

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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

AND:

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

AND:

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,  
SBC 2002, c.-57

AND:

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

**PETITIONERS**

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**WRITTEN ARGUMENT OF THE  
COMMUNICATIONS, ENERGY & PAPERWORKERS UNION OF CANADA,  
LOCALS 1, 76, 592, 630, 686, 1123 AND 1132 (the "Application Respondents")**

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**"Deemed Trust" Application by persons acting on their own behalf and on behalf of  
the Catalyst TimberWest Retired Salaried Employees Association ("RSEA")  
and by the Catalyst Salaried Employees and Pensioner's Group ("CSEP")**

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**To: The Service List**

## **PART 1: INTRODUCTION**

1. The position of the CEP Local Unions is that Section 43.1 of the *British Columbia Pension Benefits Standards Act* (“*PBSA*”) does not create a “deemed trust” over a “solvency deficiency” in a pension plan that is ongoing in the sense that it is not “terminated” or not subject to “wind up”.

*Pension Benefits Standards Act*, RSBC 1996, c. 352, s. 43.1,  
CSEP/RSEA Book of Authorities, Tab 28

2. Our principal concern is that if the orders sought are granted, the Stalking Horse Purchase Agreement (the “Sale Agreement”) will fail, causing Catalyst to become inexorably insolvent and leading to its bankruptcy. This event would have profound implications for the employee members of the Application Respondents, as well as for the communities in which they live.
3. As can be seen below, the Application Respondents’ position is not being taken in order to protect their own claims filed under the CCAA. Their overriding concern, at this point in the process, is to support the Employer so that it can continue to operate.

## **PART 2: FACTUAL BASIS**

### *The Salaried Plan*

1. Catalyst is the plan administrator of the Catalyst Paper Corporation Retirement Plan for Salaried Employees, B.C. Reg. No. 85400-1 (the “Salaried Plan”).

Affidavit #1 of B. Baarda, at para. 71

2. The Salaried Plan is intended to provide pension benefits to the non-unionized current and former employees of Catalyst, who, through their employment service with Catalyst, are entitled to such benefits. Catalyst has both a unionized and a non-union workforce and maintains a number of registered and unregistered pension

plans. As of January 31, 2012, Catalyst was current on pension payments, including ongoing contributions and special payments, prescribed by the B.C. Superintendent of Pensions (the "Superintendent").

Affidavit #1 of B. Baarda, at paras. 68 - 70

3. As of December 31, 2010, the Salaried Plan had a solvency deficiency of \$73.5 million (the "Plan Deficiency").

Affidavit #1 of B. Baarda, at para. 73

#### *The CCAA Process*

4. On January 31, 2012, