



No. S-120712
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
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 CATALYST PAPER CORPORATION
AND THE PETITIONERS LISTED IN SCHEDULE "A"

PETITIONERS

APPLICATION RESPONSE

Application Response of: Wells Fargo Bank, National Association, in its capacity as the trustee under a trust indenture for the 7 ³/₈% senior notes issued by Norske Skog Canada Limited (n/k/a Catalyst Paper Corporation) ("Catalyst" or the "Company") to noteholders, which are due March 1, 2014.

To: The Service List.

THIS IS A RESPONSE TO the Notice of Application filed by Ronald Gary McCaig, Jeff Whittaker, Janice Young, Peter Flynn, Patricia Dwornik and Francesca Pomeroy acting on their own behalf and on behalf of the Catalyst Salaried Employees & Pensioners Group on April 13, 2012 (collectively, the "CSEP").

PART 1: ORDERS CONSENTED TO

1. None.

PART 2: ORDERS OPPOSED

1. The 2014 Indenture Trustee, as defined below, opposes the orders sought in paragraphs 1 through 5 of the Notice of Application of the CSEP.

PART 3: FACTUAL BASIS.

Background

1. Wells Fargo Bank, National Association (“**Wells Fargo**”) is the trustee (the “**2014 Indenture Trustee**”) under a trust indenture for the 7^{3/8}% senior notes issued by the Company to noteholders (the “**2014 Noteholders**”), which are due March 1, 2014 (the “**2014 Notes**”). The 2014 Notes are not secured by the assets of the Petitioners.
2. On January 31, 2012, Catalyst obtained an order for the commencement of proceedings pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”).
3. Catalyst is the administrator of the Catalyst Paper Corporation Retirement Plan for Salaried Employees, B.C. Reg. No. 85400-1 (the “**Salaried Plan**”).
4. As of December 31, 2010, the Salaried Plan had a reported solvency deficiency of \$73.5 million. The most recent reported estimate of the solvency deficiency in the Salaried Plan is \$115 million. All plan liabilities are calculated on the basis of current interest rates. A modest increase in applicable interest rates would significantly reduce the calculated deficits.
5. The realizable value of the Petitioners’ currently unencumbered assets appears to be significantly less than \$115 million.

The Claims

6. The CSEP claim that section 43.1 of the Pension Benefits Standards Act, R.S.B.C. 1996 Chapter 352, (the “**PBSA**”) creates a deemed trust in favour of the Salaried Plan in the amount of \$115 million, on account of the solvency deficiency in the Salaried Plan.
7. In the event the orders sought by the CSEP are granted, the Petitioners’ unsecured creditors, including the 2014 Noteholders, would likely receive no distributions from a sale of Catalyst’s assets.

The Salaried Plan

8. To date, Catalyst has made all contributions to the Salaried Plan that are required by the British Columbia Superintendent of Pensions to be made in respect of any existing solvency deficiencies. Catalyst has also remained current on its normal cost contributions to the Salaried Plan.
9. There was not, as of January 31, 2012, and there is not at this time, any “wind up deficiency” (or in the terminology of the PBSA, any solvency deficiency upon termination) currently owing by Catalyst.
10. Moreover, there is no evidence to demonstrate that:

- a. any amounts deducted by Catalyst or the other Petitioners from an employee's remuneration have not been remitted to the Salaried Plan fund;
- b. any contributions received by Catalyst or the other Petitioners with respect to a member of the Salaried Plan have not been remitted to the Salaried Plan fund; or
- c. any contributions are "due or owing" to the Salaried Plan by Catalyst or any of the other Petitioners.

PART 4: LEGAL BASIS

1. The solvency deficiency that exists in the Salaried Plan may be an unsecured claim against Catalyst. There is no basis in law for this Court to impose a deemed trust that would benefit the CSEP to the detriment of other creditors and stakeholders.

Statutory Deemed Trust

2. The statutory deemed trusts created by applicable legislation do not apply to the solvency deficiency in the Salaried Plan.
3. Section 43.1 of the PBSA states that the following amounts are deemed to be held in trust for members of a pension plan, former members of a pension plan and any other persons entitled to pension benefits, refunds or other payments under the plan in accordance with their interests under the plan:
 - 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.
4. The CSEP have provided no evidence that (i) amounts have been deducted from a Salaried Plan member's remuneration and not yet remitted to the fund holder; or (ii) Catalyst has failed to remit to the fund holder any contributions received with respect to a Salaried Plan member.
5. Accordingly, the only issue for the Court to determine is whether any amounts are "due or owing to the pension plan" by Catalyst.
6. Section 41 of the PBSA states, in part, that:
 - (1) This section applies only to pension plans that contain defined benefit provisions.

(1.1) An employer must make contributions to a pension plan that are sufficient to pay for all the benefits in accordance with the prescribed solvency tests.

...

(2) In accordance with the prescribed tests for the solvency of pension plans and any other provisions of the regulations, a pension plan must provide for funding that is adequate to provide for payment of all benefits.

(3) The plan must be funded in accordance with the actuarial valuation reports referred to in section 9 (3) (b), as amended by any direction of the superintendent under section 9 (4).

This section explains the principles underlying the types of ongoing payments that an employer is to make to a pension plan. It does not, however, prescribe the specific amounts that are to be paid or the dates upon which those payments are to be made in any particular circumstance.

7. Section 51 of the PBSA states, in part, that:

(1) Within 30 days after the termination of a pension plan, an employer must:

(a) pay into the plan all amounts for which payment is required by the terms of the plan or this Act; and

(b) without limiting the generality of paragraph (a), make all payments that by the terms of the plan or this Act,

(i) are due from the employer to the plan but have not been made at the date of the termination, and

(ii) have accrued to the date of termination but are not yet due.

(2) If a pension plan, other than a negotiated cost plan, is terminated with a solvency deficiency and the employer is not insolvent,

(a) the employer must fund the remaining solvency deficiency as prescribed,

(b) the administrator must continue to file information returns and actuarial valuation reports as required by Section 9(3)(a) and (b) until the solvency deficiency has been retired, and

(c) subject to Section 55, the assets in the plan must be distributed in the manner and to the extent prescribed.

Subsection 51(2) is intended to address payments in respect of solvency deficiencies upon plan termination in certain circumstances. The payment obligations in Subsection 51(1) do not cover solvency deficiencies.

8. Whereas Sections 41 and 51 of the PBSA explain the types of payments that are to be made under the PBSA, the *Pension Benefits Standards Regulations*, B.C. Reg 433/93 (the “**Regulations**”) further explain how and when these payments are to be made. Subsections 35(3) and (3.1) of the Regulations state:

Subject to subsection (4) and section 35.1, every employer must pay into a plan...

(a) in respect of current employment, employer contributions made at least quarterly in an amount that is equal to the normal actuarial cost allocated to the employer as stated in the most recent actuarial valuation report filed;

(b) if the plan has an unfunded liability, equal payments made at least quarterly in an amount that is sufficient to amortize the unfunded liability over a period not exceeding 15 years from the review date that established the unfunded liability; and

(c) if the plan has a solvency deficiency, equal payments made at least quarterly in an amount that is sufficient to amortize the solvency deficiency as follows:

(i) with respect to a solvency deficiency determined on or after January 1, 1993 and before January 1, 1998, payments must be made over a period from the review date that established the solvency deficiency and ending no later than January 1, 2003;

(ii) with respect to a solvency deficiency determined on or after January 1, 1998, payments must be made over a period not exceeding 5 years from the review date that established the solvency deficiency;

(3.1) if a plan is terminated under the conditions referred to in section 51(2) of the Act, a schedule of special payments must be established as of the date of termination for the solvency deficiency to be amortized over a period of 5 years.

In this response, the amounts described in Paragraph 35(3)(a) above are referred to as “**Normal Contributions**” and the amounts described in 35(3)(b) and (c) above are referred to as “**Special Contributions**”.

9. In summary, based on Sections 41 and 51 of the PBSA and Section 35 of the Regulations:
 - a. any Normal Contributions that were payable at a time on or before the current date would be “due or owing”; and

- b. any Special Contributions that were payable at a time on or before the current date would also be “due or owing”.
- 10. Evidence shows that all Normal Contributions have been paid. This is not disputed.
- 11. Further, the evidence shows that all Special Contributions that are applicable in the circumstances have been paid. The Special Contributions referenced in Subsection 35(3.1) of the Regulations are not payable in the current circumstances since the conditions specified in Subsection 51(2) of the PBSA are not met: the Salaried Plan has not been terminated and, in any event, Catalyst is insolvent.
- 12. Any remaining solvency deficiencies, and the Special Contributions associated therewith, can become “due or owing” only in accordance with the schedule established by Section 35 of the Regulations. If Catalyst continues to make such Special Contributions up to the date of termination of the Salaried Plan (if such termination ever occurs) then no amounts will be “due or owing” at the date of such termination. If Catalyst does not continue to make such payments until termination of the Salaried Plan then the amounts that could possibly be “due or owing” at the time of such termination are the Special Contributions that are in arrears as of that date.
- 13. In summary, the PBSA cannot create a statutory deemed trust in favour of the Salaried Plan beneficiaries on account of the solvency deficiency for the following reasons, each of which dictates that no amounts are “due or owing” to the Salaried Plan at the current time:
 - a. The Salaried Plan has been neither wound up nor terminated. Therefore, the obligations imposed by Section 51 of the PBSA are not yet engaged.
 - b. Even if Section 51 of the PBSA is engaged at some time in the future, it would not result in all solvency deficiencies becoming “due or owing”. Payments in respect of solvency deficiencies are to be made under Subsection 51(2) of the PBSA on the timeline prescribed in the Regulations.
 - c. Subsection 51(2) of the PBSA expressly exempts insolvent employers from the obligation to make prescribed payments to fund solvency deficiencies on termination of a pension plan. Therefore, any solvency deficiency in the Salaried Plan cannot be “due or owing” by Catalyst, which is an insolvent company.

