NO. S120712
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 CATALYST PAPER CORPORATION AND THE PETITIONERS LISTED IN SCHEDULE "A"

PETITIONERS

WRITTEN ARGUMENT OF THE AD HOC GROUP OF 2016 NOTEHOLDERS

(CLAIMS OF CATALYST SALARIED PENSION PLAN BENEFICIARIES)

FRASER MILNER CASGRAIN LLP
Barristers and Solicitors
250 Howe Street, 20th Floor
Vancouver, British Columbia V6C 3R8
Telephone: (604) 687-4460
Solicitors for Ad Hoc 2016 Noteholder Group

***Counsel for Ad Hoc 2016 Noteholder Group*:**

J.R. Schmidt
C.J. Ramsay
J.D. Schultz

INDEX

PART I

BACKGROUND

Nature of the Applications

1. These are applications by two groups ("CESP" and "RSEA", respectively, and, together, the "Plan Beneficiaries"), most of whose members claim entitlement to benefits under the Catalyst Paper Corporation Retirement Plan for Salaried Employees (the "Salaried Plan").

2. The Plan Beneficiaries seek declaratory relief which includes the following:

   (a) that a solvency deficiency in respect of the Salaried Plan became, prior to March 10, 2010, subject to an actual or deemed trust for the benefit of the Plan Beneficiaries; and

   (b) that property subject to an actual or deemed trust forms no part of Catalyst's estate or, alternatively, that the interest of the Plan Beneficiaries ranks in priority to the claims of creditors of Catalyst.

3. The 2016 Noteholders oppose the applications. They do so primarily on the basis that no actual deficiency has yet arisen in respect of the Salaried Plan. Rather, the alleged "solvency deficiency" is simply a past estimate, based on actuarial calculations, that may or may not in the future crystallize into the subject of a live payment or funding obligation by Catalyst.

Background

4. The 2016 Noteholders are the senior secured lenders of Catalyst. The security, taken in respect of notes issued for approximately $390,000,000, attached and was perfected on March 10, 2010. It covers essentially all the assets and undertaking of Catalyst.

Affidavit #3 of Brian Baarda, Exhibits "B" and "C"
Affidavit #1 of Jyotika Reddy
Monitor's 9th Report to the Court

5. The Salaried Plan includes a defined benefit component in favour of the Plan Beneficiaries. Catalyst, as the employer, provides the contributions to the Salaried Plan. It also administers the Salaried Plan.

Affidavit #1 of William A. Sharkey, Exhibit "C"

6. The assets of the Salaried Plan are held in a trust fund of which CIBC Mellon Trust Company is the Trustee (the "Trust Fund"). The terms on which the Trust Funds are held by CIBC Mellon are contained in a trust agreement dated September 1, 2001 (the "Trust Agreement").

Affidavit #1 of William A. Sharkey, Exhibit "C", s. 1.9.4

7. The assets of the Trust Fund are invested through a master trust, of which CIBC Mellon is also the Trustee. The terms of the master trust are contained in a master trust agreement dated September 1, 2001.

Affidavit #2 of Deborah Hamann-Trou, Exhibit "B"

8. Although Catalyst is now insolvent, it has nonetheless made all required contributions to the Salaried Plan pursuant to the *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 (the "PBSA") and its corresponding regulation, B.C. Reg. 433/93 (the "Regulation").

Affidavit #1 of William A. Sharkey, para. 33
Affidavit #3 of Deborah Hamann-Trou, Exhibit "D", p. 263

9. In other words, Catalyst has complied with its payment or funding obligations. It therefore cannot be said that Catalyst has "underfunded" the Salaried Plan or that the Plan itself is "underfunded".

10. All that can be said beyond that is that an actuarial solvency deficiency has been *estimated* in respect of the Salaried Plan since in or about 2003. As at December 31, 2010, a solvency deficiency was estimated at approximately $73,000,000. Estimated solvency deficiencies are, in the present economic circumstances, widespread in respect of defined benefit pension plans.

Affidavit #1 of William A. Sharkey, paras. 30-40
Affidavit #1 of Michael Peters

11. The PBSA and the Regulation provide a mechanism to cure any solvency deficiency by quarterly payments over five years from the date of an estimated actuarial valuation report. These are referred to as "special payments".

12. Catalyst has made all special payments to the Trust Fund required to amortize the estimated Solvency Deficiency. While doing so, it remained current on its normal cost contributions.

