

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

OUTLINE OF ARGUMENT OF THE ATTORNEY GENERAL FOR ONTARIO

I OVERVIEW

1. The Petitioners seek amendments to their Re-Amended Receivership Order. The Attorney General of Ontario ("Ontario") opposes the Order 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), could be taken as releasing the Receiver from 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 any concerns at the 24 Quebec properties.
2. The motion should be dismissed on the ground that there is no basis in federal or provincial law for the Receiver to be permitted to abandon the properties to the Provincial Crown.
 3. The motion should also be dismissed on the ground that it is premature to release the Receiver from liability in advance of the date of abandonment.
 4. The motion should, as well, be dismissed on the ground that vesting orders have already 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 to amend the Re-Amended Receivership Order to add an additional 24 properties in the absence of an evidentiary basis for the court to evaluate the adequacy, or not, of the proposed monetary increase.
 5. In the event that a court order is granted, the order should clearly specify that nothing in the order shall be taken as a release of any liability that the Receiver might have by reason of its gross negligence or willful misconduct.

II SUMMARY OF ADDITIONAL FACTS

6. The Petitioners seek to expand the definition of debtor to include subsidiaries of 4513541 Canada Inc. This would have the effect of making the Receiver responsible for an additional 24 Quebec properties while only increasing the amount of money available to the Receiver by a mere \$500,000. The Petitioners have led no evidence as to the level of contamination that may or may not exist on these properties or of potential regulatory orders that might be required during the course of the receivership. Accordingly, there is no evidence that the proposed \$500,000 is an adequate sum to deal with potential problems respecting these additional properties.

III BASIS FOR CONTESTATION

There is No Legal Basis to Permit the Receiver to Abandon Properties to the Provincial Crown

7. Section 3(g) and 3(l) of the proposed Re-Amended Receivership Order would allow the Receiver “to abandon such property to the Provincial Crown in the Province in which it is situated by providing notice ...” There is no statutory authority in the CCAA, the BIA or the EPA that would allow a Receiver to abandon a property to a provincial or federal Crown.

8. In the event that this Court issues an order allowing the Receiver to abandon the properties, other than to the Provincial Crown, the properties would continue to be owned by 4513541 Canada Inc. There is simply no legal basis for ownership to be transferred to the Provincial Crown as a result of the Receiver’s abandonment.

Receivers Are Not Absolved of Liability When they Abandon Property Under the BIA

9. In determining whether to amend the Re-Amended Receivership Order as proposed, this Court should take into account the public interest which is reflected in the specific terms of s.14.06 of the BIA. The terms of s.14.06 do not exclude receivers from

liability under environmental legislation, but rather prescribe the specific circumstances in which a receiver's actions attract liability. This Court does not have the inherent jurisdiction to rewrite s.14.06 to release the Receiver from all liability including liability for gross negligence or willful misconduct by allowing it to abandon the properties to the Provincial Crown.

***Big Sky Living Inc. (Re)*, [2002] A.J. No. 886 at para. 47-53 (Q.B.)**

10. Such an avoidance of present and future regulatory responsibility increases the risk of harm to the natural environment and undermines the "polluter pays" principle that underlies environmental legislation across Canada.

11. In the event that this Court grants an order allowing the Receiver to abandon a property, the Receiver remains liable for acts of gross negligence and willful misconduct which occurred during the course of the receivership, whether discovered prior to or after abandonment of the property.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 s.14.06(1.1)(b)**

12. Section 14.06(2) of the BIA provides for personal liability for any environmental condition that arose or environmental damage that occurred after a receiver's appointment if such condition arose or such damage occurred as a result of a receiver's gross negligence or willful misconduct. There is no exception or limitation to this liability.

(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 willful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 s.14.06(2)**

13. Notably, the BIA does not state that the liability arising in s. 14.06(2) is avoided if a property is abandoned.

14. Subject to s.14.06(2), s.14.06(4) of the BIA details when a receiver is not personally liable for non-compliance with an environmental order. Even if a receiver abandons the property within 10 days of the issuance of the environmental order or within 10 days of the receiver's appointment, the receiver is still personally liable for failure to comply with an order if the environmental condition arose or the environmental damage occurred as a result of the receiver's gross negligence or willful misconduct.

15. The Receiver should only be permitted to abandon a property where a remedial order addresses an environmental condition which arose or environmental damages which occurred before a receiver's appointment or where the circumstances of the abandonment do not result in a breach of the "gross negligence" or "willful misconduct" standard of care. In other words, the right to abandon exists only where the receiver has not triggered personal liability pursuant to s.14.06(2).

