CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No. 500-11-036133-094

SUPERIOR COURT

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

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.

and

ABITIBI-CONSOLIDATED INC.

and

BOWATER CANADIAN HOLDINGS INC.
and the other Petitioners listed on the motion

Petitioners

and

ERNST & YOUNG INC.

Monitor

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Respondent on the Motion

OUTLINE OF ARGUMENT OF THE RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA IN RESPONSE TO THE PETITIONERS' AMENDED MOTION FOR THE ISSUANCE OF A RE-RE-AMENDED RECEIVERSHIP ORDER IN RESPECT OF 4513541 CANADA INC.

Unless otherwise indicated, all capitalized terms herein shall have the meaning attributed to them in the Amended Motion for the Issuance of a Re-Re Amended Receivership Order in Respect of 4513541 Canada Inc. dated November 18, 2010, filed by the Petitioners.

I. OVERVIEW

1. The Petitioners seek an order to amend the Re-Amended Receivership Order in respect of 4513541 Canada Inc. (the "Debtor").

2. Her Majesty the Queen in right of the Province of British Columbia ("BC" or "British Columbia") opposes:

   (a) Any abandonment by the Receiver to Her Majesty the Queen in right of the Province of British Columbia (the "Provincial Crown") of real property owned by Debtor and situated in the Province of British Columbia (the "Highway 28 Property") (paragraph 3(g) of draft Order);

   (b) Registration of any attendant Notice of Abandonment against title to the Highway 28 Property (paragraph 3(l) of draft Order);

   (c) Authorization for the Receiver to bankrupt, liquidate or dissolve the Debtor (paragraph 3(p) of draft Order); and

   (d) The inclusion of 24 additional properties as Property subject to the receivership (paragraph 2 of draft Order).

II. BACKGROUND FACTS

3. BC does not dispute the facts as set out in paragraphs 1 - 4 and 10 – 15 of the Amended Motion for the Issuance of a Re-Re-Amended Receivership Order in respect of 4513541 Canada Inc. (the "Amended Motion").

4. However, BC submits that the following additional facts are material to the Amended Motion and Contestation of BC.

(i) The April 27, 2010 Receivership Order in respect of 4513541 Canada Inc., which appointed Ernst and Young Inc. as Receiver, contained the following terms:

(a) The power (set out at paragraph 3(g)):

> "to undertake environmental assessments of the Property and operations of the Debtor and to enter into discussions and negotiations with the relevant environmental authorities in connection with the environmental remediation or decontamination of any Property. In the event that, after having taken possession of any Property in conformity with this Order, the Receiver determines that it is unable to sell it or reach an accommodation on a environmental remediation plan in regard thereof within a responsible period of time it may decide to abandon such Property on notice to the relevant environmental authorities."

(b) A term, at paragraph 13 and headed "Limitation on Environmental Liabilities" which stated:

> "ORDERS that the Receiver shall not occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property, including any Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination (the "Environmental Legislation), unless and until it has reached satisfactory arrangements with the relevant environmental authorities and it has served upon all interested parties and filed a Certificate to that effect with this Court. However, nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any

Environmental Legislation, unless it is actually in possession in accordance with this Order."

(c) A term, at Paragraph 14 headed Limitation on the Receiver's Liability which stated:

"Orders that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct on its part, or in respect or its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the Wage Earner Protection Program Act. Nothing in this Order shall derogate from the protections afforded the Receiver under the BIA, inkling, without limitation, section 14.06 thereof, or under any other applicable legislation."

(d) Paragraph 18 provided in part:

"Orders that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $600,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, *for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order*, including interim expenditures." (italics added for emphasis)

(ii) On July 21, 2010, the Receivership Order was amended (the "Amended Receivership Order") and Samson Belair/Deloitte & Touche Inc. was appointed as Receiver. The term of the Order headed Limitation on Environmental Liabilities was removed from the Order because the then Receiver was unable to reach satisfactory arrangements with relevant environmental authorities. Samson Belair/Deloitte & Touche Inc. agreed to be the replacement Receiver and to take possession of the properties subject only to the protections afforded to receivers and trustees under the BIA.

Second Motion for the Issuance of Various Orders Authorizing the Sale of NonCore Properties and for the Issuance of an Amended Receivership Order in Respect of 4513541 Canada Inc, July 15, 2010, at paragraphs 23 and 24.

(iii) On September 1, 2010, the Amended Receivership Order was amended (the "Re-Amended Receivership Order") by increasing the funding limit in paragraph 18 from $600,000 to $1,700,000 in contemplation of certain properties situate in Quebec, British Columbia, Ontario and New Brunswick being transferred to the Debtor.