Indalex Does Not Apply

- 14. The provisions of the PBSA differ in many relevant respects from the provisions of the *Pension Benefits Act* (Ontario), R.S.O. 1990, c. P.8 (the “**Ontario Act**”) that were under consideration in the Ontario Court of Appeal decision in *Indalex Ltd. (Re)* (2011), 75 C.B.R. (5th) 19 (“**Indalex**”).
 - a. Whereas Paragraph 75(1)(b) of the Ontario Act provides for payments in respect of solvency deficiencies in all cases, Subsection 51(2) of the PBSA does not apply in a circumstance where the employer is insolvent, as in the present case.

- b. Whereas Subsection 57(4) of the Ontario Act imposes an obligation for the employer to hold in trust “an amount of money equal to the employer contributions accrued to the date of the wind up but not yet due”, the trust imposed under Subsection 43.1(a) of the PBSA applies only to amounts that are due or owing to the pension plan by the employer.
15. In concluding that the solvency deficiencies in the *Indalex* case were subject to the deemed trust under the Ontario Act, the Ontario Court of Appeal relied heavily upon language in the Ontario Act that the court interpreted as imposing a deemed trust on liabilities that were accrued, whether or not payments of those amounts were actually due or owing at the date under consideration.¹
16. The language in the PBSA is not open to the interpretation adopted in *Indalex*. While a solvency deficiency may be “accrued” in the Salaried Plan, the future payments necessary to eliminate that deficiency are not, in the words of the PBSA, “due or owing” at the current time.
17. In the alternative, the 2014 Indenture Trustee submits that the reasoning in *Indalex* leads to a result that is contrary to the underlying purpose of the deemed trust and should not be applied in the current case. The imposition of a deemed trust may be fair or equitable in a case where an employer had an obligation to remit certain amounts for the benefit of a pension plan but chose to instead misdirect those funds to an alternative corporate purpose. However, it is not fair or equitable to impose a deemed trust on any and all solvency deficiencies, most of which result from interest rate and investment performance fluctuations and not from an improper retention of funds by the employer. Allowing the latter would effectively insure pension plans against negative market value and interest rate fluctuations at the expense of unsecured creditors. This cannot be the intended result of the statutory deemed trust provisions in the PBSA.

Conclusion

18. If granted, the application of the CSEP will effectively obviate the claims of all of Catalyst’s unsecured creditors in circumstances where the imposition of the trust sought by the CSEP is not actually contemplated by the applicable legislation or the terms of the Salaried Plan.

PART 5: MATERIAL TO BE RELIED ON

1. Affidavit of Brian Baarda, sworn January 31, 2012.
2. Affidavit of William Sharkey sworn June 1, 2012.
3. Ninth Report of Pricewaterhouse Coopers Inc., in its capacity as court-appointed Monitor of Catalyst Paper Corporation, et al., dated April 10, 2012.

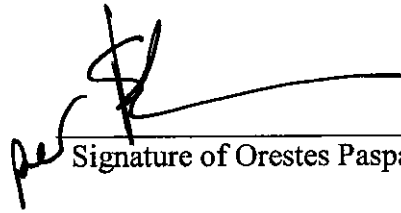
¹ *Indalex Ltd. (Re)* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) at paras. 99 – 101.

The Application Respondent estimates that the application will take: 10 minutes.

☒ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

☐ The application respondent has not filed in this proceeding a document that contains an address for service.

Date: June 15 , 2012

A handwritten signature in black ink, appearing to be 'Orestes Pasparakis', written over a horizontal line.

Signature of Orestes Pasparakis

☐ Applicant ☒ Lawyer for Wells Fargo Bank, National Association

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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LISTED IN SCHEDULE "A"

PETITIONERS

APPLICATION RESPONSE

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