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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

TO: ATTACHED SERVICE LIST

WRITTEN ARGUMENT

(April 13, 2012 Application for Deemed Trust)

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900,
Box 52
Toronto, Ontario M5H 3R3

Andrew J. Hatnay
Email: ahatnay@kmlaw.ca
Tel: 416-595-2083
Fax: 416-204-2872

Ari Kaplan
Email: akaplan@kmlaw.ca
Tel: 416-595-2087
Fax: 416-204-2819

PART I – OVERVIEW

1. The Catalyst Salaried Employees & Pensioners Group (“CSEP”) brings this application for, *inter alia*, a declaration:

- (a) that the amount of \$115 million representing the wind up deficiency owing to the Catalyst Paper Corporation Retirement Plan for Salaried Employees (Reg. No. 85400-1) (the “Salaried Plan”) by Catalyst is subject to a deemed trust for the benefit of all the beneficiaries of the Salaried Plan pursuant to section 43.1 of the *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 (the “PBSA”);
- (b) that this amount is not distributable to other creditors of the Petitioners; and
- (c) if the sale proceeds under the Sales Investment Solicitation Procedure (“SISP”) and the Stalking Horse Purchase Agreement (“SHPA”) that this amount is to be paid into the Salaried Plan fund in accordance with the PBSA.

2. CSEP is comprised of current and former salaried employees of Catalyst, the vast majority of whom are entitled to defined benefits from the Salaried Plan. There are no active employee members of the Salaried Plan accruing defined benefits. Current salaried employees of Catalyst earn defined contribution pensions within the Salaried Plan. The defined benefit part of the Salaried Plan, at issue on this application, includes obligations to current pensioners (including spousal and beneficiary payments), deferred pensioners, and active employees with “frozen” (i.e. non-accruing) defined benefits payable in the future. CSEP represents pension plan members in each of these categories.

Affidavit #1 of Brian Baarda sworn January 31, 2012, para. 72.

3. The Salaried Plan is underfunded. In the ongoing CCAA proceeding, the continued payment of the pension benefits earned by CSEP members and other beneficiaries of the

Salaried Plan are at great risk. The SISP and SHPA exclude the Salaried Plan from the obligations required to be assumed by the stalking horse purchaser. Under the SISP and SHPA, it is a virtual certainty that the Salaried Plan will be wound up in its underfunded state.

4. Accordingly, under the SISP and SHPA, the Salaried Plan members are facing certain and significant cuts to their pension benefits. The current valuation of the Salaried Plan discloses a solvency deficit ratio of 68%, which would see benefits cut by approximately 32%.

PART II – THE FACTS

5. The Salaried Plan members have earned entitlements to pension benefits, payable upon retirement, arising from their years of employment service with the company.

6. The pension benefits are a key part of Catalyst's compensation system for its employees. Catalyst has a legal responsibility to ensure that this promise is met. Catalyst told its employees that pension benefits are part of their compensation, stating that “[y]our total compensation consists of your annual salary *and the contributions the Company makes on your behalf* towards the cost of providing your income security programme” (emphasis added).

Affidavit of William Sharkey sworn June 1, 2012 (“Sharkey Affidavit”), para 6.

7. As of December 31, 2010, there were 1,477 members of the defined benefit portion of the Salaried Plan.

Sharkey Affidavit, para. 18

8. The Salaried Pension Plan is significantly underfunded. The latest estimate from the company places the solvency deficiency at approximately \$115 million.

Affidavit #3 of Gary McCaig sworn April 13, 2012, para. 5. (“McCaig Affidavit”)

17th Report of the Monitor, para. 5

9. The Salaried Pension Plan has been in significant deficit for many years. As of December 31, 2003, the amount of the solvency deficiency was \$48,012,516. As of December 31, 2006, the solvency deficiency was \$39,326,277, but had worsened to \$44,651,428 as of December 31, 2007 and had reached \$87,759,000 by December 31, 2007. When the company obtained CCAA protection in January, 2012, the solvency deficiency reported by the company was \$73,482,585 against assets worth \$284,321,345. A few months later, the company reported that the actual figure was estimated to be \$105.7 million. The company has now reported that the solvency deficiency is approximately \$115 million.