(iv) BC, Ontario and New Brunswick opposed the transfer of non-core properties to 4513541 Canada Inc. but were unsuccessful and vesting orders were pronounced on September 10, 2010 (the "Vesting Orders").

(v) At the request of the Receiver, each of the Vesting Orders contained the following sentence in paragraph 6.1:

> "Nothing in this paragraph shall change in any way the provisions of paragraph 14 of this Court's Re-Amended Receivership Order in respect of 4513541 Canada Inc. dated September 1, 2010."

(vi) The Sanction Order granted on September 23, 2010, contained a 'carve out' term (at paragraph 31), which was agreed to between the Petitioners, BC and Ontario regarding potential environmental liabilities in the event future circumstances triggered a concrete dispute.

III. POSITION OF BC

(i) *Abandonment to the Provincial Crown*

5. In their Motion, the Petitioners seek to 'clarify the abandonment procedure' set out in paragraph 3(g) of the Re-Amended Receivership Order. The procedure as now set out in paragraph 3(g) is for the Receiver to abandon property "on notice to the relevant environmental authorities". The proposed new procedure would be for the Receiver to 'abandon' the property "to the *Provincial Crown in the Province it is situated*, by providing notice to the relevant provincial Ministry/Department of the Environment to that effect" (italics added for emphasis). The purpose and intent of the proposed amendments to paragraph 3(g) is to insulate the Receiver from any future claim that the act of abandonment constitutes gross negligence or wilful misconduct on behalf of the Receiver.

6. Briefly summarized, BC's position is as follows:

(i) Abandonment under the BIA is not the equivalent of a forfeiture or an escheat, both of which are governed by provincial and federal legislation (other than the BIA);

(ii) Whether or not an act of abandonment constitutes gross negligence or wilful misconduct depends on the circumstances of the particular abandonment.

(iii) Section 14.06 of the BIA sets out the protections afforded to the Receiver relating to contaminated properties and abandonment and is preserved in Paragraph 14 of the Amended Receivership Order. Provincial legislation also provides protection to Receivers. There is no authority to expand beyond those protections.

(ii) *Abandonment under the BIA*

7. Section 14.06 of the BIA merely authorizes a Receiver to renounce (abandon) the Receiver's *control* over a property. Upon abandonment, control of the property reverts to the owner of the property, in this case 4513541 Canada Inc. Nothing in section 14. 06 of the BIA authorizes the Receiver, or this court, to unilaterally transfer control and/or possession of property in the Debtor's estate to the Provincial Crown. Abandonment, pursuant to section 14.06 of the BIA, does not, and cannot, constitute an escheat or forfeiture.

8. The process of forfeiture or escheat of the Highway 28 Property to the Crown would be governed by, and depending on the facts in existence at the time of forfeiture or escheat, either the *Taxation (Rural Area) Act*, R.S.B.C. 1996, c. 448 or the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 or the *Escheats Act*, R.S.C. 1985, c. E-13.

9. If, and in accordance with the provisions of the *Taxation (Rural Area) Act*, the Highway 28 Property were to forfeit - it would forfeit to the Provincial Crown and legal title and possession would vest in the Provincial Crown. However, no such forfeiture has taken place.

10. Alternatively, if the Highway 28 Property were to escheat in accordance with the *Canada Business Corporations Act* or the *Escheats Act*, it would escheat to Her Majesty the Queen in right of Canada (the "Federal Crown") and legal title and possession would vest in the Federal Crown. Again, no such escheat has taken place.

11. It is therefore not clear to which Crown the Highway 28 Property *might* ultimately forfeit or escheat to.

12. Assuming the Receiver could abandon the Highway 28 Property to the Provincial Crown, which BC says it cannot, what would abandonment mean? Would the Provincial Crown own the land, control the land, be in possession of the land? What legal relationship would the Provincial Crown have with the land? Would it be some sort of bailor, trustee, licencee? What obligations and responsibilities, concurrent with the incident of control or possession, would flow to the Provincial Crown?

(iii) *Abandonment and gross negligence or willful misconduct*

13. The Petitioners have provided no evidence in support of the Motion as to the conditions at the Highway 28 Property, or even if the Highway 28 Property is to be abandoned, and if so when and why.

14. As submitted above, whether an act of abandonment by a Receiver will constitute gross negligence or willful misconduct depends upon the circumstances of the abandonment and the conditions at the property at the time of the abandonment.

Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 US 494 (1986).

(iv) *Legislated Liability Protection for Receivers*

15. Section 14.06(4)(c) of the BIA contemplates that the Receiver may abandon environmental compromised properties in advance of, or in the absence of, any regulatory compliance order issued by an environmental regulator. Section 14.06(4) of the BIA provides that a Receiver is not liable to comply with a remediation order if it abandons the property as set out in that subsection but notwithstanding such

abandonment a Receiver may be liable for an environmental condition or environmental damage arising out of gross negligence or willful misconduct (see section 14.06(2)).