Marin and Ilchenko, "Amendments to the Bankruptcy and Insolvency Act – Bill C-5 Environmental Liabilities of Trustees and Receivers", *National Insolvency Review*, Vol. 14. No. 2 at pp. 25-26

16. Accordingly, abandonment does not immunize receivers from environmental liability in all situations and there is no basis for granting the requested Order in this case if it were to have the effect of releasing the Receiver in advance of the date of abandonment. The Court is given no power to extend or limit the protection given to the Receiver in respect of liability for environmental damage. There would be nothing objectionable to a provision in the Order which essentially parallels s. 14.06(2), but the Order as proposed goes beyond the terms of s.14.06(2).

***Big Sky Living Inc. (Re)*, supra.**

Ontario's Law Reflects the Policy Consideration in Sections 14.06(2) and (4) of the BIA

17. As with section 14.06(2) and (4) of the BIA, several provisions in the EPA impose liability on trustees and receivers for gross negligence or willful misconduct.

18. Section 168.19(1)(a) of the EPA provides that the Ontario Ministry of the Environment (MOE) may issue an environmental order to a trustee or a receiver if the order arises from the "gross negligence or willful misconduct" of the trustee or receiver. There is no provision indicating that abandonment is a valid defence.

19. Section 168.20(2) and (7) of the EPA provides that a trustee or receiver must comply with an order requiring a trustee or receiver to take remedial action to ensure that there is no: (1) danger to the health and safety of any person; (2) impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or (3) injury or damage or serious risk of injury or damage to any property or to any plant or animal life if the order arose from the gross negligence or willful misconduct of the trustee or receiver. There is no provision authorizing abandonment as a valid defence.

20. Like in the BIA, abandonment under the EPA does not immunize trustees and receivers from environmental liability in all situations. Trustees and receivers remain liable for gross negligence or willful misconduct.

21. Ontario Courts have also held that companies must take appropriate measures to ensure that there is no risk of imminent harm to humans or the natural environment. In *Appletex v. Ontario (Minister of Environment and Energy)*, the Ontario Divisional Court upheld a decision of the Ontario Environmental Appeal Board (now the Ontario Environmental Review Tribunal) that found two investors liable for the clean-up of a closed wool dying facility. Though the tribunal was sympathetic to the argument that the

investors should not be personally liable to clean up decades of environmental contamination when they had only been operating the facility for a few years prior to its closure, the Board still required the investors to ensure that the facility was not abandoned in a manner that itself posed “imminent and obvious environmental hazards”.

In its decision the Board states that:

To begin with, one must acknowledge that by definition those responsible for a failing business will not have the resources needed to meet all their responsibilities. Such persons will have a variety of competing obligations...

However, we do feel that it is reasonable to expect the person having financial management or control of a failing company to take reasonable steps to safeguard the property against imminent and obvious environmental hazards...

This will include such obvious steps as disposing of all flammable materials and hazardous wastes and securing from vandals and from forces of nature the parts of the property containing environmental hazards where it is not feasible to remove contaminants and sources of contamination. Under such circumstances, such parts of the property should be securely fenced, locked, and posted. If the persons having management and control fail to have the corporation carry out such obvious precautions, the Board will not hesitate to hold them personally responsible for using their personal funds to do so.

***724597 Ontario Inc. (c.o.b. Appletex) v. Ontario (Minister of Environment and Energy)*, [1994] O.E.A.B. No. 17 at p. 28 affd. [1995] O.J. No. 3713 (Ont. Div. Ct.).**

22. In the event that this Court allows the Receiver to abandon properties, the court order should make it clear that the Receiver must take all necessary steps to ensure that all imminent environmental hazards are dealt with so that there is no risk of harm to humans or the natural environment and that the receiver retains liability for gross negligence and willful misconduct.

The Additional 24 Quebec Properties

23. No Order should be made respecting these properties in the absence of any evidence as to their environmental condition. To do so on the present record would result in a dilution of the funds otherwise available for use at the other properties.

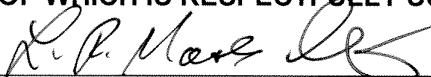
V RELIEF REQUESTED

24. 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 Shona L. Compton
Counsel for the Attorney General for Ontario

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

N. 500-11-036133-094

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PROVINCE OF QUEBEC
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ABITIBIBOWATER INC. *et al*
Petitioners

- and -

ERNST & YOUNG INC.
Monitor

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

**OUTLINE OF ARGUMENT OF THE ATTORNEY
GENERAL OF ONTARIO**

ORIGINAL

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