

VANCOUVER

06-Mar-12

COURT OF APPEAL
REGISTRY

Case File No. **CA39754**

FORM 1 (RULE 3 (a)).

Court of Appeal File No.:

Supreme Court File No.: S120712

Supreme Court Registry: Vancouver

COURT OF APPEAL

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

- AND -

**IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*,
R.S.C. 1985, c. C-44**

- AND -

**IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57**

- AND -

**IN THE MATTER OF THE *CATALYST PAPER CORPORATION*
AND THE PETITIONERS LISTED IN SCHEDULE "A"**

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Appellants, listed in Schedule "B", hereby apply for leave to appeal to the Court of Appeal for British Columbia from certain provisions of the order of the Honourable Mr. Justice Sewell of the Supreme Court of British Columbia (the "CCAA Judge") pronounced the 14th day of February, 2012 and the order of March 5, 2012 at Vancouver, British Columbia, ordering, *inter alia*, that certain potential statutory claims and rights of current employees and retirees of Catalyst Paper Corporation and its related companies ("Catalyst") are subordinated to the claims of other creditors of Catalyst and dismissing the application to appoint representative counsel to the employees and retirees of Catalyst.

I. The appeal is from a:

<input type="checkbox"/> Trial Judgment	<input type="checkbox"/> Summary Trial Judgment
<input type="checkbox"/> Order of a Statutory Body	<input checked="" type="checkbox"/> Chambers Judgment

2. If the appeal is from an appeal under Rule 18-3 or 23-6 (8) of the Supreme Court Civil Rules or Rule 18-3 or 22-7 (8) of the Supreme Court Family Rules, name the maker of the original decision, direction or order: **NOT APPLICABLE**
3. Please identify which of the following is involved in the appeal:

<input checked="" type="checkbox"/> Constitutional/Administrative	<input type="checkbox"/> Civil Procedure
<input checked="" type="checkbox"/> Commercial	<input type="checkbox"/> Family
<input type="checkbox"/> Motor Vehicle Accidents	<input type="checkbox"/> Municipal Law
<input type="checkbox"/> Real Property	<input type="checkbox"/> Torts
<input checked="" type="checkbox"/> Equity	<input type="checkbox"/> Wills and Estates

AND FURTHER TAKE NOTICE THAT the Court of Appeal will be moved at the hearing of this application for:

1. An Order granting leave to appeal certain provisions of the order of the CCAA Judge dated February 14, 2012;
2. An Order granting leave to appeal the order of the CCAA Judge dated March 4, 2012 dismissing the application to appoint Ronald Gary McCaig, Patricia Dwornik, Janice Young, Peter Flynn and Francesca Pomeroy as representatives of the employees and retirees of Catalyst and Koskie Minsky LLP as representative counsel.
3. An Order, if requested, that the hearing of this leave motion and if leave is granted, the appeal, be heard on an expedited basis;
4. An Order, if necessary, for leave to introduce evidence that arose after the hearing of the motion, or alternatively, prior to the disposition of the within leave to appeal motion;
5. Costs; and
6. Such further and other relief as to this Honourable Court seems just.

THE GROUNDS OF THIS APPLICATION ARE:

1. The Applicants are current employees and retirees of Catalyst who earned an entitlement to pension benefits from the Catalyst Paper Corporation Retirement Plan for Salaried Employees, B.C. Registration No.

85400-1 (the "Salaried Plan"). The Salaried Plan is a pension plan sponsored by Catalyst and registered with the Financial Institution Commission of British Columbia and Canada Revenue Agency.

2. The Salaried Plan is underfunded on a wind up basis by over \$73.5 million. If the plan is wound up in an underfunded state, it will result in significant losses to the monthly pension benefits payable to the members and retirees of the Salaried Plan.

3. On January 31, 2012, following a failure to restructure under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, Catalyst applied for and obtained protection from its creditors under the CCAA. The CCAA Judge issued an Initial CCAA Order. One provision of the Initial CCAA Order states that any interested party, on seven days' notice, could apply to the CCAA Judge to vary or amend the Initial Order (the "Comeback Clause").