Sharkey Affidavit, paras. 30 to 40.

10. Based on the current information available, the Salaried Plan is approximately 32% underfunded.

Sharkey Affidavit, para. 40.

Catalyst's CCAA Proceedings

11. On January 31, 2012, after an unsuccessful out-of-court restructuring under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, Catalyst obtained protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA").

McCaig Affidavit, para. 6.

12. In late March 2012, Catalyst proposed a Plan of Compromise and Arrangement to its creditors, which contemplated the restructuring of a significant portion of Catalyst's debt and would have seen the company emerge from CCAA protection as a going-concern and continue with the administration of the Salaried Plan without a wind-up.

Sharkey Affidavit, para. 43.

13. Pension claims were classified as unaffected under the Plan of Compromise. Despite a request by the members of the Salaried Plan that they be entitled to vote on the Plan, they were not allowed to do so.

Sharkey Affidavit, para. 44.

14. The original Plan of Compromise was amended (the "Amended Plan"), but the requirement for the company to continue administering the Salaried Plan was maintained. On May 23, 2012, at a meeting of creditors, the Amended Plan failed to gain approval of a sufficient majority of Catalyst's creditors.

Sharkey Affidavit, para. 46.

The sale of Catalyst's assets under the SISP and the Wind-Up of the Salaried Plan

15. With the Amended Plan having failed, the SISP Order provides that the terms of the SHPA will proceed.

16. In the event that the SHPA is implemented, the Salaried Plan members will be prejudiced as the purchaser will not assume liability for any deficiency in the Salaried Plan, nor any pension or other post-retirement liability of the Salaried Plan members. In particular:

- (a) the definition of "Excluded Liabilities" under the Agreement includes any pension or other post-retirement liability of the Sellers to any current or former employee, except with respect to any transferred employees;
- (b) the Agreement expressly exempts the Salaried Plan from the definition of "Transferred Employee Plan" under the Agreement, meaning that the purchaser of the assets of the Petitioners will not assume liability for any deficiencies in the Salaried Plan; and,
- (c) the Agreement includes a condition that, on closing, the Canadian Court granting a Final Order shall discharge the Purchaser from any liabilities or obligations of the Sellers under any of the Seller's Employee Plans other than Transferred Employee Plans.

McCaig Affidavit, para. 16.

17. This effectively means that on the sale of Catalyst, the Salaried Plan will be abandoned and by necessity will need to be wound up. However, in contrast, under the SISP and SHPA, the administration of the pension plans of Catalyst's unionized employees will be assumed by the purchaser, and as such, the unionized Catalyst employees will not experience any losses to their monthly pension benefits

McCaig Affidavit, para. 17.

18. As a result of the SISP and the SHPA, if the relief requested in this Application is not granted, the funding amounts owing to the Salaried Plan will not be paid, and the Salaried Plan will be wound up in its underfunded state. This in turn will result in a reduction to the monthly benefits being paid to the Salaried Plan's members.

19. On June 14, 2012, after discussions with the various stakeholders, including the representatives of the Members of the Salaried Plan, the company proposed a Second Amended Plan of Compromise (the "Second Amended Plan"). On June 18, 2012, this court authorized the Second Amended Plan to proceed to a vote with creditors on June 25, 2012. If it passes, the Salaried Plan should not be wound up and it will not be necessary for the amount that is subject to the deemed trust to be paid into the Salaried Plan at this time.

20. However, if the Second Amended Plan is defeated, the amount subject to the deemed trust needs to be paid into the Salaried Plan prior to any distribution to any other creditors of Catalyst, with the exception of certain priority charges identified in paragraph 55 of the Amended and Restated Initial Order and claims ranking in priority to those charges.¹

PART III – THE ISSUE

21. The issue on this Application is:

¹ The specific claims that are being referenced here are certain Crown deemed trusts under the *Bankruptcy and Insolvency Act*, *Income Tax Act*, the *Employment Insurance Act* and the *Canada Pension Plan*.

