression remedy to make "any interim or final order it thinks fit" (CBCA s 241 (3)), including making "an order compensating an aggrieved person" (CBCA s 241 (3) (j), and may even order" the trial of any issue" (s. 241 (3) (n). It is respectfully submitted that the appropriate order in this situation would be to order Abitibi to pay the Post Filing Cogen Payable.

58. The courts have held that the "reasonable expectations" of the parties are relevant to whether a finding of oppression or unfairly disregarding interests will be made. Here:

(a) Cogen had a reasonable expectation that BPCL would be kept operating by Abitibi while Abitibi was seeking lender support for the restructuring of the ESC;

(b) Cogen had a reasonable expectation that it would be informed if Abitibi or BPCL had decided not to proceed with the ESC Restructure, and that a managed shutdown would ensue (Cogen was never so informed, and no such process was conducted);

(c) Cogen as an involuntary supplier which had engaged cooperatively in managed shutdown negotiations with Abitibi in 2008 and then in the ESC restructuring negotiations with BPCL and Abitibi in 2009, had a reasonable expectation that it would be informed by each of Abitibi and BPCL (a) of the strategy to liquidate BPCL in lieu of restructuring it that Abitibi and BPCL developed and implemented from July through October 2009, and (ii) of the undisclosed limits on the financial support being provided to BPCL from and after August 18, 2009;

(d) Cogen had a reasonable expectation that any limits imposed on the Post-Filing Support Commitment would be above any amount sufficient to fully fund the obligations to Cogen (otherwise BPCL would have been insolvent and should have ceased trading.

(e) Cogen had a reasonable expectation that Abitibi or BPCL would not induce Cogen to continue supplying in reliance on a pattern of conduct and representations of Abitibi support that suggested BPCL was not insolvent, and that it would knowing that Cogen would not be paid in full, which is precisely what happened)

(f) Cogen, as an involuntary supplier, had a reasonable expectation that BPCL would cease drawing energy supplies once it had no reasonable expectation of being able to pay for them (i.e. if its financial resources were withdrawn or limited by Abitibi to a level below which it was sufficiently certain that Cogen would be paid, or if its insolvency was imminent;) and so inform Cogen;

(g) Cogen had a reasonable expectation that BPCL and its directors would comply with the *UK Insolvency Act 1986* and that they would not engage in wrongful trading and that Abitibi would not facilitate that;

(h) Cogen had a reasonable expectation that Abitibi, as the sole source of financial support for BPCL, would either provide the necessary financial support to fund BPCL's operations, or inform Cogen of its intention to cease providing that support so that Cogen could immediately terminate supply;

(i) Cogen had a reasonable expectation that (a) Abitibi would not curtail its financial support and then allow BPCL to extend its operational life (until Abitibi was ready to trigger its liquidation) by "cherry picking" payables to pay– i.e. selectively choose who to pay and who to draw supply from without paying, and that (b) BPCL would cease trading once it no longer had a sufficient commitment of sufficient financial support from Abitibi necessary to pay Cogen for continuing supply.

59. In *J.S.M. Corporation (Ontario) Ltd. v. The Brick Furniture Warehouse Ltd. et al. ("JSM Corp"),* damages resulting from the breach of a commercial lease were awarded against the affiliated parent company of the tenant. Although there was no direct contract to pay rent from the parent to the landlord, there were representations by the parent that the rent would be paid and the Court found that those representations were made for the purpose of inducing the landlord to consent to various assignments of the lease in question. The Court found that the affiliated parent company by its representations had created reasonable expectations and reliance on the part of the landlord that the rental obligations under the lease would be met.

When the tenant that was effectively a shell corporation vacated the premises before the end of the term, the Court concluded that the affiliated parent company had defeated those reasonable expectations and acted oppressively through "invidious corporate and contractual maneuverings" which injured the landlord.

J.S.M. Corporation (Ontario) Ltd. v. The Brick Furniture Warehouse Ltd. et al. [2006] 16 B.L.R. (4^{th}) 227 (Ont. S.C.J.) at paras 67-69, Cogen Brief of Authorities, Tab 4

60. In *Downtown Eatery*, the plaintiff obtained judgment and then discovered that the directors of the debtor company had transferred the debtor's assets to other companies within the group of companies, leaving no assets to satisfy the judgment debt. The Ontario Court of Appeal granted the plaintiff creditor relief although the conduct was allegedly not undertaken with the intention of harming the complainant. The court held that the failure to take steps to preserve assets within the company sufficient to discharge the contingent liability created by the litigation, defeated the plaintiff's reasonable expectations, and produced an oppressive result.

Downtown Eatery (1993) Ltd. v. Ontario, (2001), 200 D.L.R. (4th) 289 (Ont.C.A.) leave to appeal to S.C.C. refused 207 D.L.R. (4th), Cogen Brief of Authorities, Tab 5

61. Similarly, in *1413910 Ontario Inc. v. McLennan*, statements by a company representative as to the use of the proceeds from a pending sale was the basis on which reasonable expectations were found to arise and for which the oppression remedy was an appropriate remedy.