4. On application by Catalyst, the Initial CCAA Order was amended on February 3, 2012, February 6, 2012, February 7, 2012 and February 14, 2012, and is now referred to as Amended and Restated Initial Order.

5. On February 2, 2012, the firm of Koskie Minsky LLP was approached by a group of Catalyst retirees seeking assistance with this matter. They expressed particular concern given the result in the CCAA proceeding of *Pope and Talbot Inc.* where retirees lost 30% of their pension benefits.

6. Koskie Minsky LLP has received 194 retainers from Catalyst retirees and active employees requesting assistance with this matter.

7. On February 14, 2012, the Applicants appeared before the CCAA Judge to request that the priorities ordered in paragraph 55 of the Amended and Restated Initial Order be reconsidered, and that the priority of the DIP Lender not be made permanent but remain subject to the Comeback Clause. The CCAA Judge dismissed the request to reconsider the priorities in paragraph 55 and ordered that the DIP priority is excluded from the Comeback Clause, thus making the DIP priority permanent.

8. Paragraph 55 of the Amended and Restated Initial Order provides that the claims and rights of employees and retirees based on:

- a) statutory deemed trusts, including the pension deemed trust pursuant to the British Columbia *Pension Benefits Standards Act R.S.B.C. 1996* (the "PBSA");
- b) any finding based on past or future breach of fiduciary duty by the company or its agents to the Salaried Plan members; and
- c) the statutory secured claim for unpaid pension contributions under sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* (the "BIA").

are all subordinated and rank below:

- a) the DIP Lenders' Charge;
- b) the Administrative Charge;
- c) the Critical Suppliers' Charge;
- d) the Directors' and Officers' Charge; and
- e) in relation to certain property constituting the 2016 Notes First Lien Collateral, the security interest of the 2016 Notes.

9. At this time, the Applicants do not seek leave to appeal from the order of the CCAA Judge ordering that the Administrative Charge, the Critical Suppliers' Charge, the Directors' and Officers' Charge and the DIP Lenders' Charge rank in priority to the PBSA deemed trust for unpaid contributions owing to the Salaried Plan.

10. The CCAA Judge erred by ordering that the Administrative Charge, the Critical Suppliers' Charge, the Directors' and Officers' Charge and the DIP Lenders' Charge rank in priority ahead of any claim arising from

any past and future breach of fiduciary duty by the company and ahead of the statutory pension priority under sections 81.5 and 81.6 of the BIA.

11. The CCAA Judge also erred by ordering priority to the 2016 Notes ahead of the statutory claims of the Applicants under deemed trusts, including under the PBSA, and ahead of any claims arising as a result of any past or future breach of fiduciary duty and over the statutory priorities under sections 81.5 and 81.6 of the BIA.

12. Section 43.1 of the PBSA states that amounts that an employer owes to a pension fund which it has not paid are deemed to be held in trust by the employer and deemed to be held separate and apart as a result of a filing under the CCAA, even if those amounts are not yet due but simply “owing” to the pension plan. Section 43.1 states:

Deemed trust

43.1 (1) An employer must, with respect to a pension plan to which the employer is required to make contributions, keep separate and apart from the employer's own assets

- (a) all contributions that are due or owing to the pension plan by the employer,
- (b) all amounts that have been deducted by the employer from a member's remuneration and not yet remitted to the fund holder, and
- (c) all contributions that have been received by the employer with respect to a member and not yet remitted to the fund holder.

(2) The amounts referred to in subsection (1) are deemed to be held in trust for members of the pension plan, former members, and any other persons entitled to pension benefits, refunds or other payments under the plan in accordance with their interests under the plan.

(3) If there is, in respect of an employer, a proceeding

- (a) under the *Companies' Creditors Arrangement Act* (Canada),
- (b) under the *Winding-up and Restructuring Act* (Canada) or similar provincial legislation,
- (c) in relation to liquidation, receivership or secured creditor enforcement, or
- (d) in relation to insolvency other than under the *Bankruptcy and Insolvency Act* (Canada),

an amount equal to the amounts deemed to be held in trust under subsection (2) is deemed to be separate and apart and form no part of the estate of the employer, whether or not that amount has in fact been kept separate and apart from the employer's own assets or from the assets of the estate.