(a) Does the deemed trust in section 43.1 of the PBSA apply to the \$115 million that is owed by Catalyst to the fund of the Salaried Plan, such that this amount forms no part of the estate of Catalyst and is not distributable to other creditors, and if the SISP and SHPA proceed this amount should be paid into the fund of the Salaried Plan ahead of any other payment to Catalyst's other creditors?

Answer: Yes.

PART IV – THE LAW

A. The Concept of a Deemed Trust

22. This Application concerns the interpretation of a statute. Other parties may try to raise arguments about economics, or equity, or commercial realities, but those arguments obfuscate the actual issue. This is a legal issue, which turns on the interpretation of key words in British Columbia's pension statute.

23. What is at stake in this Application is whether section 43.1 of the PBSA requires Catalyst to satisfy its obligations to current and former employees, or whether it is in fact a toothless statutory provision that provides no meaningful protection to employees.

24. A deemed trust is a statutory device whose purpose is to secure a payment of an amount to persons, funds or other entity that Parliament or a provincial Legislature has determined is in need of protection and should receive a priority payment.

25. Deemed trusts exist in a plethora of federal and provincial statutes across Canada and have been specifically enacted to protect employees and members of pension plans. For example, deemed trusts exist under all pension legislation across Canada. Another example is the deemed trust in Ontario's *Employment Standards Act, 2000*, S.O. 2000, c. 41, for vacation pay that is owing to employees.

Kevin McElcheran, *Commercial Insolvency in Canada* (Toronto: LexisNexis/Butterworths, 2005), at 110-112.

Employment Standards Act, 2000, S.O. 2000, c. 41 [ESA], s. 40.

26. Pension deemed trusts have been found to apply in both CCAA and receivership proceedings.

27. In the recent case of *Re Indalex*, a unanimous Ontario Court of Appeal held that in the CCAA proceedings of *Indalex*, Ontario's pension deemed trust applied to direct and require a payment toward eliminating all of the Indalex pension plan's solvency deficiency ahead of a secured claim of Indalex's parent company based on a guarantee of the DIP loan. The DIP lender had been repaid in full. In that decision, Madam Justice Gillese (for the Court) stated:

[107] The CCAA judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

[108] Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the PBA, was subject to a deemed trust. The CCAA judge erred in holding that no deemed trust existed with respect to that deficiency as at July 20, 2009.

Re Indalex Ltd., 2011 ONCA 265, at para. 107-108.

28. In the same decision, the Court of Appeal also noted that "[t]he CCAA was not designed to allow a company to avoid its pension obligations."

Re Indalex Ltd., ibid., at para. 199.

29. In *Re Usarco Ltd.*, (a receivership) Mr. Justice Farley gave effect to the deemed trust in section 57 of Ontario's *Pension Benefits Act* and ordered the receiver to pay an amount of money equal to the regular and special payments required to have been made but not yet paid into the pension plan:

13 Therefore, since the bankruptcy petition has not been dealt with, we are presently dealing with a claim by the administrator for certain trust funds held by the receiver. The security interest of the bank is subordinate to the interest of the beneficiaries of the deemed trust. [emphasis added]

Re Usarco Limited (1991) 42 E.T.R. 235 (Ont. Gen. Div.), at para. 29 ("Usarco").

B. The PBSA Deemed Trust

30. The applicable section of the PBSA 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. [Emphasis added].

31. Pension deemed trusts appear in all pension benefits standards statutes in every jurisdiction in Canada. The PBSA's deemed trust provides significantly more protection than that of other jurisdictions – including the pension deemed trust in Ontario's PBA which was given effect in *Indalex* – to employees of companies under CCAA protection.

32. The three types of contributions that are subject to the deemed trust in section 43.1 are:

- (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.

33. The principal issue in this case is the meaning to be given to the words "all contributions that are due or owing to the pension plan by the employer". CSEP concedes that subsection 43.1(1)(b) and 43.1(1)(c) are not applicable in this Application.

34. Section 43.1 contains three separate mechanisms for protecting pension plan beneficiaries:

- a) First, it requires that the employer keep separate and apart all amounts due or owing to a pension plan;
- b) Second, it creates a deemed trust over the amounts that *should have been* kept separate and apart, but were not; and

c) Third, if there is a CCAA proceeding, the amounts owing to a pension plan are deemed to be held separate and apart.

35. Section 43.1 should be interpreted to mean that a deemed trust exists over the assets of Catalyst to the extent of the solvency deficiency in the Salaried Plan, that these amounts do not form part of the estate of Catalyst, and that an amount representing the solvency deficiency is to be paid into the Salaried Plan before any payment or consideration to the 2016 Noteholders or any other purchaser takes control of the company under the SISP or SHPA.

36. The leading Canadian case on statutory interpretation is *Re Rizzo & Rizzo Shoes Ltd.*, which relies on Dreidger's "modern principle of statutory interpretation". This principle was affirmed by the Supreme Court of Canada in *Bell ExpressVu Ltd. Partnership v. Rex*, and was subsequently applied by that Court in *Monsanto v. Superintendent of Financial Services* to cover the interpretation of pension standards legislation. The principle is described as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Re Rizzo & Rizzo Shoes Ltd. [1998] 1 S.C.R. 27

Bell ExpressVu Ltd. Partnership v. Rex., [2002] 2 S.C.R. 559, 2002 SCC 42, at para 26

Monsanto v. Superintendent of Financial Services, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 19

37. Further, legislation in British Columbia must be read in conjunction with the *Interpretation Act*, section 8 which provides that "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

Interpretation Act, R.S.B.C. 1996, c. 238, s. 8

C. *The grammatical and ordinary sense of section 43.1 means that the deemed trust extends over the entire solvency deficiency that is owing to the Salaried Plan*

38. The deemed trust applies to "all contributions that are due or owing to the pension plan by the employer". A plain reading of section 43.1 militates in favour of the deemed trust extending over the entire solvency deficiency.

39. In this Application, the meaning of "contributions" encapsulates money that an employer is required to pay or remit into the pension fund under the PBSA or pursuant to the Salaried Plan text. This amount includes special payments to rectify a solvency deficiency. This interpretation is not controversial. That "contributions" includes amounts that must be paid to fund a solvency deficiency is clear from the context of how it is used in the legislation, and in the way that it is used in the Salaried Plan text. In fact, the Salaried Plan text states that the employer will "contribute to the Fund each Plan Year such amounts, if any, which when added to the which have been accumulated in the Fund, are estimated by the Actuary to be adequate to fund, in Accordance with Applicable Pension Laws, any unfunded liability which may exist under the Plan".

Salaried Plan text, section 1.9.1

40. Under the PBSA when an actuarial valuation of a pension plan discloses a solvency deficiency, the employer must make quarterly contributions over a period of five years to amortize that deficiency. A schedule of contributions is created, and the employer must pay the amounts as per the schedule.

PBSA, section 41; PBSA Regulations, B.C. Reg. 433/93, s. 35(3) and (3.1)

41. With respect to the phrase "due or owing", the Canadian Oxford English Dictionary states that the word "due" means "owing or payable as a debt or an obligation, whether immediately *or at some future date*".

42. This is exactly the sense in which the word “due” is used in section 43.1 of the PBSA: it comports with the notion of solvency payments that are “owing...at some future date”.

43. The Canadian Oxford English Dictionary also defines “owing” as meaning “owed; yet to be paid”. Again, the plain meaning of the word “owing” in its grammatical and ordinary sense would clearly apply to all of the solvency payments that must be paid to the Salaried Plan.

Canadian Oxford Dictionary, ibid.

44. To hold that the PBSA deemed trust only applies to a solvency payment as of the date a particular payment becomes due and which has passed but which have not yet been made would be to read words into the statute which are not there.

