

### DECEMBER 2012

- 1 *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 (the “Abitibi case”): Clean-Up Orders and the CCAA
- 2 Contact Us

### *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 (the “Abitibi case”): Clean-Up Orders and the CCAA

By Shauna Finlay

#### Introduction

The Supreme Court of Canada (the “SCC”) recently released an important decision relating to how provincial clean up orders against corporations may be treated when that corporation enters creditor protection proceedings. In the Abitibi case, the decision of the majority (7-2), written by Deschamps J., was to uphold the lower courts’ findings that the remedial orders issued by the Province of Newfoundland and Labrador against AbitibiBowater Inc. et al. (“Abitibi”) were “claims” subject to the stay provisions of the *Companies’ Creditors Arrangement Act* (“CCAA”).<sup>1</sup> According to one set of interveners, this decision paves the way for corporations to avoid responsibility for environmental liabilities through insolvency protection proceedings.<sup>2</sup> However, a close read of the factual context and background to this case make it apparent that the result in this decision may not be so easily replicated in other cases.

That said, this decision is likely to reinforce for regulatory bodies the necessity of requiring adequate security from corporations to secure

---

<sup>1</sup> These proceedings are equivalent to a filing under Chapter 11 in the United States.

<sup>2</sup> See, for example, press release from Friends of the Earth/Ecojustice, Friday, December 7, 2012 entitled “Supreme Court decision leaves taxpayers with the bill for cleaning up AbitibiBowater’s pollution” found at <http://huffstrategy.com/MediaManager/Includes/Print.php?ReleaseID=2674>.

environmental obligations in legislation and approvals and of participating effectively in insolvency proceedings where such obligations are outstanding.

### The Abitibi Case

The proceedings that gave rise to the Abitibi case were initiated by an application by the Province of Newfoundland and Labrador (the “Province”) in the CCAA proceedings involving Abitibi’s proposed reorganization. The Province applied to the Quebec Court (sitting as a CCAA court) for a declaration that the Province’s enforcement of the remedial orders would not be subject to the claims procedure order issued under the CCAA. The central question before the Superior Court of Quebec was whether the remedial orders were financial or monetary in nature as opposed to being pure regulatory orders. If the true nature of the orders were found to be financial, they would be subject to the claims process. If the true nature of the orders were regulatory, they would not. The Superior Court found the remedial orders were, in fact, financial orders and this finding was upheld in the SCC (McLaughlin C.J. in her dissent stated she would have overturned this finding of fact). But does this mean that all or most remedial orders issued by environmental regulatory authorities against corporations will be found to be “claims” in the context of insolvency proceedings? As suggested above, the unique facts of this SCC decision may limit the applicability of the findings to other less clear cases.

### Background

The background to the issuance of the remedial orders was as follows:

For over 100 years, Abitibi Bowater Inc. and its predecessors and affiliates had carried out extensive operations in Newfoundland and Labrador. As noted in the decision of the Quebec Superior Court at paragraph 45, these activities included mining and processing minerals, cutting and milling timber, making wood pulp and paper

products, and shipping and storing materials. Abitibi also owned a number of hydroelectric facilities. However, by 2008, Abitibi was in financial crisis and had shut many of its operations and mills, including those in Newfoundland. On December 4, 2008, it announced the closure of its last remaining mill in Newfoundland. These actions incensed political leaders in Newfoundland.<sup>3</sup> On December 16, 2008, the Province introduced and passed the *Abitibi-Consolidated Rights and Assets Act* (the “Abitibi Act”) which terminated Abitibi’s timber rights and water rights. It effectively expropriated all the assets, property and undertakings of Abitibi in Newfoundland and barred Abitibi from seeking compensation.

Subsequently, Abitibi sought insolvency protection in the United States and in Canada. A stay of proceedings was issued in Canada on April 17, 2009. Shortly thereafter, Abitibi made a \$300 million claim for losses related to the Abitibi Act under the North America Free Trade Agreement (NAFTA). On November 12, 2009, the Province issued five remedial orders that required Abitibi to submit remediation action plans to the Minister of the Environment for five industrial sites, three of which had been expropriated under the Abitibi Act, and to complete the remedial actions approved by the Minister following review of the plans.

