CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 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)

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 Applicants as defined herein

Petitioners

and
ERNST & YOUNG INC.

Monitor

CONTESTATION OF GREEN HUNT WEDLAKE INC., TRUSTEE IN BANKRUPTCY FOR BOWATER CANADA FINANCE CORPORATION IN CONNECTION WITH A MOTION FOR AN ORDER ESTABLISHING A PROCEDURE FOR THE FILING, REVIEW AND DETERMINATION OF CLAIMS SECURED BY CCAA CHARGES

GREEN HUNT WEDLAKE INC. IN ITS CAPACITY AS TRUSTEE IN BANKRUPTCY FOR BOWATER CANADA FINANCE CORPORATION (HEREINAFTER THE "TRUSTEE") CONTESTS THE FOREGOING MOTION FOR THE REASONS STATED BELOW:

I. Overview

1. The process sought by the Applicants in the motion materials dated December 21, 2010 (the "**Motion Materials**") has not been requested by BCFC or the Trustee, and is premature since it is not yet known whether there will be any assets to distribute from the estate of BCFC. Furthermore, it unnecessarily duplicates a process provided for under

the *Bankruptcy and Insolvency Act* ("**BIA**") and introduces the Monitor into a claims process that is mandated to be under the supervision of the Trustee pursuant to the BIA.

2. In the alternative, if the Court finds that a claims bar process pursuant to the *Companies Creditors Arrangement Act* ("**CCAA**") is necessary or desirable then the Trustee submits that the order sought should be amended to (i) entrust the supervision and approval of claims jointly to the Trustee and Monitor, (ii) defer the procedure to determine contested claims to a later hearing before this Honourable Court or the Supreme Court of Nova Scotia in Bankruptcy and Insolvency for direction, and (iii) establish a claims bar date with a longer period for the filing of a potential claim by the Trustee against the directors and officers of BCFC for thirty days after the final determination of certain related proceedings before the US Bankruptcy Court between the Trustee and the member of BCFC related to the Trustee's claim for contribution pursuant to section 135 of the *Companies Act* (Nova Scotia), RSNS 1989 c. 81 (the "**Companies Act**").

3. In either event, the Trustee submits that the Court should release and discharge all charges against the assets of BCFC granted under the initial order made by this Honourable Court on April 17, 2009 as subsequently restated and amended from time to time (the "**Initial Order**") except for the charge in favour of officers and directors more particularly described below and in the Motion Materials.

II. Background

4. The Trustee concurs with the facts as outlined in Section A to the motion materials filed by the Applicants. For the purpose of this contestation, "**Applicants**" and "**Petitioners**" have the same meaning as in the Motion Materials.

5. As noted by the Applicants, the order of this Court issued September 23, 2010 approving the plan of reorganization and comprise in respect of the Applicants expressly excluded BCFC, whose creditors had voted to the reject the plan (the "**Plan**"). As noted in Your Lordship's decision in relation to that order at para 67:

> As stated by Abitibi's counsel at hearing, BCFC is neither an "Applicant" under the terms of the releases of the CCAA Plan nor pursuant to the Sanction Order. As such, BCFC does not give or get releases as a result of a Sanction Order. The CCAA Plan does not release BCFC nor its directors or officers acting as such.

6. On November 23, 2010, the US Bankruptcy Court issued *Finding of Facts, Conclusions of Law, and Order Confirming Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (as amended)* in respect of certain AbitibiBowater debtors, including the member of BCFC, a true copy of the order is attached as **Exhibit T-1** (the "**Confirmation Order**"). This order included, in Section XX beginning on page 68 of the Confirmation Order, provisions for the determination of certain claims by BCFC against the member of BCFC pursuant to the Companies Act. The agreed process for resolving those claims was summarized by Judge Carey of the United States Bankruptcy Court in his *Opinion on Confirmation* at page 8 as follows:

> BCFC is an unlimited liability company organized under the laws of Nova Scotia. The BCFC Minority Noteholders objected to the Plan, arguing (among other things) that their claims against Bowater (Class 6S) were not adequately addressed. Those claims include (i) a claim based upon Bowater's guaranty of the 7.95% Notes (the "BCFC Guaranty Claim") and (ii) a claim based upon Section 135 of the *Companies Act* (Nova Scotia), which obligates Bowater to contribute funds to BCFC to fully satisfy BCFC's obligations (including those under the 7.95% Notes) if the company is "wound up" (the "Contribution Claim" or, sometimes, the "Wind-up Claim"). (Discl. St., p. 79). The Agreed Order filed on November 16, 2010 includes resolution of the BCFC Minority Noteholders' objections regarding treatment of those claims in Section XX of the revised proposed confirmation order, which provides, briefly, for (i) establishment of a reserve of New ABH Common Stock for the 7.95% Disputed Claims, (ii) distribution of New ABH Common Stock to the 7.95% Indenture Trustee in accordance with the Plan provisions, as if the Indenture Trustee held an Allowed Class 6S Claim of $619,875,000, (iii) establishment of a BCFC Escrow Account, which funds will be released (as agreed) to a BCFC Representative *[The Trustee]* in connection with prosecuting the BCFC Contribution Claim and the actual expenses of winding-up the BCFC estate, (iv) payment of BCFC's Independent Advisors pursuant to agreed terms, and (v) taking steps to cause BCFC to make an assignment for the benefit