45. Such a reading would also run contrary to the express direction in the *Interpretation Act* that “[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”

D. *The Purpose of the PBSA is to protect pension plan members*

46. The object of pension benefits legislation such as the PBSA is to protect members of pension plans. The Supreme Court of Canada recently confirmed this purpose, noting that pension legislation “is clearly public policy legislation” that is “intended to benefit and protect the interests of members and former members of pension plans”.

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services), 2009 SCC 39, at para. 28.

47. The Ontario Court of Appeal has also confirmed that the purpose of pension legislation is to protect members and pensioners of pension plans:

I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees.

Huus v. Ontario (Superintendent of Pensions), 2002 CanLII 23593 (Ont. C.A.) 58 O.R. (3d) 380, at para 25.

48. In *Re Indalex*, the Ontario Court of Appeal also confirmed the purpose of pension benefits legislation, noting that:

...the overall purpose of [pension legislation] is to establish minimum standards, safeguard the rights of pension plan beneficiaries, and ensure the solvency of pension plans *so that pension promises will be fulfilled*. [Emphasis added].

Re Indalex, *supra*, at para. 104.

49. Further, the Supreme Court of Canada has recognized that pension entitlements are not a gratuitous benefit offered by the employer to employees, but instead are a form of deferred compensation. The Supreme Court stated that employees "almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour."

Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611 at 646.

50. The purpose of pension legislation is to ensure that pension plan members are not deprived of the benefit to which they are entitled as a result of a timing issue, for example, the deferral of payment of their wages. Section 43.1 of the PBSA serves to ensure that this promise will be delivered, and that pension entitlements are not reduced.

E. The scheme of the PBSA provides distinct and express protections for employees both of solvent and insolvent companies

51. The PBSA comprehensively regulates registered pension plans in British Columbia, including their wind up. The PBSA provides a scheme setting out what is required to wind up a pension plan including the provision of notice to plan members, benefit entitlements and funding requirements.

52. The wind up of a pension plan is a process and not a single event. It is commenced by an event that triggers the commencement of the wind up and continues until the last dollar is liquidated from the pension fund.

Ari N. Kaplan, *Pension Law* (2006: Irwin Law, Toronto) at p. 503.

53. Definitions of "termination" and "winding up" are provided in the PBSA:

"**termination**" means, when used in relation to a pension plan, an event constituting a termination of the plan under section 48, 49 or 58 (3) to the extent that the event affects members and former members;

"**winding up**" means, in relation to a pension plan that has been terminated, the process of distributing the assets of the plan;

PBSA, s. 1(1)

54. Under the PBSA, there are two ways a pension plan may be terminated and wound up. First, the employer who is sponsoring the plan (and who is also the administrator) may terminate the plan, and after the plan is terminated, it must be wound up unless the Superintendent consents to delay the wind up. Second, the B.C. Superintendent of Pensions in prescribed circumstances may terminate the plan and order that it be wound up.

PBSA, s. 49, 50, 52, and 54

55. Where an employer ceases to make contributions to the pension plan, that failure constitutes a termination of the pension plan, and a wind-up becomes inevitable. Also, if the employer discontinues all or part of its business, the Superintendent can declare the plan terminated.

PBSA, s. 48 and 49

56. In the case of Catalyst, if the Second Amended Plan is rejected by Catalyst's creditors at the creditors meeting on June 25, 2012, and the SISP and/or SHPA goes forward, it is a certainty that the Salaried Plan will be abandoned and will be wound up.

57. The PBSA creates two types of protections for employees when a plan is terminated or an employer ceases to make contributions to the pension plan. One protection applies when the employer is solvent, and the other applies when the employer is insolvent.

58. Section 51(2) describes what is done when a pension plan is terminated with a solvency deficiency and the employer is solvent:

- (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...

PBSA, section 43.1 and 51(2)

59. However, if this were the only provision protecting employees and pensioners, this would be a hollow right as one of the central reasons that a pension plan is terminated is that the employer has become insolvent and is no longer making contributions.