### Lower Court Decisions

The Quebec Court found these remedial orders to be financial in nature, and not purely regulatory, for a number of reasons, including:

- (a) The orders were inappropriate in their sequencing and unrealistic in their scheduling as they required the delivery of action plans which would have taken

---

<sup>3</sup> See, for example, the text of the speech of Danny Williams, then Premier of Newfoundland and Labrador, in the Legislature on December 16, 2008: <http://www.releases.gov.nl.ca/releases/2008/exec/1216n07.htm>

close to a full year to be carried out adequately as opposed to a few months. The direction to carry out the actual work in one year was held to be unrealistic and the Superior Court also found that the Province never truly intended for the remedial orders to be complied with.

- (b) There did not appear to have been any consideration of whether any third parties might be responsible for the environmental contamination. The orders were only issued against Abitibi.
- (c) Actions were required to be taken on lands that were no longer owned by Abitibi because they had been taken by the Province. The Court found that the beneficiary of the work ordered to be done would be the Province because it now owned the lands.
- (d) The environmental reports prepared for the Province were stated to have been prepared for its NAFTA/CCAA counsel as opposed to the Minister of Environment and, according to Abitibi, overlooked the actions of other parties that had operated on the sites. The reports did not verify in some cases that Abitibi's actions could have caused the alleged environmental contamination. In other words, the reports appeared "directed" to a certain conclusion.
- (e) The Province had identified itself as a creditor in a previous motion for access to a data room on the basis that Abitibi's operations had exposed it to environmental liabilities for which the Province alleged it had incurred significant costs. Further, the Province had initiated a process to seek third party tenders for some of the work ordered in the remedial orders.

In summary, the Quebec Superior Court found that the remedial orders were actually issued for

the purpose of giving the Province some bargaining power in light of Abitibi's NAFTA claims. The Court's *obiter* comments reveal his impression of the Province's actions, specifically, that by seizing all of Abitibi's assets and property in Newfoundland, it had already "realized" on its security to the detriment of other creditors and now sought to further impact creditors by having its remedial orders have priority over the balance of the claims against Abitibi.<sup>4</sup>

The Quebec Court of Appeal dismissed the Province's appeal.

### **The Supreme Court of Canada Decision**

The Quebec Superior Court's finding that the Province was attempting to characterize the remedial orders as true regulatory orders when it was really trying to gain priority over other claims, was picked up and accepted by the majority in the SCC. For instance, the majority found "[w]hat the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions."

The SCC deferred to the Quebec Superior Court's findings of fact and upheld its decision.

Ultimately, the SCC found that a regulatory order will be a "claim" under CCAA if (i) there is a debt, liability or obligation to a creditor, (ii) the debt, liability or obligation occurred before the debtor becomes bankrupt, and (iii) it is possible to attach a monetary value to the debt, liability or obligation. The majority found that when a regulatory body exercises its enforcement power against a debtor, it becomes a creditor. The majority also found that the third requirement will be satisfied if there are sufficient indications that the regulatory body that triggered the

---

<sup>4</sup> See *AbitibiBowater inc. (Arrangement relative a)*, 2010 QCCS 1261, at para. 178 and para. 286.

enforcement mechanism will ultimately perform the remediation work and assert a monetary claim to recover the costs of performing such work.

### Conclusion

It remains to be seen whether the application of this case will interfere with the application of the “polluter pays” principle that is the hallmark of much of the environmental legislation in Canada. However, at least in this case, it did not result in additional financial exposure for creditors that would ultimately have borne the costs of compliance with the remedial orders.

Going forward, one way in which potential polluters will likely pay is in increased security costs imposed as terms and conditions under regulatory approvals and licenses. Provinces are likely to become more vigilant in light of this decision in ensuring they have adequate security for contingent and future environmental obligations.

### Contact Us

For further information, please contact a member of our [National Insolvency](#) or [National Environmental Groups](#).