Affidavit #1 of William A. Sharkey, para. 33
Affidavit #1 of Michael Peters, para. 8
Affidavit #3 of Deborah Hamann-Trou, Exhibit "D",
p. 263

13. However, Catalyst also entered into ongoing discussions with the Superintendent of Pensions for consent to certain relief, often called "solvency relief", regarding the amount of contributions that would otherwise have to be paid to the Trust Fund.

Affidavit #3 of Deborah Hamann-Trou, Exhibit "D",
p. 263

14. By letter dated December 14, 2011, the Superintendent granted Catalyst an extension of time for amortizing the estimated solvency deficit. In the letter, the Superintendent set out a schedule of annual special payments to liquidate the estimated solvency deficit over a seven-year period.

Affidavit #1 of Brian Baarda, Exhibit "E"

15. On January 31, 2012, Catalyst commenced these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

16. The effect of the filing under the CCAA was that the relief granted by the Superintendent in the December 14, 2011 letter was no longer available to Catalyst.

17. However, on February 7, 2012, the Superintendent granted another request by Catalyst through a second consent letter, extending the time limit for making payments to liquidate the estimated solvency deficit on substantially similar terms as the December 14 letter. The February 7th letter sets annual special payments and confirms that, other than two payments totaling $1,100,000 due March 18, 2012, and April 15, 2012, "there are no amounts considered due and owing to the Salaried Plan ... with regard to solvency deficiencies as of the date of this letter."

Affidavit #3 of Deborah Hamann-Trou, Exhibit "D",
p. 263

18. Further, by early June, 2012, Catalyst had, in the context of seeking the agreement of its creditors to a proposed further amended Plan of Compromise and Arrangement, asked the Province of British Columbia to make statutory amendments to allow it to obtain further solvency relief and allow certain Plan Beneficiaries to take advantage of a "Special Portability Election Rule". Such a rule would allow them to take a lump sum equivalent to the current solvency value for their pension in full satisfaction of their entitlement from the Salaried Plan. According to Catalyst, the Province has responded positively, on a preliminary basis, to its proposal.

Monitor's 17th Report to the Court
Affidavit #3 of Deborah Hamann-Trou, Exhibit "D",
p. 268; Exhibit "I"

19. As indicated above, Catalyst is now seeking, pursuant to an order pronounced June 18, 2012, the requisite approval of its secured and unsecured creditors to a further amended Plan of Compromise and Agreement.

Supplemental Meetings Order, made June 18,
2012

20. However, should the further amended Plan fail, a sale process will continue which contemplates the sale of Catalyst's business and operations by bid at an

auction, or its acquisition by a "stalking horse" purchaser, controlled by the 2016 Noteholders, through a credit bid.

> Sale and Investment Solicitation Process Order,
> made March 22, 2012

21. Against that background, the Plan Beneficiaries assert on these applications that, in part:

(a) if a sale of Catalyst occurs, it will not include the assumption by the purchaser of Catalyst's obligations under the Salaried Plan;

(b) the Salaried Plan will therefore be wound up, with a solvency deficiency outstanding; and

(c) there will be, in the result, a significant reduction in pension benefits for the Plan Beneficiaries.

> Affidavit #3 of Ronald G. McCaig, paras 16-18
> Affidavit #1 of Clifford LeRoy (Lee) Best, para. 10
> Affidavit #1 of William A. Sharkey, paras 52, 55 and 57 - 61

22. Notwithstanding these assertions, neither Catalyst nor the Superintendent has attempted to terminate or wind up the Salaried Plan. Nor is it now known whether, should a sale occur, a consequence will necessarily be the winding up of the Salaried Plan.

23. Indeed, even if there were a wind-up of the Salaried Plan, it is not known now whether or to what extent there will turn out to be adverse consequences for the Plan Beneficiaries. For one thing, further legislative action by the Province of British Columbia, beyond that recently requested by Catalyst, could well be taken, as it has been elsewhere in recent, large insolvencies, to reduce the negative impact of a wind-up on the Plan Beneficiaries.

PART II

SUMMARY OF THE 2016 NOTEHOLDERS' POSITION

24. These applications concern only the estimated solvency deficiency. No issue arises concerning Catalyst's normal contributions or special payments to the Salaried Plan, each of which are current.

25. Accordingly, insofar as the 2016 Noteholders are concerned, the issues on these applications can be reduced to whether any trust for the entirety of an estimated solvency deficiency arose prior to March 10, 2010, the effective date of the 2016 Noteholders' security. If no trust arose, the 2016 Noteholders' security is unaffected by the claims of the Plan Beneficiaries.