60. Rather than leave employees without any recourse where a company becomes insolvent, the B.C. legislature chose to expressly protect pension plan members in the insolvency proceeding of their employer through the deemed trust provision in s. 43.1.

61. Section 43.1 expressly states that where there is a proceeding under the CCAA, an amount representing the amount “due and owing” to the pension plan is deemed to be held separate and apart and make up no part of the estate of the employer.

62. If an amount equal to the wind-up deficiency is held separate and apart and forms no part of the estate of the employer, that amount cannot be distributed to other creditors.

63. The British Columbia legislature chose to protect pension plan members whose companies are subject to creditor protection under the CCAA by legislating express protection, and mandating that amounts owing to a pension plan are deemed to be held in trust so that such members will have the retirement security and income that they are entitled to.

64. In short, Section 51(2) of the PBSA provides the protection that pensioners have when the employer is solvent, and section 43.1 provides the protection that the pensioners are entitled to when the employer is insolvent. That is the scheme of the Act.

PBSA, section 43.1 and 51(2)

F. Section 43.1 of the PBSA in context

65. Dreidger's modern principle of statutory interpretation calls for a contextual reading of the provision at issue. The context has already been partially discussed above, but there are three additional contextual points which militate in favour of interpreting section 43.1 as applying to the entire solvency deficiency owing to the Salaried Plan.

66. First, the Salaried Plan text buttresses such an interpretation. Section 1.9.1. calls for the company to make "contributions" to the Plan which are "adequate to provide" the benefits which are owed under the Plan:

...each Participating Company will contribute to the Fund each Plan Year such amounts, if any, which when added to the which have been accumulated in the Fund, are estimated by the Actuary to be adequate to fund, in Accordance with Applicable Pension Laws, any unfunded liability which may exist under the Plan.

Section 1.9.1, Salaried Plan Text

67. In addition to section 43.1 of the PBSA, section 1.9.2. of the Plan text also deems amounts owing to the Salaried Plan to be separate and apart and form no part of the estate of the company is subject to CCAA proceedings:

The Company and every other Participating Company must keep separate and apart from its own assets all contributions due or owing to the Plan. These contributions are deemed to be held in trust for Members and any other person entitled to pension benefits, refunds, or other payments under the Plan. **Where a proceeding exists in respect of the Companies' Creditors Arrangement Act (Canada), Winding Up and Restructuring Act (Canada) or similar provincial legislation or in relation to liquidation, receivership or secured creditor enforcement, or insolvency other than under the Bankruptcy and Insolvency Act (Canada), these amounts are deemed to be separate and apart and form no part of the estate of the Company or other Participating Company.** [Emphasis added]

Section 1.9.2., Salaried Plan Text

68. Second, it is settled law that a plan administrator owes a fiduciary duty to pension plan members and pensioners in respect of all activities administering a pension plan under both section 8 of the PBSA and the common law.

PBSA, Section 8

Pension Law, supra, at pp. 330-345.

Indalex, supra, para. 117

69. The administrator's fiduciary duty continues through the wind up of a pension plan and extends to any discretionary decisions made by an administrator during the wind up process. The exercise of discretion by an administrator during the wind up process must be discharged in a manner that avoids any conflicts of interest in respect of its role as both administrator and employer.

Pension Law, supra, at pp. 522-523.

70. In *Usarco*, Mr. Justice Farley held that the deemed trust provisions in Ontario's pension legislation themselves imply a fiduciary obligation on the company.

Usarco, supra, at para. 16.

71. Catalyst is required to act in the best interests of the Salaried Plan members. It is acting on that duty by supporting this Application. This is another reason why the CSEP's interpretation should be accepted by this Honourable Court.

72. The third contextual point concerns the B.C. Superintendent's position when an amount becomes "owing". In *Butler Brothers v. Superintendent of Pensions*, the Superintendent submitted that it is the actuarial valuation report and the creation of an amortization payment schedule which creates the obligation to pay into the pension fund.