> of the creditors in Nova Scotia under the *Bankruptcy and Insolvency Act* of Canada ("BIA") and appointment of Peter Wedlake as trustee in the BIA, and dismissing BCFC's Chapter 11 case and CCAA proceeding.

A copy of Judge Carey's opinion is attached hereto as **Exhibit T-2.**

7. It appears from the resolution of the sole shareholder of BCFC passed December 17, 2010 and attached as Exhibit R-1 to the Motion Materials that AbiBow US Inc. (formerly, Bowater Incorporated) authorized the bringing of this motion at the same time as authorizing an assignment in bankruptcy rather than leaving it to the Trustee to determine how and when the question of the CCAA Charges should be addressed. It is also to be noted that BCFC did not join with the Applicants in bringing this motion notwithstanding the authorization in the resolution.

8. According to the records of BCFC provided to the Trustee, the directors of BCFC resigned from their positions on or about December 20, 2010.

9. In accordance with the Order of Judge Carey, BCFC made an assignment in bankruptcy on December 31, 2010 and appointed Green Hunt Wedlake Inc. as Trustee in Bankruptcy. Peter Wedlake is the President of Green Hunt Wedlake Inc.

10. Upon the Trustee becoming aware of the Motion Materials filed by the applicant in this proceeding (since it was not on the original service list), counsel for the Trustee wrote to this Honourable Court on January 7, 2011 requesting an adjournment *sine die* of this motion until such time as there was a first meeting of creditors, confirmation of the Trustee and its counsel and a distribution of assets from the estate was likely. Such letter (with a minor typographical error corrected) is produced herewith as **Exhibit T-3**.

11. At the first meeting of creditors for BCFC held January 25, 2011, the creditors confirmed the appointment of the Trustee and the Trustee's legal counsel, Robert G. MacKeigan, Q.C. of Cox & Palmer.

III. Outstanding CCAA Charges

12. As noted by the Applicants in the Motion Materials, the Initial Order created certain charges as security for the obligations of all of the Petitioners, including BCFC. The Trustee understands that, upon implementation of the Plan, the charges against the assets of all of the Applicants were discharged and released by order of this Honourable Court, and no amount remains owing under them. Those CCAA charges (collectively, the "**CCAA Charges**") that remain in issue with respect to BCFC are:

a) A charge for security for the obligation to indemnify the directors of the Bowater Petitioners (including BCFC) where the directors "acted honestly and in good faith in the best interests of the Petitioners and Partnerships" charging all of the property of the Bowater Petitioners to the extent of the aggregate amount of $25,000,000 to the extent that the directors of the Bowater petitioners do not have coverage under any directors' and officers' insurance (Initial Order, paras. 51 and 53) (the "**D&O Charge**"); and

b) A charge on all the property of the Bowater Petitioners, including BCFC, as security for the professional fees and disbursements of the Monitor, the Monitor's legal counsel, the Bowater Petitioners' legal counsel in respect of: "these proceedings, the Plan and the Restructuring" to the extent they remained unpaid (Initial Order, para. 77) (the "**Administrative Charge**").

IV. Nature of the Contribution Claim or Wind-Up Claim

13. As noted by the U.S. Court, BCFC is an unlimited liability company incorporated pursuant to the laws of the Province of Nova Scotia. As such, its present and certain past members are liable pursuant to s. 135 of the Companies Act as follows:

> In the event of a company being wound-up, every present and past member shall, subject to this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding-up and for the adjustments of the rights of the contributories among themselves, with the qualifications following:...

14. Such a contribution claim may be asserted by a liquidator of the unlimited company, which in this case is the Trustee since BCFC is bankrupt. The member is required to keep paying until such time as all the debts and liabilities of BCFC are paid together with the costs of administration.