13. Further, the 2016 Notes is debt that pre-existed the CCAA. Section 11.2 of the CCAA expressly provides that “The security or charge may not secure *an obligation that exists before the order is made.*”

14. The CCAA Judge further erred when he issued an order which purports to override the express statutory pension priorities in the BIA, a federal statute which governs a completely separate process than the one before him. The BIA, in sections 81.5 and 81.6, provides express protections for pension plan members in the event of a bankruptcy or receivership:

Security for unpaid amounts re prescribed pensions plan — bankruptcy

81.5 (1) If the bankrupt is an employer who participated or participates in a prescribed pension plan for the benefit of the bankrupt's employees, the following amounts that are unpaid on the date of bankruptcy to the fund established for the purpose of the pension plan are secured by security on all the assets of the bankrupt:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament.

Rank of security

(2) A security under this section ranks above every other claim, right, charge or security against the bankrupt's assets, regardless of when that other claim, right, charge or security arose, except

(a) rights under sections 81.1 and 81.2;

(b) amounts referred to in subsection 67(3) that have been deemed to be held in trust; and

(c) securities under sections 81.3 and 81.4.

Security for unpaid amounts re prescribed pensions plan — receivership

81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament.

Rank of security

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

15. The CCAA Judge further erred when he ordered that a claim for past or future breach of fiduciary duty by the company or its agents could never rank in priority over the DIP Lenders' Charge, the 2016 Notes Security over their First Lien Collateral, the Directors' and Officers' Charge, the Administration Charge or the Critical Suppliers' Charge, this is contrary to equity, public policy, and case law.

16. The CCAA Judge further erred by failing to appoint Ronald Gary McCaig, Patricia Dwornik, Janice Young, Peter Flynn and Francesca Pomeroy as representative of the employees and retirees of Catalyst and Koskie Minsky LLP as representative counsel. Further particulars will be provided on receiving of the CCAA Judge's Reasons when they are released.

17. The proposed appeal satisfies the four point test for granting leave to appeal in CCAA matters:

- (a) *The point is of significance to the practice.* The point on appeal deals with employee and retiree priorities and the application of the deemed trust in section 43.1 of the PBSA in CCAA situations. This is a developing area of the law, and the point has not yet been considered in an appellant decision in British Columbia.
- (b) *The point raised is of significance to the action itself.*
 - (i) The point raised is of significance to the action as it will impact the determination of the priority of employees' and retirees' claims among the claims of other creditors of Catalyst.
 - (ii) The proposed appeal is also significant as it would deal with the jurisdiction of a CCAA judge to issue an order that purports to override the statutory pension priority distribution scheme in the BIA.
- (c) *The appeal is *prima facie* meritorious and is not frivolous:* The proposed appeal raises serious and arguable grounds which are meritorious. In particular, the CCAA judge erred when he:
 - (i) ordered priorities to secured and other creditors without prior notice to the beneficiaries of the PBSA deemed trust;
 - (ii) ordered that an equitable claim based on a *past or future* breach of fiduciary duty by the company on its agents are, regardless of the manner or extent of the breach, subordinate to other claims of creditors and effectively will only ever rank as an unsecured claim; and
 - (iii) ordered that the statutory pension secured claims in the BIA are overridden and subordinated to claims of other creditors.

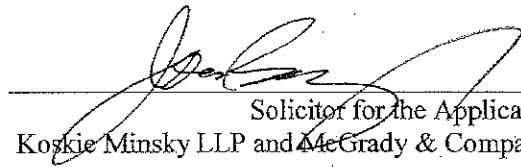
(e) *The appeal will not unduly hinder the progress of the action:* There will be no undue hindrance on the progress of the action by this appeal, particularly if this motion and if leave is granted, the appeal, are expedited.

18. Sections 11, 13 and 14 of the CCAA.

19. Sections 81.5 and 81.6 of the BIA.

The trial/hearing of this proceeding occupied 1 day/hours.

Dated at Vancouver, British Columbia, this 6th day of March, 2012.



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This Notice of Leave to Appeal is given by Koskie Minsky LLP and McGrady & Company, whose address for service is Box 12101, Nelson Square, 1105 – 808 Nelson Street, Vancouver, British Columbia V6Z 2H2. Email: akaplan@kmlaw.ca. Fax: 416-204-2819.