Butler Brothers v. B.C. Supt. of Pensions et al, 2004 BCSC 1004, affirmed by Butler Brothers Supplies v. BC Superintendent of Pensions, 2005 BCCA 344 ("Butler Brothers")

73. The Court noted that in that case the Superintendent wrote a letter to the employer stating the following:

[10] The second letter, dated 5 November 2003 reads, in part:

We agree that the letter would obligate the bank to pay to the Plan upon the happening of certain events stipulated in the letter. However, the event that obligates the employer to make payments to the Plan has already occurred, namely amortization of the solvency deficiency that exists in the Plan as at December 31, 2002. [Emphasis added].

Butler Brothers, ibid.

74. The Court found that the Superintendent's position in this case was correct, and this holding was upheld by the Court of Appeal. Therefore, the notion that the amounts required to fund the solvency deficiency are "owing" to the Plan and thus subject to the deemed trust has already been commented on by the Superintendent and this analysis was not disputed by either level of court in that case.

Butler Brothers, ibid.

PART V - ORDERS REQUESTED

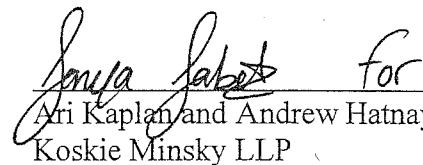
75. The Pensioners request:

- a) A Declaration that the amount of \$115 million representing the solvency or wind up deficiency owing by the Petitioners and/or any related party of the Petitioners (collectively "Catalyst") to the Salaried Plan, or such other amount as may be determined as the solvency or wind up deficiency, of the assets of Catalyst is subject to a deemed trust for the benefit of the beneficiaries of the Salaried Plan pursuant to section 43.1 of the *PBSA*.
- b) If the SISP and/or the SHPA or other sale which abandons the Salaried Plan proceeds, an order directing that the amount of the wind up liability be paid to the fund of the Salaried Plan by Catalyst or from the assets of Catalyst, as the case may be, in priority to the claims of any other creditor

of Catalyst, subject only to the charges in paragraph 55 of the Amended and Restated Initial Order and any claims ranking in priority to those charges under sections 81.3 and 81.4 of the *Bankruptcy and Insolvency Act*, sections 227(4) and 227(4.1) of the *Income Tax Act*, section 23(3) and 23(4) of the Canada Pension Plan, and sections 86(2) and 86(2.1) of the *Employment Insurance Act*;

- c) A declaration that the amount of the wind up deficiency that is subject to the deemed trust is not distributable to other creditors of Catalyst, subject only to the charges in paragraph 55 of the Amended and Restated Initial Order and any claims ranking in priority to those charges under sections 81.3 and 81.4 of the *Bankruptcy and Insolvency Act*, sections 227(4) and 227(4.1) of the *Income Tax Act*, section 23(3) and 23(4) of the Canada Pension Plan, and sections 86(2) and 86(2.1) of the *Employment Insurance Act*, and that such declaration survive any bankruptcy or receivership of Catalyst;
- d) If necessary, an Order amending the Amended and Restated Initial Order dated February 3, 2012, to implement the relief in the paragraphs above; and,
- e) Such further and other relief as counsel may advise and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of June, 2012.



Ari Kaplan and Andrew Hatnay,
Koskie Minsky LLP

Action No. S120712
Vancouver Registry
SUPREME COURT OF BRITISH COLUMBIA

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
PETITIONERS LISTED IN SCHEDULE "A",

WRITTEN ARGUMENT

McGRADY & COMPANY
Lawyers
Box 12101 - Nelson Square
Suite 1105 - 808 Nelson Street
Vancouver, British Columbia
V6Z 2H2
Tel: (604) 734-7003
Fax: (604) 734-7009

KOSKIE MINSKY LLP
Barristers and Solicitors
20 Queens Street West
Suite 900, Box 52
Toronto, Ontario
M5H 3R3
Tel: (416) 542-6285
Fax: (416) 204-2819

ATTENTION: SONYA SABET-RASEKH ATTENTION: JAMES HARNUM