

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 ONTARIO AS REPRESENTED BY
THE MINISTER OF THE ENVIRONMENT.**

Respondent on the motion

**CONTESTATION BY THE ATTORNEY GENERAL OF ONTARIO IN
RESPONSE TO THE PETITIONERS' AMENDED MOTION FOR THE
ISSUANCE OF A RE-RE-AMENDED RECEIVERSHIP ORDER IN RESPECT
OF 4513541 CANADA INC.**

I OVERVIEW

1. The Petitioners seek amendments to their Re-Amended Receivership Order. The Attorney General of Ontario ("Ontario") opposes the Order sought principally because:

- a) clauses 3(g) and 3(l) purport to vest the properties in Ontario and impose obligations on Ontario that it would not otherwise have with respect to these properties;
- b) the relief sought, in particular clauses 3(g), 3(l) and 3(p), may amount to a release to the Receiver for all responsibility for its conduct, including any acts of gross negligence or willful misconduct contrary to s.14.06 of the *Bankruptcy and Insolvency Act* ("BIA") when it is premature for such a release to be given;
- c) clauses 2 and 18 purport to make the Receiver responsible for an additional 24 Quebec properties in the absence of any evidence as to their environmental condition and provides the Receiver with only an additional \$500,000. Such an Order would potentially dilute the pool of available funds that would otherwise address environmental concerns on the Ontario properties if the additional funds are insufficient to address potential concerns on the 24 Quebec properties.

II BASIS FOR CONTESTATION

- 2. The motion should be dismissed on the ground that there is nothing in the *Companies' Creditors Arrangement Act* ("CCAA"), the BIA or Ontario's *Environmental Protection Act* ("EPA") that allows a Receiver to abandon properties to the Provincial Crown by providing notice to the Ministry of the Environment.
- 3. Further, it is neither fair nor reasonable that the Receiver be relieved from liabilities imposed by a regulatory regime enacted in the public interest relating to the Receiver's gross negligence or willful misconduct by transferring the properties to the Provincial Crown or by obtaining the relief sought in clause 3(p).
- 4. Ontario requests that the motion of the Petitioners be dismissed on the ground that there is nothing in the CCAA, the BIA, or in the EPA which supports the relief sought.

5. Section 14.06 of the BIA provides that a receiver is personally liable for any environmental condition or environmental damage that arose as a result of the receiver's gross negligence or willful misconduct. There is no limitation on this liability and liability that is triggered during the course of a receivership is not avoided if the receiver abandons the property.

6. Regarding the additional 24 Quebec properties, the motion should be dismissed on the ground that vesting orders have been granted in respect of certain specific properties and an amount set aside to deal with environmental issues on those properties. It is neither fair nor reasonable that the Receiver take on an additional 24 properties, in the absence of evidence as to the level of contamination and the extent of future regulatory action that may be required with respect to these additional properties. In the absence of such evidence, this Court is unable to properly evaluate the adequacy, or not, of the proposed \$500,000 monetary increase and it is reasonable to conclude that the relief sought would dilute funds otherwise available for use on the other properties.

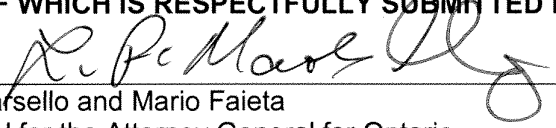
III RELIEF REQUESTED

7. Ontario respectfully requests that this Honourable Court:

- a) Dismiss Abitibi's motion for approval of the Re-Re-Amended Receivership Order;
- b) In the alternative, Ontario requests that the Re-Re-Amended Receivership Order be amended to clearly state that, if the Receiver does abandon a property, the Receiver retains liability for any gross negligence or willful misconduct which occurred during the course of its possession and control, whether discovered during the Receivership or after the date of abandonment;
- c) Its costs of this motion; and
- d) Such further and other Order as to this Honourable Court may seem just.

November 30, 2010

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:



L.F. Marsello and Mario Faieta
Counsel for the Attorney General for Ontario

SCHEDULE A

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

14.06

...

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

- (a) before the trustee's appointment; or
- (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

...

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

- (i) complies with the order, or
- (ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

- (i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or
- (ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

Environmental Protection Act, R.S.O. 1990, c. E.19

168.19 (1) The Minister, the Director or a provincial officer shall not issue any order under any provision of this Act to a receiver, receiver representative, trustee in

bankruptcy or trustee in bankruptcy representative with respect to the property held or administered by the receiver or trustee in bankruptcy unless the order arises from,

- (a) the gross negligence or wilful misconduct of the receiver, receiver representative, trustee in bankruptcy or trustee in bankruptcy representative; or
- (b) circumstances prescribed by the regulations. 2001, c. 17, s. 2 (39).

Consent order

(2) Subsection (1) does not apply to an order issued with the written consent of the receiver, receiver representative, trustee in bankruptcy or trustee in bankruptcy representative. 2001, c. 17, s. 2 (39).