To the respondent(s):

IF YOU INTEND TO PARTICIPATE in this proceeding, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Notice of Appearance" (Form 2 of the Court of Appeal Rules) in a Court of Appeal registry and serve the notice of appearance on the appellant WITHIN 10 DAYS of receiving this Notice of Application for Leave to Appeal.

IF YOU FAIL TO FILE A NOTICE OF APPEARANCE

- (a) you are deemed to take no position on the application, and
- (b) the parties are not obliged to serve you with any further documents related to the application.

The filing registries for the British Columbia Court of Appeal are as follows:

Central Registry:

B.C. Court of Appeal
Suite 400, 800 Hornby Street
Vancouver BC V6Z 2C5

Other Registries:

B.C. Court of Appeal
The Law Courts
P.O. Box 9248 STN PROV GOVT
850 Burdett Ave
Victoria BC V8W 1B4

B.C. Court of Appeal
223 – 455 Columbia Street
Kamloops BC V2C 6K4

Inquiries should be addressed to (604) 660-2468 Fax filings: (604) 660-1951

Schedule "A"

LIST OF ADDITIONAL PETITIONERS

Catalyst Pulp Operations Limited
Catalyst Pulp Sales Inc.
Pacifica Poplars Ltd.
Catalyst Pulp and Paper Sales Inc.
Elk Falls Pulp and Paper Limited
Catalyst Paper Energy Holdings Inc.
0606890 B.C. Ltd.
Catalyst Paper Recycling Inc.
Catalyst Paper (Snowflake) Inc.
Catalyst Paper Holdings Inc.
Pacifica Papers U.S. Inc.
Pacifica Poplars Inc.
Pacifica Papers Sales Inc.
Catalyst Paper (USA) Inc.
The Apache Railway Company

SCHEDULE "B"

	LAST NAME	FIRST NAME
1	Ackerman	David
2	Allan	John C. R.
3	Alsip	William Pitt
4	Andow	Lois D.
5	Asman	Glen
6	Bailey	Wayne
7	Baker	Tony
8	Barfield	Robert S.
9	Barker	Robert Bruce Richard
10	Beamond	Lynn
11	Beardmore	Catherine
12	Benisky	Tanis J.
13	Berard	Kevin Arthur
14	Bernardo	Paul N.
15	Bonar	Gord
16	Bourcier	Don
17	Brehaut	William George
18	Brennert	Hans
19	Brett	Gary E.
20	Brown	David
21	Burrell	Charles J.
22	Cable	Peter
23	Cain	Bob
24	Carter	David Daniel
25	Castelsky	Roy
26	Catcher	John
27	Cherry	Len
28	Chipman	Brian
29	Ciarniello	M. D.
30	Clarke	Roy
31	Combe	Anne
32	Crawford	Robert R.
33	Crema	Ron
34	Cross	Larry
35	Culos	Wayne
36	Culos	Jean
37	De Wynter	Evelyn
38	De Wynter	Kevin
39	Dillon	Gary
40	Donnelly	James
41	Dupuis	Bernard L. J.
42	Dwornik	Patricia

43	Dyer	Raymond A
44	Eng	Steve
45	Ericksen	Robert J.
46	Erickson (Manners)	Carol
47	Fair	Darlene
48	Fawcett	Ruth
49	Finch	Peter
50	Fisher	David
51	Fisler	Hansruedi
52	Fitzpatrick	John
53	Flynn	Peter
54	Forrest	William Neish
55	Fougere	Ambrose Alonzo
56	Fowler	Art
57	Fox	Graham
58	French	Timothy
59	Gambetta	Gladys
60	Gilchrist	David John
61	Gordon	Robert B.
62	Gosgnach	Sheila
63	Gray	Neil
64	Gunther	Steven M.
65	Gustafson	Gerald George
66	Hanna	Barb
67	Hatch	Darryl
68	Hettle	Shelley A.
69	Hiltunen	Paul E.
70	Hirayama	Masami
71	Hoberg	Philip
72	Hodgins	David
73	Holland	Bradley
74	Hughes	John
75	Hundley	Ziutka
76	Hunold	Peter
77	Hunter	Ken
78	Jackson	Ken
79	Jakeway	Walter
80	Jee	Alan
81	Jellema	Marinus
82	Johnson	Dennis A.
83	Jones	Gordon J.
84	Jones	Ken
85	Kary	Ralph
86	Kirkham	Janet
87	Klint	Peter
88	Kofler	Norman Peter