26. No such trust could have arisen here, either under the common law or under the PBSA, because there has never been an *actual* solvency deficiency. Such a deficiency would only arise on the wind up of the Salaried Plan. Failing that, an employer cannot be said to have an obligation to pay what has been identified only as an *estimated* deficiency. Such an estimate is just that: it is not an ascertainable or definite amount and therefore is incapable of being the subject of a specific liquidation obligation.

PART III

ISSUES

27. Whether any trust for the entirety of an estimated solvency deficiency arose prior to March 10, 2010.

28. Whether, in the alternative, if any trust arose after March 10, 2010, it would have any effect on the Noteholders' security.

PART IV

SUBMISSIONS

Whether any trust for the entirety of an estimated solvency deficiency arose prior to March 10, 2010.

Actuarial Estimates of Solvency Deficits

29. The contributions an employer is required to make to a defined benefits plan are based, at least in part, on the anticipated liabilities of the plan. This stands in contradistinction to a defined contribution plan, where the employer's contributions are fixed. The anticipated liabilities of a defined benefits plan must be estimated by an actuary and are determined through each of a "going concern" valuation and a "solvency" valuation. The former assumes no decision has been made to wind up the plan; the latter assumes the plan is to be wound up on the valuation date.

Regulation, s. 1

30. For an active plan, it is well settled that that an actuarial deficit is merely a calculation. It exists only on paper. It is constantly subject to change and re-evaluation. It remains indefinite and unascertained until termination of the plan, when any deficit, if it then exists, will crystallize.

Burke v. Hudson's Bay Co., 2010 SCC 34, [2010] 2 S.C.R. 273 at para. 5.

31. Although the concept of a solvency deficit in a defined benefits pension plan has received limited judicial treatment, the converse (an actuarial surplus) has been the subject of considerable analysis.

32. The leading case is *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631. There, the Court concluded the use of surplus funds was not an encroachment on the trust as the actuarial surplus in an ongoing plan is always uncertain: a beneficiary's interest in the surplus will not crystallize until the plan is

wound up. Particularly apposite is the following analysis (pp. 665-666 (D.L.R.)):

> Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of the accrued benefits.
>
> ...
>
> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination.
>
> [Emphasis added]

See also: *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678

33. In British Columbia, courts have similarly acknowledged the indefinite and speculative nature of actuarial calculations of defined benefit plan liabilities. In one instance, the Court observed, citing, in part, an Ontario judgment:

> ... *Maurer v. McMaster University* involved the entitlement of an employer to take a contribution holiday when there is an actuarial surplus. Haley J. said the following about the interplay between the funding of pension plans and actuarial valuations:
>
> > It is necessary to recognize the dynamic nature of the funding process as described by Mr. Hirst. Each year the actuary makes a forecast, based on assumptions, of how much money is required now to pay for the benefits to be accrued in the coming year when they ultimately come to be paid out for the plan members. How well the assumptions accord with reality will determine at any valuation date whether there

> will be a deficit in the fund or a surplus in the fund. If the assumptions mirror reality there will be neither deficit nor surplus and the benefits will be fully funded...
>
> An actuarial surplus is clearly the result of expectations turning out differently from reality. If reality is less favourable than expected, the employer is required by pension legislation to fund the "experience deficiency" by additional payments spread over five years. If the reality is more favourable, and "experience gain" is reported which is named an "actuarial surplus".
>
> ...
>
> As acknowledged ... in *Schmidt* ... many assumptions utilized in actuarial valuations are speculative in nature and cannot be expected to be precise. Reality will often lead to results which are different from the assumptions. Actuaries utilize economic trends in an effort to be as accurate as possible with their predictions but they cannot be expected to have a crystal ball showing exactly what the future holds. ...
>
> When actuaries perform valuations of pension plans, they must choose from different methodologies and different assumptions in accordance with generally accepted actuarial practice. In view of the speculative nature of the assumptions, it is not possible to say that one assumption is correct and all other possibilities are incorrect. Rather, there is a range of potential assumptions which are generally accepted in actuarial practice. If two different actuaries pick different values within the acceptable range in respect of one assumption and otherwise use the same assumptions and the same methodologies, one cannot say that the valuation done by one actuary is correct and that the other valuation is mistaken. The two actuaries have expressed their opinions, neither of which can be categorized as mistaken.
>
> *Fata v. Simon Fraser University Administrative/Union Staff Pension Plan* (1997), 17 C.C.P.B. 14 (B.C.S.C.) at paras. 57-59

34. As set out below, when an estimated solvency deficiency is identified, the PBSA and the Regulations provide for an employer to either begin making additional "special payments" to a pension plan in order to help reduce the deficiency or provide security through the delivery of a letter of credit. However, future "special payments", if an employer decides to make them, are not certain. Instead, they are subject to changes or other fluctuations in the estimated solvency deficiency that may arise from time to time.