15. The contribution claim was initially filed by BCFC's Vice-President, Restructuring, Lisa Donahue on September 1, 2010 in a Chapter 11 proceeding under the US Bankruptcy Code for the member of BCFC. Pursuant to the US Confirmation Order, the Trustee, through its U.S. counsel, is now pursuing the contribution claim in accordance with the process outlined by Justice Carey (the "**US Proceeding**"). Counsel for both the Trustee and the member of BCFC are presently discussing a litigation schedule as required under the applicable U.S. Rules of Court, which contemplates a trial on or about June 2011.

V. What is the Interest of the Applicants?

16. The Motion Materials are not clear as to who has requested this motion.

17. The Trustee notes that the Applicants have now exited CCAA protection and have no further interest in the property or assets of BCFC that are subject to the CCAA Charges. Similarly, unless this Honourable Court provides otherwise through the order sought, the Monitor has no ongoing role with respect to BCFC given that BCFC is now bankrupt.

18. For the reasons outlined in its counsel's previous letter to this Honourable Court and this contestation, the Trustee does not believe this motion should be heard at this time and believes it is premature given the status of the U.S. Proceeding.

19. To the extent that this motion is brought for the benefit of the directors and officers who are the primary beneficiaries of the remaining CCAA Charges, the Trustee submits that their interests are adequately protected by the applicable provisions of the BIA.

VI. Other *CCAA* charges

20. The Motion Materials identify certain charges on the assets of BCFC established by the Initial Order other than the D&O Charge (notably the Administrative Charge) but the

proposed order does not provide a mechanism for dealing with them or for their discharge. In particular, the definition of BCFC Claim is limited to the "claims of any person against a beneficiary of the BCFC CCAA Charges in respect of any obligations which are, or may be, secured by the BCFC CCAA Charges" (Motion Materials, para 21). This would exclude the Administrative Charge since it is a direct claim by the beneficiary of the charge against the assets of BCFC.

21. The Trustee submits that, since all professional fees of the Monitor, counsel to the Monitor, and counsel to the Petitioners, were paid in full upon or since implementation of the Plan, then this Honourable Court should expressly release and discharge the Administrative Charge from the assets of BCFC.

22. Similarly, given that the *CCAA* restructuring of BCFC has failed, there is no further work with respect to the Plan or Restructuring (as defined in the Initial Order), and BCFC is now bankrupt, the Trustee submits that this Honourable Court should terminate the CCAA proceedings in respect of BCFC and release and discharge the Administrative Charge.

23. Counsel for the other AbitibiBowater Inc companies and the Monitor should not be permitted to claim under the Administrative Charge for their fees and disbursements incurred in connection with this motion given that it is being heard absent a request of the Trustee and over its objections.

24. Any charges on the assets of BCFC levied by the Initial Order other than the CCAA Charges that were paid out through implementation of the Plan should likewise be released and discharged.

VII. No Urgency

25. The directors and officers, as well as every other beneficiary of the CCAA Charges in respect of BCFC, are secured creditors under the BIA; that legislation and the existing orders of this Court protect their interests.

26. A final determination of the extent of the claims of all creditors (secured and unsecured) can be made in the time frames contemplated by the BIA.

27. The BIA requires that every creditor prove its claim or lose the entitlement to a distribution from the assets of the estate (s. 124). Any distribution of assets from the estate of BCFC is contingent on the outcome of the US Proceeding with respect to the contribution claim at which time it will become clear whether there are any assets to distribute.

VIII. Process under the *Bankruptcy and Insolvency Act*

28. The claims process outlined in the Motion Materials needlessly duplicates the statutory scheme provided under the BIA.

29. As noted above, the beneficiaries of the CCAA Charges are secured creditors and protected under the BIA. They and all other creditors of BCFC are required to prove their claims under the BIA. The process outlined in the Motion Materials would therefore require claimants to prove their claims under two separate systems.

30. Claims of the directors and officers of BCFC, to the extent that they are contingent or unliquidated are required to be valued by the trustee in bankruptcy pursuant to s. 135(1.1) of the BIA. A right of appeal of the Trustee's determination to the Supreme Court of Nova Scotia in Bankruptcy and Insolvency is also available should the creditor be unsatisfied with the Trustee's determination.

31. The BIA claims procedure includes a prescribed form of proof of claim (s. 124(2)).

32. The Trustee, as an officer of the court, is mandated by the BIA to evaluate and judge claims in respect of the bankruptcy. The proposed role for the Monitor is therefore superfluous to that already prescribed by the BIA. The Trustee submits that there is no benefit to having two separate court appointed officers with broadly similar expertise and areas of responsibility evaluating the same group of claims.

IX. *CCAA Claims Bar Process*

33. In the alternative, should the Court rule that a *CCAA* claims bar process is necessary in these circumstances to deal with the D&O Charge and/ or the Administrative Charge then the Trustee submits that the claims process should be overseen jointly by the Monitor and Trustee.