1413910 Ontario Inc. v. McLennan [2008] 53 B.L.R. (4^{th}) 115 at paras 43-45, Cogen Brief of Authorities, Tab 6

62. It is well established that a creditor has standing to bring an application as a complainant under the oppression remedy. In addition, standing as a complainant may be granted to "any other person who, in the discretion of the Court, is a proper person to make an application under this Part."

Canada Business Corporations Act, s. 238

Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461 at paras. 47-51, Cogen Brief of Authorities, Tab 8

C. Energy Supply Contract Guarantee: Purported Repudiation Not Valid

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

(a) the Purported Repudiation did not facilitate the orderly restructuring of Abitibi's business and affairs;

(b) the consent of the Monitor to the repudiation was not obtained;

(c) the repudiation was neither on terms negotiated with Cogen, nor was it a unilateral repudiation effected <u>following a failure of agreement on those terms</u> (which are the only two options provided for in 46f).

64. The onus is on Abitibi to prove that the Purported Termination was effective as it is the party that seeks to rely on it (not as Abitibi alleges in its contestation, on Cogen to prove the termination was invalid). Cogen raised its objection on August 11, 2009. In the succeeding 17 months, Abitibi has failed to provide adequate evidence that the Purported Termination complied with s 46f:

(a) the Purported Repudiation did not facilitate an orderly restructuring. At the time it was issued, the restructuring step under consideration was a consensual deal to restructure the ESC and thereby relieve Abitibi of the burden of the Guarantee. It is only if Abitibi decided to reject that deal, terminate the negotiations, and proceed to shut down BPCL, that it could have then issued a unilateral repudiation of the Guarantee. That is what a good faith orderly process required. Instead, Abitibi used the repudiation notice as a tactic <u>during</u> the negotiation, which s. 46f does not provide for. Abitibi then went down the road of allowing Cogen to believe there was still a pending tentative deal awaiting lender approval, while quietly working in the background to line up the process to liquidate BPCL, which made the restructuring even more disorderly. Abitibi had to be more forthright than that to take advantage of 46f.

(b) Abitibi has failed to produce any reliable evidence that the Monitor provided its prior consent to the Purported Repudiation. That is not merely a technical requirement. The Monitor's consent is required to ensure that the debtor has complied with the preconditions to the use of the repudiation power granted in s 46f.

(c) Abitibi went down the first road provided by section 46f, which is to try to reach an agreement on terms to repudiate the Guarantee. The termination of the Guarantee was the subject of the continuing ESC Restructuring negotiation, which provided for the repudiation of the Guarantee as part of the terms of the ESC restructure. Only if there was a failure to reach agreement on those terms could Abitibi then invoke the right of unilateral repudiation. But the negotiations had not failed by July 7, 2009 when Abitibi purported to unilaterally repudiate – indeed the Dea affidavit claims to the contrary. Hence on July 7, 2009, Abitibi was not yet in a position to exercise a right to unilaterally repudiate the Guarantee.

65. Section 46(f) also makes the right to repudiate subject to further order of the CCAA Court. The CCAA Court therefor has the power to declare, as is requested in this case, that the repudiation, whether or not otherwise effective, is not effective to terminate the Guarantee insofar as it applies to energy supply after the CCAA filing occurred. In short this Honourable Court has a discretionary power under the Initial Order by virtue of that part of s. 46f to grant that relief if considered just.

66. Finally the Purported Repudiation of the ESC Guarantee does not comply with the limits imposed by the case law interpreting the power of a CCAA petitioner to repudiate contracts as:

(a) the ESC Guarantee is not capable of repudiation as based on CCAA case law, non-executory, financial contracts are not capable of repudiation; and

(b) Abitibi has not met the test set out by the CCAA case law to exercise a power to repudiate namely, that:

(i) the repudiation must be intended to facilitate formation of a viable plan, not simply a way to make the plan more profitable; and

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

677960 Alberta Ltd. v. Petrokazakhstan Inc. 2009 CarswellAlta 382 (Alta. Q.B.), Cogen Brief of Authorities, Tab 9

Doman Industries Ltd. (Re) [2004] B.C.J. No. 1149, Cogen Brief of Authorities, Tab 10

9145-7978 Québec inc. (Arrangement relatif à) [2007] J.Q. no 3812 (Que. C.A.), Cogen Brief of Authorities, Tab 11

67. It is respectfully submitted therefore that the ESC Guarantee remains in full force and effect as it pertained to the Post Filing Cogen Payable, and that Abitibi is liable thereunder for the full amount of that claim plus interest.

D. Post-Filing Supply, Oppression, and Guarantee Claims are Not Affected Claims

68. Each of the conduct giving rise to the Oppression Remedy Claim, the indebtedness owing under the Outstanding Post-Filing Cogen Payable and the contractual commitment of Abitibi under the Post-Filing Support Commitment all arose after the date of Abitibi's CCAA filing and after August 31, 2009 and, as such, are not compromised by Abitibi's CCAA Plan as each are not a "Claim", "Subsequent Claim" or "Restructuring Claim" as defined by the Claims Procedure Order and Sanction Order.