35. What follows from this is that a solvent employer can, as a matter of law, have no obligation to liquidate a solvency deficiency until the amount of any actual

deficiency is known, following wind up of the plan. In other words, an estimated solvency deficiency is not capable of giving rise to an enforceable payment obligation prior to an actual deficiency being ascertained following plan termination. Put even more simply, it is not capable, while a plan is ongoing, of being either due or owing.

Actual or "True" Trust

36. To the extent the Plan Beneficiaries allege a true trust, they rely on s. 1.9.2 of the Salaried Plan, which so far as is material, provides that "... Catalyst ... 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 persons entitled to pension benefits, refunds or other payments under the Plan."

37. However, in order to succeed in establishing a true trust as against the 2016 Noteholders, the Plan Beneficiaries must, among other things, prove that:

(a) Catalyst was under an obligation to pay any estimated solvency deficiency as soon as one was identified;

(b) such an obligation constituted one of the "contributions due or owing to the Plan" with the result that Catalyst was required to pay into the Trust Fund an amount equivalent to any estimated solvency deficiency as soon as such a deficiency was identified;

(c) Catalyst was therefore required to keep the amount paid by it in respect of any estimated solvency deficiency, along with other contributions due and owing to the Salaried Plan, "separate and apart from its own assets";

(d) Catalyst did in fact keep the amount paid by it in respect of any estimated solvency deficiency separate and apart from its own assets; and

(e) the alleged trust in respect of the estimated solvency deficiency satisfied the common law requirements for an enforceable trust, including certainty of intention and subject matter.

38. For the reasons set out above, arising from the application of *Schmidt*, the Plan Beneficiaries fail on the first step: Catalyst was never under an obligation to pay any estimated solvency deficiency as soon as one was identified.

39. Further, the contributions described, under s. 1.9.2., as those due and owing are limited to the ones required by the "Applicable Pension Laws". Those laws are comprised of the PBSA and the Regulation, neither of which, for reasons developed below, places any obligation on Catalyst to pay the entire amount of an estimated solvency deficiency as soon as one arises.

40. Beyond that, it is clear from the documentary evidence before the Court that Catalyst never paid any amount of an estimated solvency deficiency to the Salaried Plan. There is and can be no contention that the Trust Fund consists, insofar as payments from Catalyst are concerned, of anything more than the normal contributions and ascertained special payments made by Catalyst at the required times, in accordance with the operation of the PBSA and the Regulation.

41. Morever, the Pension Beneficiaries have failed to establish that the three certainties arise in this case.

42. Firstly, the "deeming" language contained in s. 1.9.2 of the Salaried Plan falls short of evidencing an intention to hold particular assets in trust, much less those for payment of an estimated solvency deficiency. Further evidence of this lack of intention, as it relates to an estimated solvency deficiency, is provided by the various reports, financial statements and member reports required by statute. These make it clear that, at least prior to these CCAA proceedings, neither Catalyst, the Pension Beneficiaries, the actuary for the Salaried Plan nor the Superintendent of Pensions ever considered there to be a separate trust, beyond the Trust Fund, consisting of assets for the purposes of paying any estimated solvency deficiency that may have existed from time to time.

43. Secondly, the submissions of the Pension Beneficiaries are contrary to the well established authority from the Supreme Court of Canada that specific trust property must be identifiable. The Salaried Plan, at best, describes "contributions" to be held in trust. The "formula" proposed by the Pension Beneficiaries fails to identify what property makes up these "contributions" and is held in trust. Indeed, this case falls short the factual circumstances identified in *Henfrey Samson* and *Sparrow*, where amounts were notionally capable of identification and "calculation" (i.e. G.S.T. on sales, and

income tax deducted from employee pay-cheques), but it was not possible to identify which property represented the amounts being calculated.

