

# Canadian Structured Finance Newsletter

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## THE QUESTION OF BANKRUPTCY REMOTENESS: QUÉBEC COURT AFFIRMS SECURITIZATION IN A CCAA PROCEEDING

One of the fundamental elements of a structured finance transaction is the concept of bankruptcy remoteness. Transactions are carefully structured so that an issuer of asset-backed securities will not be affected by the bankruptcy of the originator of the assets or any other party to the securitization transaction. When rating a securitization transaction, DBRS requires legal opinions that state that the sale of the assets is a true sale and that in the event of the bankruptcy of the originator, creditors, including the trustee in bankruptcy of the originator, will not be able to look to the assets transferred to the securitization vehicle to satisfy their claim. These issues are comprehensively canvassed in *Legal Criteria for Canadian Structured Finance*, available at [www.dbrs.com](http://www.dbrs.com).

The widespread use of securitization is a relatively new development in finance. During the last major economic downturn in the early 1990s, securitization was in its early days and was dominated by residential mortgage securitizations. Bankruptcy remoteness has therefore seldom been tested in Canadian courts. Indeed, the current recession is the first major economic downturn since the widespread adoption of securitization as a corporate funding strategy. It is therefore reasonable to expect that this turbulent period of economic history will generate useful judicial consideration of securitization concepts.

On April 16, 2009, AbitibiBowater Inc. and certain of its affiliates (Abitibi) filed voluntary petitions in the United States under Chapter 11 of the United States Bankruptcy Code. The next day, Abitibi and certain of its Canadian affiliates sought creditor protection in Canada under the Companies' Creditors Arrangement Act (CCAA) (see related DBRS press release of [April 16, 2009](#)). Abitibi-Consolidated Inc. (ACI) was one of the Abitibi affiliates included as a petitioner in the filings. ACI is party to a receivables securitization transaction (not rated by DBRS) where it acts as originator and servicer.

An initial court order was issued by the Superior Court of Québec on April 17, 2009 (the Initial Order), which was amended and restated by the court on June 15, 2009 (the Amended Initial Order). In the Amended Initial Order, the court specifically ordered that:

“ACI is hereby directed, authorized and empowered to perform or continue to perform its obligations, including the sale and servicing of (R)eceivables and all (R)elated (S)ecurity...” under the applicable existing receivables securitization agreements and any amended receivables securitization agreements it enters into, which amendments the court specifically sanctioned (collectively, the applicable securitization agreements).<sup>1</sup>

And:

“ACI is hereby authorized and empowered to continue selling the relevant (R)eceivables and (R)elated (S)ecurity ...” pursuant to the applicable securitization agreements.<sup>2</sup>

And:

“ACI is authorized and empowered to continue fulfilling its obligations under [the existing receivables securitization agreements], including, but not limited to, the sale of relevant (R)eceivables and (R)elated (S)ecurity...” until the amended receivables securitization agreements are entered into.<sup>3</sup>

The court further declared that:

“the transfers by ACI of its (R)eceivables and (R)elated (S)ecurity... shall constitute and continue to constitute true sales under applicable non-bankruptcy laws and are hereby deemed true sales and were or will be for fair consideration.”<sup>4</sup>

And:

“that notwithstanding (i) these proceedings and any declaration of insolvency made herein; (ii) any bankruptcy application or bankruptcy motion filed pursuant to the BIA [Bankruptcy and Insolvency Act] in respect of the Petitioners and any bankruptcy order or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners...the transfers of (R)eceivables and (R)elated (S)ecurity made by ACI pursuant to the [applicable securitization agreements] and this Order did not, and on or after April 17, 2009, do not and will not, constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law”.<sup>5</sup>

And:

“the transfers of (R)eceivables and (R)elated (S)ecurity... by ACI pursuant to the [applicable securitization agreements] and this Order shall continue to be valid and enforceable against all (P)ersons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioners, for all purposes.”<sup>6</sup>

On June 17, 2009, Abitibi announced that the securitization agreements had been amended and restated as authorized by the Amended Initial Order.

This is a significant development in Canadian securitization. Not only were past, pre-petition asset sales affirmed, but the court also declared that post-petition asset sales by an originator subject to a CCAA proceeding would be bankruptcy remote true sales. In issuing the Initial Order, Justice Gascon recognized the importance of ACI’s securitization program to its liquidity position and viability in the short term, stating that “the continued operation of the securitization program appears crucial to the ongoing operations of the Petitioners.”<sup>7</sup>

DBRS takes some comfort from these orders. Each bankruptcy and restructuring proceeding is different and bankruptcy courts have broad discretionary powers. The result in the Abitibi case is no guarantee of similar holdings by other courts in similar circumstances. However, the affirmation by the Québec Superior Court of ACI’s securitization program post-CCAA filing can only be seen as positive judicial recognition of the bankruptcy remoteness of Canadian securitization structures.

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1. *AbitibiBowater, Inc.*, Re (15 June 2009), Montréal 500-11-036133-094 (Q.S.C.) at paragraph 30.  
2. *Ibid.*, at paragraph 31.  
3. *Ibid.*, at paragraph 31.1.  
4. *Ibid.*, at paragraph 32.  
5. *Ibid.*, at paragraph 35.  
6. *Ibid.*, at paragraph 37.  
7. *AbitibiBowater, Inc.*, Re (17 April 2009), Montréal 500-11-036133-094 (Q.S.C.), at paragraph 5.