

VANCOUVER

APR 13 2012

COURT OF APPEAL
REGISTRY

Court of Appeal File No. CA39754
Supreme Court Action No. S120712
Vancouver Registry

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"

**MEMORANDUM OF ARGUMENT OF TIMBERWEST FOREST CORP.
ON AN APPLICATION
FOR LEAVE TO APPEAL**

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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

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MEMORANDUM OF ARGUMENT

PART I STATEMENT OF FACTS

1. The Respondent, TimberWest Forest Corp. ("**TimberWest**"), has reviewed the facts as stated by the proposed Applicants and takes no issue with respect to the facts as stated, but wishes to state a few additional facts.
2. TimberWest is a supplier of product to the Petitioners in their *Companies' Creditors Arrangement Act* ("**CCAA**") proceeding. On February 6, 2011 TimberWest was declared a Critical Supplier to the Petitioners (against its objections) and, together with other Critical Suppliers, granted a charge on certain assets of the Petitioners (the "**Critical Suppliers' Charge**").
3. By this proposed appeal, the Applicants seek to set aside the priority of the Critical Suppliers' Charge (in addition to the priority of other charges).

PART II POINTS IN ISSUE

4. There are two points in issue:
 - (a) should the Applicants' leave to appeal application be dismissed as a result of not being in compliance with the time requirements; and
 - (b) if not, whether leave to appeal should be granted in the circumstances.

PART III ARGUMENT

Applicants out of Time

5. The CCAA provides at Section 13 that leave is required for an appeal. Section 14(12) of the CCAA requires that an appeal be perfected within 21 days. The Critical Suppliers' Charge was granted on February 6, 2012. The Applicants applied for leave to appeal on March 6, 2012. The Applicants are out of time, and given the nature of these proceedings, an extension ought not be given.

CCAA, ss. 13, 14(12)

Leave to Appeal

6. In British Columbia, leave to appeal is assessed in accordance with a four-pronged test:

- (a) whether the point on appeal is of significance to the practice;
- (b) whether the point raised is of significance to the action itself;
- (c) whether the appeal is *prima facie* meritorious or frivolous; and
- (d) whether the appeal will unduly hinder the progress of the action.

Edgewater Casino (Re), 265 B.C.A.C. 274, 2009 BCCA
40, Applicants' Book of Authorities, Tab 5, para. 17

7. This is the same test to be applied in CCAA proceedings, but it has been expressly recognized, having regard to the third and fourth prong of the above test, in active CCAA proceedings leave to appeal will only be granted sparingly.

Edgewater, supra, para. 18

Four-Pronged Test

8. In this case, because the order(s) impugned involve an exercise of discretion, leave to appeal ought not be granted.

(i) Significance to Practice

9. The narrow points on the proposed appeal are not of significance to the practice. The proposed appeal deals with the issue of whether a CCAA supervising judge can use his or her discretion to re-order certain priorities in the CCAA, and also addresses pension issues in CCAA proceedings. Both issues have already been canvassed at the appellate level.
10. The Supreme Court of Canada has confirmed that the discretion given to a CCAA supervising judge is flexible, broad and expansive, used to further the purpose of the CCAA.

Century Services v. Canada, 2010 SCR 60, Book of Authorities of Catalyst Paper Corporation et al, Tab 4, paras. 61, 62

11. Pension issues were canvassed in *Indalex*, and the fact-specific findings therein do not assist the Applicants, nor create new issues in the CCAA context.

Re Indalex, 2011 ONCA 265, Applicants' Book of Authorities, Tab 6

(ii) Significance to the Action

12. The points raised are of significance to the Applicants, but not to the action itself. The Applicants raise a priority issue, not a restructuring issue.

(iii) Merit of Proposed Appeal

13. The appeal is not meritorious because it attempts to interfere with the broad discretion of the supervising judge, which discretion has been clearly recognized by the Supreme Court of Canada. The decisions made were consistent with the over-arching objectives of the CCAA, which is to allow a debtor to remain in business and avoid liquidation.

Century Services, supra, para. 64

14. The supervising judge has heard all of the proceedings in this CCAA restructuring, being approximately 12 hearing days since late January, 2012. He is well-versed in the facts and he engaged in a consideration of what was necessary in the circumstances. He had the benefit of able counsel and lengthy argument. The exercise of his discretion should not be interfered with.

(iv) Progress of the Action

15. This restructuring is complex and has already led to multiple, adversarial days in court. As is the case in most restructurings, the orders in the restructuring proceedings represent a delicate balancing of interests by the supervising judge having regard to all of the circumstances in the case.

16. One aspect of the impugned order(s) is the Critical Suppliers' Charge, This was granted having regard to Section 11.01(b) of the CCAA which provides that:

11.01 No order made under section 11 or 11.02 has the effect of

...

(b) requiring the further advance of money or credit.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, s. 11.01(b)

17. Section 11.01 stands for the well-accepted doctrine that as a general rule, a creditor cannot be compelled to extend credit to a debtor company in the course of CCAA proceedings.
18. Section 11.4 of the CCAA, pursuant to which the supervising judge granted the Critical Suppliers' Charge, is an exception to the above-noted general rule. It provides that a court may designate a person as a critical supplier of goods and services of a debtor company where such goods or services are critical to the company's continued operation:

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the *goods or services that are supplied are critical* to the company's continued operation.

19. Section 11.4 also **requires** the court to give a charge for goods and services supplied on credit:

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

CCAA, at s. 11.4(3)

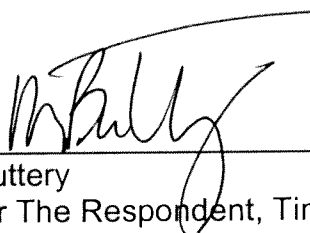
20. If the Critical Suppliers' Charge is set aside (or moved so far down the priority chain so as to render it useless) by a successful appeal, this would not give the Critical Suppliers the charge that is mandated by Court order, and may impugn the entire restructuring as it would be arguable as to whether they had to provide product on the basis of a charge that does not protect them.
21. Were leave to appeal be granted, the delicate balance achieved by the supervising judge would be upset. Presumably the debtor-in possession lender would fail to provide further credit, and the company may not have access to the credit and product supplied by the Critical Suppliers. This uncertainty would hinder or even derail the restructuring.

PART IV NATURE OF THE ORDER SOUGHT

22. This leave to appeal application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Davis LLP

Per:



Mary I.A. Buttery
Counsel For The Respondent, TimberWest Forest
Corp.

April 13, 2012
Vancouver, BC

LIST OF AUTHORITIES**Cases****Tab No.***Century Services v. Canada*, 2010 SCR 60**6**
(Catalyst Book)*Edgewater Casino (Re)*, 265 B.C.A.C. 274, 2009 BCCA 40**5**
(Applicant Book)*Re Indalex*, 2011 ONCA 265**6**
(Applicant Book)**Statutes***Companies' Creditors Arrangement Act*, R.S.C. 1985, ss. 13, 14(12)**2,3 & 4**
(Catalyst Book)