34. With respect to the claims determination process, should this Honourable Court not agree that the BIA should govern such process, then the Trustee submits that this issue should be deferred for a later hearing since it would be advisable to determine whether there are any such claims in respect of which the Trustee and the Monitor fail to reach agreement before prescribing a mandatory process.

35. With respect to the timing for the filing of claims, the Trustee submits that all parties other than the Trustee should have to assert their claims on or before March 15, 2011. With respect to a potential claim by the Trustee against the directors and officers arising from or relating to the U.S. Proceeding, the Trustee submits that it would be reasonable to provide it with 30 days from the date of the final determination of the contribution claim by the US Bankruptcy Court (including any appeals therefrom) to assert any claims against the directors and officers. While it is the Trustee's position that it has a valid contribution claim against the member of BCFC, in the event that the U.S. Court finds that that claim has been compromised by actions or omissions of BCFC prior to its assignment in bankruptcy, if such actions or omissions were within the control of the directors and officers of BCFC and they breached their obligations to BCFC then the Trustee would file a claim against the directors and officers.

36. The Trustee submits that, prior to a final determination of the contribution claim in the US Proceedings, it is not possible or reasonable for it to assert a claim or for such claim to be valued. It would further be illogical for the Trustee to be asserting in the U.S. Proceeding that it has a valid claim while simultaneously in Canada asserting that its claim has been compromised by the acts or omissions of the directors and officers of BCFC even if only on a placeholder basis.

37. Since the US Proceeding is between either the same parties or parties closely related to the parties to the present motion, the Trustee submits that it is logical to defer consideration of a potential claim by the Trustee until the contribution claim is determined according the agreed process between the parties as outlined in the Confirmation Order.

IX. Conclusion

38. The Trustee respectfully submits that an order be granted on the following basis:

a) Terminating the CCAA proceedings with respect to BCFC;

b) Discharging the Monitor in respect of BCFC;

c) Declaring that all charges on the assets of BCFC created by the Initial Order other than the D&O Charge be released and discharged from the assets of BCFC; and

d) Providing for the determination of any claims in respect of the holders of the D&O Charge be conducted pursuant to the applicable procedures under the BIA.

39. In the alternative, the Trustee submits that the proposed order be issued on an amended basis as follows:

a) Declaring that all charges on the assets of BCFC created by the Initial Order other than the D&O Charge be released and discharged from the assets of BCFC;

b) Providing that the procedure for claims secured by the D&O Charge be conducted jointly by the Trustee and Monitor and that, unless both the Monitor and the Trustee agree, no claim secured by the CCAA Charges may be accepted, rejected or revised without further order of this Honourable Court or the Supreme Court of Nova Scotia in Bankruptcy and Insolvency;

c) Declaring that a procedure for the adjudication of disputed claims be the subject of a further motion before this Honourable Court or the Supreme Court of Nova Scotia in Bankruptcy and Insolvency; and

d) Ordering that the Trustee shall have 30 days from the final determination of the contribution claim in the U.S. Proceeding to file any claim against the directors and officers of BCFC.

a mark-up of the order proposed by the Applicants incorporating the foregoing changes is attached hereto as **Exhibit T-4**.

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

WHEREFORE, MAY THIS COURT:

Issue an order on the basis outlined above, and

The whole with costs of the Trustee payable by the Applicants forthwith.

Halifax, Nova Scotia, January 26, 2011

COX & PALMER,
Attorneys for Green Hunt Wedlake Inc.,
Trustee In Bankruptcy for Bowater Canada
Finance Corporation

AFFIDAVIT

I, the undersigned, PETER WEDLAKE, President, exercising my profession at Suite 315, 7001 Mumford Road, Halifax, Nova Scotia B3L 4N9, solemnly declare as follows:

1. I am a duly authorized representative of Green Hunt Wedlake Inc.;

2. The facts alleged in the present Contestation are to my knowledge and are true.

AND I HAVE SIGNED:

/**PETER WEDLAKE**

SOLEMNLY AFFIRMED before me at Halifax, Nova Scotia, this 26th day of January, 2011

ROBERT G. MacKEIGAN
NOTARY PUBLIC
NOVA SCOTIA

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LIST OF EXHIBITS

T-1	Confirmation Order
T-2	Opinion on Confirmation
T-3	Letter from counsel to the Trustee to this Honourable Court dated January 7, 2011
T-4	Amended Order

Halifax, Nova Scotia, January 26, 2011

Cox & Palmer

COX & PALMER,
Attorneys for Green Hunt Wedlake Inc.,
Trustee In Bankruptcy for Bowater Canada
Finance Corporation