89	Konkin	Walter
90	Leach	Christopher C.
91	Leach	Anthony
92	Leger	Shirley
93	Levangie	Reg
94	Lewis	Richard
95	Lichty	Joanne Gail
96	Lightfoot	Ronald
97	Lofkrantz	Eric
98	Luff	Keith
99	Lyle	Shelli
100	Lynch	Kenneth
101	Manners	Ron
102	Massullo	Anna
103	Matheson	Colin
104	McCaig	Ronald Gary
105	McCartney	Robert
106	McIlveen	Maria
107	McInnes	G. Don
108	McKnight	Keith
109	McMurtrie	Don
110	McNeil	Dennis
111	Meredith	Doug
112	Michaelson	Robert Bjorn
113	Mitchell	John Gordon
114	Mobley	Douglas Miles
115	Mollet	Edward A. (Ted)
116	Monahan	Marianne P.
117	Morrison	Mary E.
118	Morrison	Bruce R.
119	Nelson	Robert
120	Nicklin	Dennis
121	Nicklin	Donald G.
122	Norrington	John
123	Novak	Carol Annetta
124	O'Brien	John
125	Ollenberger	David
126	Pagani	Peter
127	Pagani	Tineke
128	Passenger	Sandra L.
129	Peel	Douglas
130	Perkonig	Andreas
131	Pichor	Dora
132	Pierce	Susan
133	Pomeroy	Francesca
134	Poole	Daryl W.

135	Posein	Orville
136	Poucher	Elda
137	Powell	Michelle
138	Prothman	Brian R.
139	Quarnstrom	Jack
140	Rasmussen	Preben
141	Reed	Clark
142	Reid	Terry
143	Reithaug	Harvey
144	Richmond	Gary
145	Riley	Rick
146	Robson	William R. C.
147	Rogers	Richard
148	Ronalds	David
149	Ruel	Mary I.D.
150	Sasaki	Kelly
151	Savegnago	Giampaolo
152	Seabrook	Donald E.
153	Seabrook	Jason
154	Seguin	Raymond J.
155	Shankie	David
156	Shepard	Perry
157	Silvester	Hendrika (Penny)
158	Simpson	Ronald R.
159	Sjerven	David J.
160	Smith	Beverley D.
161	Somerville	Darryl
162	Souchuk	Nick
163	St. Claire	Ian
164	Stewart	Terry
165	Stewart	Celeste
166	Stoddart	Irving
167	Stroomer	Matheus (Ted)
168	Stroomer	Willem
169	Swiatlowski	Donald P.
170	Tait	Ron
171	Tardif	J. Denis
172	Tham	Yin Nor (Nora)
173	Theus	Kai
174	Thibodeau	Doug
175	Tkacz	Andrew
176	Toms	Brian
177	Tull	Richard Danby
178	Tunstall	Edward W.
179	Turnbull	James Kelso
180	Van Gorkom	Donovan

181	van Hooydonk	Adrian (Andy)
182	van Kooten	Jacob
183	von Melville	Len
184	Walerius	Gerald
185	Walerius	Leslie
186	Whittaker	Jeffrey G. T.
187	Wiekenkamp	Robert H.
188	Williamson	Elaine
189	Willis	David M.
190	Wolanski	Thomas
191	Woodfin	John C.
192	Yateman	Jason
193	Yeo	Charlene
194	Young	Janice

Court of Appeal File No. S120712
Action No. S120712
Vancouver Registry

COURT OF APPEAL

BETWEEN:

**IN THE MATTER OF THE COMPANIES' CREDITORS' ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED**

AND:

**IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C.
1985, c. C-44**

AND:

IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, S.B.C. 2002, c. 57

AND:

**IN THE MATTER OF THE CATALYST PAPER CORPORATION AND THE
PETITIONERS LISTED IN SCHEDULE "A"**

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

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