> *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 at para. 45
>
> *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 at paras. 28, 31
>
> See also: *Re Graphicshoppe Ltd.* (2005), 260 D.L.R. (4th) 713 (O.C.A.) at paras. 130-132

44. In this regard, the *Edmonton Pipe* case, relied on by RSEA, is of no assistance. There are important differences between the documentary provisions in that case and the relevant provisions contained in the material before the Court in the case at bar. Indeed, the analysis in *Edmonton Pipe* specifically calls into question whether the language of the Salaried Plan here, such that it purports to create a trust by "deeming" one to be created, could have any effect.

45. Moreover, the Court in *Edmonton Pipe*, appears to have decided to simply disregard the dictum from *Henfrey Samson*, *supra*. In that respect, the case should be considered to be wrongly decided. The law, properly stated, is that even if a notional amount can be ascertained for the *res* of a trust, there is no certainty of subject matter where funds are not kept separate and apart from general assets.

Statutory Deemed Trust

46. To the extent the Plan Beneficiaries allege a deemed trust arising as soon as an estimated solvency deficiency was identified, they rely on s. 43.1 of the *PBSA*. It provides, in material part:

> (1) An employer must ... 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,
>
> ....
>
> (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.
>
> . . . .

47. In order to succeed against the 2016 Noteholders on this point, the Plan Beneficiaries must, as with the alleged "true" trust, establish that:

(a) Catalyst was under an obligation to pay any estimated solvency deficiency as soon as one was identified; and

(b) such an obligation constituted, this time under the *PBSA*, one of the "contributions due or owing" to the Salaried Plan, with the result that Catalyst was statutorily required to pay into the Trust Fund an amount equivalent to any estimated solvency deficiency as soon as such a deficiency was identified.

48. As under *Schmidt*, *supra*, an estimated solvency deficiency cannot give rise to a payment obligation by an employer, the allegation of a deemed trust fails on the first step. That is sufficient to dispose of the point.

49. However, even if an estimated solvency deficiency were capable of giving rise to a payment obligation, it would not constitute a payment obligation under the *PBSA* or, put more precisely, it would not constitute an amount "due or owing" under s. 43.1.

50. The scheme of the PBSA and the Regulation, when reduced to its basic requirements for employer contributions to active defined benefit pension plans, sets out the following general framework:

(a) a plan must be funded in accordance with specified actuarial valuation reports (PBSA, s. 41(3));

(b) in respect of current employees, the employer must make quarterly cost contributions in accordance with the normal actuarial cost attributed to the employer in the most recent actuarial valuation report (Regulation, s. 35(3)(a));

(c) where there is an "unfunded liability", i.e. an amount by which the plan's going concern liabilities exceed its going concern assets, the employer must make quarterly payments to amortize the unfunded liability over not more than fifteen years (Regulation, s. 35(3)(b));

(d) where there is an estimated solvency deficiency, the employer must make quarterly payments to amortize the deficiency over not more than five years (Regulation, s. 35(3)(c)(ii));

(e) notwithstanding (d) above, where a subsequent actuarial report reveals that a solvency deficiency no longer exists, the obligation to make special payments may be reduced or eliminated altogether (Regulation, s.35(3.2) (8) and (20)); and,

(f) instead of making "special payments" in respect of a solvency deficiency, an employer may post a letter of credit (Regulation, s. 35.1).

51. The contributions in (b) above are "normal contributions". The contributions in (c) and (d) are "special payments". (Here, however, the only special payments required of Catalyst have been with respect to the estimated solvency deficiency; notwithstanding the use of the term in parts of the Plan Beneficiaries' arguments, there is no "unfunded liability" in respect of the Salaried Plan.)

52. While special payments are in respect of an estimated solvency deficiency, the obligation on an employer only arises in this regard if the employer elects to make special payments instead of posting security in the form of a letter of credit. Further, if a special payment obligation is undertaken it will only be one to make the special payments themselves. This is different from an obligation to pay the estimated solvency deficiency itself. Indeed, the changing nature of an estimated solvency deficiency is recognized by the provision in the Regulation, cited above, that will operate to either reduce or eliminate special payments, if the next actuarial valuation report discloses a reduction or elimination of the previously projected solvency deficiency.

53. Further, where a plan is terminated, and the assets of the plan are to be distributed through a "winding up", Part IV of the PBSA is triggered. Section 51 in Part IV contains a general requirement that, following plan termination, the employer pay all

required amounts to the plan. It then sets out a specific further requirement that applies where:

(a) the plan is terminated with a solvency deficiency; and,

(b) the employer is *not* insolvent.

