

Case Law Update: Her Majesty the Queen in Right of the Province of Newfoundland and Labrador v. AbitibiBowater Inc., et al.

December 20, 2010

Bankruptcy and Insolvency Companies' Creditors Arrangements Act Provincial Obligations

On November 25, 2010, the Supreme Court of Canada granted leave to appeal in *Her Majesty the Queen in Right of the Province of Newfoundland and Labrador v. AbitibiBowater Inc., et al.*

The central issue is whether a court overseeing proceedings under the *Companies' Creditors Arrangements Act* ("CCAA") has the ability to effectively extinguish regulatory obligations imposed on the restructuring company by provincial law. In this case, the Province of Newfoundland and Labrador ("the Province") issued orders under its environmental protection legislation (the "EPA Orders") several months after AbitibiBowater Inc. ("Abitibi") commenced CCAA proceedings. The provincial legislation provided that if Abitibi failed to comply with the EPA Orders, the Province could undertake the remediation work itself and then recover the associated costs from Abitibi.

Abitibi argued that these orders were monetary in nature, in that it would have to spend money to comply, and because it could not effectively comply with the orders, and therefore the Province would have to do so and seek to recover the costs.

The Province brought a motion to decide the issue. The Quebec Superior Court overseeing Abitibi's CCAA Proceedings (the "CCAA Court") had previously issued a Claims Procedure Order ("CPO") that defined "claims" as encompassing any breach of a statutory duty. Thus, all "claims" not filed before the deadline in the CPO are stayed, while any "claim" filed before it is subject to compromise along with all other such claims. Abitibi argued the EPA Orders were caught by the definition of "claim" in the CPO, and since they were not issued before the deadline, the obligation to comply was stayed. The Province requested a declaration that the orders were not barred or extinguished, and that their enforceability was not affected by the CPO in this matter.

The CCAA Court dismissed the Province's motion. The CCAA Court held that the definition of "claim" in the CCAA was broad enough to encompass statutory duties that are "financial or monetary in nature", and held that the EPA Orders were monetary in nature due to a combination of factors, such as Abitibi being required to spend money for a purpose that did not result in profit to the company, and the ability of the Province to undertake the work itself and claim resulting costs from Abitibi. As the EPA Orders were "claims" for the purpose of the CPO, and the EPA Orders were made after the deadline for filing claims, the CCAA Court held that Abitibi's obligations under the Province's orders were extinguished.

The Province moved for leave to appeal to the Quebec Court of Appeal. The Court of Appeal denied leave, holding that the CCAA Court correctly interpreted the definition of "claim" in the CCAA, and the CCAA Court's application of that definition to the Province's orders was a factual finding that could not be challenged on appeal.

The Supreme Court of Canada granted leave to appeal, though it is unusual to do so from a denial of leave to appeal in the court below. The specific issue before the Supreme Court will be whether Abitibi's duty under the environmental laws of the Province to comply with the EPA Orders can be extinguished under the CCAA like any commercial debt, though the appeal will also deal with broader issues that will have a significant impact on future insolvency proceedings across the country.

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