16. Paragraph 3(g) of the Amended Receivership Order expressly authorizes the Receiver to abandon property of the Debtor on certain conditions, including notice to the relevant environmental authorities and paragraph 14 expressly references section 14.06 of the BIA.

17. Section 26 of the *Contaminated Sites Regulation*, B.C. Reg. 375/96 also limits the liability exposure of a Receiver.

18. BC submits that the protections outlined in paragraphs 15 - 17 above provide the Receiver with sufficient liability protection and respectfully submits that additional liability protection, particularly given the factual vacuum regarding any abandonment, cannot and should not be granted.

(v) *Registration of Notice of Abandonment*

19. The Highway 28 Property is owned by the Debtor and is registered in the name of the Debtor. That fact is not changed by reason of the Debtor being in receivership. The only thing that is changed by reason of the receivership is who is able to exercise control over the property. There is no notation on title to the Highway 28 Property that indicates that the Debtor is in receivership. There is no need for or legal basis for registration of a notice of abandonment. Furthermore, even if such a notice could be registered, and this Court was inclined to grant such an order, it would be necessary to stipulate what the notice would say and, in particular, to ensure that registration of the notice would not indirectly do what BC submits cannot be done, namely abandon the property to the Provincial Crown.

(vi) *Authorization to bankrupt, liquidate or dissolve the Debtor*

20. Each of British Columbia, Alberta, Saskatchewan and Ontario have model Receivership Orders. None of the model orders contain a provision that permits a receiver to bankrupt

abandonment a Receiver may be liable for an environmental condition or environmental damage arising out of gross negligence or willful misconduct (see section 14.06(2)).

16. Paragraph 3(g) of the Amended Receivership Order expressly authorizes the Receiver to abandon property of the Debtor on certain conditions, including notice to the relevant environmental authorities and paragraph 14 expressly references section 14.06 of the BIA.

17. Section 26 of the *Contaminated Sites Regulation*, B.C. Reg. 375/96 also limits the liability exposure of a Receiver.

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(vi) *Authorization to bankrupt, liquidate or dissolve the Debtor*

20. Each of British Columbia, Alberta, Saskatchewan and Ontario have model Receivership Orders. None of the model orders contain a provision that permits a receiver to bankrupt

the debtor company. Each of the explanatory notes that accompany the model orders contains a statement to the effect (quoted from BC Model Order Explanatory Notes):

> "There is no specific provision allowing the Receiver to make an assignment in bankruptcy or to consent to the making of a Bankruptcy Order under the BIA. While some case law permits Receivers to take such steps, typically Receivers seek prior Court approval even where the specific power to do so is included in the Order. Bankrupting the Debtor may reverse priorities and prejudice or favour certain creditors over others. Bankruptcy is a sufficiently material, substantive and final act that, if a Receiver is empowered to bankrupt the Debtor, it should be expressly brought to the Court's attention.

21. In the *2011 Annotated Bankruptcy and Insolvency Act*, the esteemed authors note:

> "There is lack of unanimity in the decided cases whether the court can authorize a court-appointed receiver to file an assignment for a company. Some cases have held that the court cannot authorize such action: *Everex Systems Inc. v. Pride Computer Distributions Ltd.* (1988), 68 C.B.R. (N.S.) 24 (B.C. S.C.); other cases have held that the court can authorize such action: *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585 (Ont. Gen. Div.); *Royal Bank v. Sun Squeeze Juices Inc.* (1994), 24 C.B.R. (3d) 302 (Ont. Gen Div.); affirmed (1994), 28 C.R.R. (3d) 201 (C.A.)."

> *2011 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, at section D72(2)(*x*) on page 194.

22. The motion for the orders vesting the Highway 28 Property and other properties in Quebec, Ontario and New Brunswick provided that the Petitioners were seeking the appointment of the Receiver in respect of those properties "to permit the continued safe custody of such properties while their future is being determined under court supervision."

> Amended Second Motion for the Issuance of Various Orders Authorizing the Sale of Non-Core Properties and for the issuance of a Re-Amended Receivership Order in respect of 4513541 Canada Inc., paragraph 28

23. The Petitioner's say in their Memorandum of Argument for the Vesting Orders:

> "The Vesting Orders will not exempt the Purchaser from environmental obligations in respect of the Properties and, indeed,

> the Petitioners have agreed to provide funding to the receiver of the Purchaser, Samson Belair/Deloitte & Touche Inc. (the "Receiver"), specifically to permit prudent care, custody and management of the Properties."
>
> and
>
> "The Receiver is tasked with the management of all assets transferred to the Purchaser in an environmentally responsible manner and, where possible, with the sale of these assets to third-party buyers."