Cogen Motion, Exhibits 21, 22 and 23

69. As each claim is a post-filing claim, it is respectfully submitted that they are neither affected nor compromised by the CCAA plan or the Sanction order and are fully payable and owing by Abitibi.

70. If the Guarantee was not repudiated, it remains in force, and hence a claim under the Guarantee arising from post filing conduct is not a Claim compromised by the CCAA Plan and hence is unaffected.

E. Drawing an Adverse Inference for Failing to Disclose Documents/Produce Witnesses

71. Cogen throughout this proceeding has made a number of disclosure requests of Abitibi in connection with relevant information or documents only in the knowledge or possession of Abitibi or its employees which Abitibi failed to produce.

72. The Code of Civil Procedure provides as follows:

> **311.** A witness who has in his possession any document touching the matter in issue is bound to produce it on demand. Except in the case of an authentic writing, he must allow copies, extracts or reproductions to be made which, when certified by the clerk, have the same probative effect as the original.

73. Article 2849 of the Civil Code provides as follows:

> **2849.** Presumptions which are not established by law are left to the discretion of the court which shall take only serious, precise and concordant presumptions into consideration.

74. In *Crispino c. General Accident Insurance Co.*, 2007 QCCA 1293, the Quebec Court of Appeal reviewed the approach to be adopted in order for a court to be able to rely on such presumptions

> Presumptions are <u>serious</u> when the relationship of the known fact and the unknown fact are such that the existence of the unknown fact is established <u>by way of a powerful inference</u> resulting from the known fact (...) Presumptions are <u>precise</u> where such inferences <u>establish directly and specifically</u> the unknown and contested fact. If it is also possible to draw different conclusions or to assume the existence of different and contradictory facts, the presumption would not be precise but would lead to doubt or uncertainty. They are <u>concordant</u> when, whether they have a common or different origin, they, <u>in their entirety and as a result of being in alignment with the conclusion</u>, establish the fact that is trying to be proved. If they are contradictory or neutralize one another, they are not concordant and the court will only be able to retain doubt with regards to the unknown fact.
>
> *Crispino c. General Accident Insurance Co., 2007 QCCA 1293, Cogen Brief of Authorities, Tab 12*

75. It is therefore respectfully submitted that the court should draw adverse inferences from the refusal of Abitibi to seek or produce clearly relevant documents. Similarly, Abitibi elected not to tender any evidence as to what happened before the BPCL board at the key times from April 2009 through January 2010 from Abitibi's two officers who were on the BPCL board, one of whom is the senior group executive responsible for BPCL. It is respectfully submitted that an adverse inference arises from that as well.

PART IV – RELIEF REQUESTED

76. Cogen respectfully requests an Order in accordance with the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of November, 2010.

Chris Besant

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

Tel.: 416.865.2318
Fax: 416.863.6275

Lawyers for Npower Cogen Limited

SCHEDULE "A"

Canada Federal Statutes
Canada Business Corporations Act
Part XX — Remedies, Offences and Punishment

238. Definitions
In this Part,
"action" means an action under this Act; *("action")*
"complainant" means

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
(c) the Director, or
(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part;

...

241.
241(1) Application to court re oppression
A complainant may apply to a court for an order under this section.

241(2) Grounds
If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,
(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

241(3) Powers of court
In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;
(b) an order appointing a receiver or receiver-manager;
(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
(d) an order directing an issue or exchange of securities;
(e) an order appointing directors in place of or in addition to all or any of the directors then in office;
(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the monies that the security holder paid for securities;
(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
(j) an order compensating an aggrieved person;
(k) an order directing rectification of the registers or other records of a corporation under section 243;
(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XIX to be made; and
(n) an order requiring the trial of any issue.

241(4) Duty of directors
If an order made under this section directs amendment of the articles or by-laws of a corporation,
(a) the directors shall forthwith comply with subsection 191(4); and
(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.

241(5) Exclusion
A shareholder is not entitled to dissent under section 190 if an amendment to the articles is effected under this section.

241(6) Limitation
A corporation shall not make a payment to a shareholder under paragraph (3)(f) or (g) if there are reasonable grounds for believing that
(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or
(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

241(7) Alternative order
An applicant under this section may apply in the alternative for an order under section 214.

2001, c. 14, s. 135 (Sched., s. 77)

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

No. 500-11-036133-094

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

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

and

ERNST & YOUNG INC.
Monitor

and

NPOWER COGEN LIMITED
Petitioner

BS0350 n/dos.: 041053-1170

MEMORANDUM OF LAW AND ARGUMENT OF NPOWER COGEN LIMITED

Chris Besant Tel.: 416.865.2318
Fax: 416.863.6275

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

Attorneys for Npower Cogen Limited