Exceptional circumstances, secured creditors, receivers and trustees in bankruptcy

Secured creditors

168.20 (1) Despite section 168.18, the Director may issue an order described in subsection (4) to a secured creditor who has become the owner of the secured property by virtue of a foreclosure if the Director has reasonable grounds to believe that, as a result of the presence or discharge of a contaminant on, in or under the property, any of the following circumstances exist:

1. There is danger to the health or safety of any person.
2. There is impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it.
3. There is injury or damage or serious risk of injury or damage to any property or to any plant or animal life. 2001, c. 17, s. 2 (39).

Receivers and trustees in bankruptcy

(2) Despite section 168.19, the Director may issue an order described in subsection (4) to a receiver or trustee in bankruptcy if the Director has reasonable grounds to believe that, as a result of the presence or discharge of a contaminant on, in or under the property held or administered by the receiver or trustee in bankruptcy, any of the circumstances listed in subsection (1) exist. 2001, c. 17, s. 2 (39).

Restriction if record of site condition

(3) If a record of site condition has been filed in the Environmental Site Registry under section 168.4 with respect to the property, no order shall be issued under subsection (1) or (2) unless the Director has reasonable grounds to believe that, as a result of the presence of a contaminant that was on, in or under the property as of the certification date, there is danger to the health or safety of any person. 2001, c. 17, s. 2 (39).

Scope of order

(4) An order under subsection (1) or (2) may only require the secured creditor, receiver or trustee in bankruptcy, within such times as are specified in the order, to comply with such directions specified in the order as are reasonably necessary to ensure that,

- (a) none of the circumstances listed in subsection (1) exist, if no record of site condition has been filed in the Environmental Site Registry under section 168.4 with respect to the property; or

- (b) there is no danger to the health or safety of any person, if a record of site condition has been filed in the Environmental Site Registry under section 168.4 with respect to the property. 2001, c. 17, s. 2 (39).

Same

- (5) The directions referred to in subsection (4) may include the following:
 1. A direction requiring the doing of anything mentioned in section 124.
 2. A direction requiring the removal or disposal of the contaminant or anything affected by the contaminant.
 3. A direction to secure, by means of locks, gates, fences, security guards or other means, any land, place or thing.
 4. If the presence or discharge of the contaminant has damaged or endangered or is likely to damage or endanger existing water supplies, a direction to provide temporary or permanent alternate water supplies. 2001, c. 17, s. 2 (39); 2005, c. 12, s. 1 (47).

Information to be included in order

- (6) An order under subsection (1) or (2) shall briefly describe the reasons for the order and the circumstances on which the reasons are based, including the circumstances listed in subsection (1) that exist. 2001, c. 17, s. 2 (39).

Exception

- (7) A receiver or trustee in bankruptcy is not required to comply with an order under subsection (2) if the order did not arise from the gross negligence or wilful misconduct of the receiver or trustee in bankruptcy, or of a receiver representative or trustee in bankruptcy representative, and,
 - (a) not later than 10 days after being served with the order, or within such longer period as may be specified by the Director in the order, the receiver or trustee in bankruptcy notifies the Director that they have abandoned, disposed of or otherwise released their interest in the property to which the order relates; or
 - (b) the order was stayed under Part I of the *Bankruptcy and Insolvency Act* (Canada) and the receiver or trustee in bankruptcy notified the Director, before the stay expired, that they abandoned, disposed of or otherwise released their interest in the property. 2001, c. 17, s. 2 (39).

Notice under subs. (7)

- (8) Notice under clause (7) (a) or (b) must be given in the manner prescribed by the regulations. 2001, c. 17, s. 2 (39).

When notice of order filed in Registry

- (9) The Director shall file notice of an order under subsection (1) or (2) in the Environmental Site Registry in accordance with the regulations if a record of site condition has been filed in the Registry under section 168.4 with respect to the property. 2001, c. 17, s. 2 (39).

Notice of compliance with order

- (10) If notice of an order has been filed in the Registry under subsection (9) and the Director is satisfied that the order has been complied with, the Director shall file notice of the compliance in the Registry in accordance with the regulations. 2001, c. 17, s. 2 (39).

Filing of new record of site condition

(11) If notice of an order has been filed in the Registry under subsection (9) and the Director is satisfied that the order has been complied with but the Director is of the opinion that a certification contained in the record of site condition filed in the Registry does not accurately reflect the current state of the property, subsection (10) does not apply until a new record of site condition is filed in accordance with section 168.4. 2001, c. 17, s. 2 (39).

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 MONTREAL

In the matter of Plan of Compromise or Arrangement of:

ABITIBIBOWATER INC. *et al*
Petitioners

- and -

ERNST & YOUNG INC.
Monitor

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

**CONTESTATION BY THE ATTORNEY GENERAL OF
ONTARIO IN RESPONSE TO THE PETITIONERS'
AMENDED MOTION FOR A RE-RE-AMENDED
RECEIVERSHIP ORDER IN RESPECT OF 4513541
CANADA INC.**

ORIGINAL

Mr. Leonard F. Marsello Tel: 416-326-4939
Ms. Shona L. Compton Fax: 416-326-4181

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9