Memorandum of Argument of the Petitioners on the Respondents Contestations of and Cross-Motions in response to the Amended Second Motion for the Issuance of Various Orders authorizing the sale of non-core properties and the issuance of a Re-Amended Receivership Order in respect of 4513541 Canada Inc., paragraphs 2 and 4.

24. Assuming that there is power to authorize the Receiver to bankrupt, liquidate or dissolve the Debtor, the question remains as to whether or not the power should be granted at any particular stage of the proceedings. In *Royal Bank v Sun Squeeze Juices Inc.* Mr. Justice Farley held that the court has the power to authorize the court appointed Receiver/Manager to either file an assignment in bankruptcy or consent to the petition and then went on to say:

> "Thus this matter boils down to whether in the circumstances I should authorize the R/M to consent to the receiving order. Each case of course must be determined on its own facts. It seems to me that where there is an obvious insolvency then the Court should examine whether there is a "need" for a bankruptcy and if this need overcomes any contras."

Royal Bank v Sun Squeeze Juices Inc., 1994 Carswell Ont 226, 24 C.B.R. (3d) 302 at paragraph 11

25. In the circumstances, the Province submits that authority to bankrupt, liquidate or dissolve the Debtor should only be given when and if there is evidence that indicates that the purpose of the receivership has been or cannot be fulfilled and what the pros and cons of any such "final act" would be. There is no evidence of a need for a bankruptcy, liquidation or dissolution at this stage of the proceedings.

(vii) ***Addition of 24 new properties***

26. The motion for the order seeking to increase the funding for the Receiver consequent upon the vesting of the British Columbia, Quebec, Ontario and New Brunswick properties to the Debtor from $600,000 to $1,700,000 stated:

> "Such financing shall be used to cover for (i) estimated fees and disbursements of the replacement Receiver for an initial period of 12 months, and (ii) reasonable costs of conservation, environmental studies and any urgent, currently unforeseen, remediation work required to stabilize the Purchaser's properties (including the Non-Core Properties once transferred) while negotiations are undertaken for the remediation and disposition of such properties."
>
> Amended Second Motion for the Issuance of Various Orders Authorizing the Sale of Non-Core Properties and for the issuance of a Re-Amended Receivership Order in respect of 4513541 Canada Inc., paragraph 26(b)

27. The 24 new properties that are proposed to be subject to the receivership are properties that are owned by St.-Maurice River Drive Company. The CCAA Plan, at paragraph 29 of the Amended and Restated CCAA Plan Supplement 6.1(a)(i), provides that the shares held by each of ACCC and BCFPI in the capital of St. Maurice are to be transferred to the Debtor for nil consideration. Following transfer of the shares, the new properties will continue to be owned by St. Maurice. The new properties will not be owned by the Debtor.

28. There is no evidence of the environmental or other state of the new properties. There is no evidence of what it will cost to maintain or remediate these properties and/or sell them.

29. The Petitioners propose that the Receiver's funding be increased from $1,700,000 to $2,200,000. It appears from the Petitioner's motion that some of the increase is required for the management of the British Columbia, Quebec, Ontario and New Brunswick properties transferred or to be transferred to the Debtor under the Vesting Orders. Presumably some of the increase is intended for the management of the new properties. In the absence of any evidence as to the state of the new properties or the cost to maintain, remediate and/or sell the new properties, there is a legitimate concern that the inclusion of the 24 new properties may adversely affect the ability of the Receiver to deal

with the British Columbia, Quebec, Ontario and New Brunswick properties in the manner contemplated at the time of vesting.

IV. RELIEF REQUESTED

British Columbia respectfully requests:

i) that the relief sought by the Petitioners as set out in clauses (i), (ii) and (iii) of paragraph 16(d) of the Petitioners motion and as more particularly set out in the proposed amendments to the Re-Amended Receivership Order at paragraphs 2, 3(g), 3(l) and 3(p) be dismissed;

ii) costs of this motion;

iii) such further and other relief as to this Honourable Court may seem just.

All of which is respectfully submitted

November 29, 2010
Vancouver, British Columbia

Gowling Lafleur Henderson LLP
for: ____________________________
Elizabeth J. Rowbotham,
Ministry of Attorney General, Counsel for BC

Gowling Lafleur Henderson LLP
for: ____________________________
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N° 500-11-036133-094

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ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent on the motion

Outline of Argument of Attorney General of British Columbia

in support of the Contestation in response to the amended motion for the issuance of re-re-amended receivership order in respect of 4513541

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Outline of Argument of Attorney General of British Columbia

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