54. This further requirement calls on the non-insolvent employer to fund the "remaining solvency deficiency as prescribed".

55. The entirety of s. 51 reads:

> (1) Within 30 days after the termination of a pension plan, the 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 that 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 of the plan must be distributed in the manner and to the extent prescribed.

56. Against that background, the PBSA clearly provides for specific and individual treatment of any employer obligation to fund a "*remaining* solvency deficiency", i.e. one that remains after the application of normal contributions and special payments. Such an obligation arises *only* on plan termination and *only if* the employer is solvent. (This insolvency exception is also found in other pension benefits legislation: see s. 65(4) of the *Pension Benefits Act*, S.N.B. 1987, c. P-5.1.)

57. Accordingly, while both normal contributions and special payments may constitute amounts capable of being "due or owing" while a plan is ongoing, the same cannot be said for an amount required to liquidate a Solvency Deficiency.

Whether, in the alternative, if any trust arose after March 10, 2010, it would have any effect on the Noteholders' security.

58. The Pension Beneficiaries accept that an alleged "true" trust would only have priority (although to what extent is not clear) over the 2016 Noteholders' security if it had been settled before March 10, 2010 and had operated so as to immediately attach to any estimated solvency deficiency that was identified, again before March 10, 2010.

59. The Pension Beneficiaries do not make the same acknowledgment with respect to the alleged statutory deemed trust.

60. However, before addressing their position in substance, it must be recognized as a starting point that there is no provision in British Columbia (as there is, for instance, in Ontario) that purports to give a deemed trust arising under the *PBSA* any "super-priority" or to otherwise permit it effectively to take priority over security that was valid and enforceable, before the date the deemed trust arose, as against all the assets and undertaking of an employer.

61. So in order to supplant the principle that a secured creditor takes legal title over those assets of the debtor which are subject to the particular security agreement, leaving any beneficiary under a subsequently established trust subordinate to the secured creditor, the Plan Beneficiaries attempt to assert that a deemed trust that, for example, "crystallizes" as to the amount of the deficiency owing on the termination of the Salaried Plan, would reach back for its effective date to the point at which an estimated solvency deficiency was first identified, sometime in 2004.

62. The first deficiency in this argument is that, as the Plan Beneficiaries concede, Catalyst is insolvent. If, as the Plan Beneficiaries contend, the Salaried Plan will be terminated and wound up, that will happen while Catalyst is still insolvent.

63. Under s. 51(2) of the *PBSA*, an obligation on an employer to fund a remaining solvency deficiency *only* applies where the employer is solvent. So the same or a similar problem that presents itself in the context of the allegations of a pre-March 10, 2010 trust arises here: there would be no payment obligation on Catalyst and therefore no essential condition precedent for an enforceable trust obligation.

64. Further, the Plan Beneficiaries' reliance on *Sparrow* is inapt. The decision does not stand for the proposition that a statutory deemed trust operates like a floating charge, so as to potentially trump a previously perfected security interest. Despite the Plan Beneficiaries' contentions to the contrary, such a proposition does not emerge coherently from the dissenting judgment, where consideration of the point was expressly acknowledged as *obiter*. Moreover, it is inconsistent with the recognition by the Court that clear and explicit language would be required for a statutory deemed trust to prevail over previously registered, valid security and that: "it would be contrary to well-established authority to stretch the interpretation [of a statutory deemed trust similar to the one provided in s. 43.1 of the *PBSA*] to permit the expropriation of the property of third parties who are not specifically mentioned in the statute" (para. 39 *per* Gonthier J.).

65. More importantly, however, the majority of Court did not expressly adopt the dissentients' analysis on the point the Plan Beneficiaries attempt to isolate, leaving the dissenting analysis to largely academic consideration.

66. Although the resolution of the foregoing issues in favour of the 2016 Noteholders would dispose of these applications, the 2016 Noteholders propose to reserve their right to make further submissions, if necessary, to address the recognition of statutory deemed trusts under the CCAA and also certain constitutional issues. These questions are sufficiently intertwined that the 2016 Noteholders have agreed with counsel for the Attorney General of British Columbia that they should be argued together, if necessary, in the event Catalyst's further Amended Plan is not accepted by its creditors and a further application is made to the Court at the conclusion of the sale process.

PART V
FORM OF ORDER SOUGHT

67. The 2016 Noteholders submit that the applications of the Plan Beneficiaries be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: June 22, 2012

Counsel for the 2016 Noteholders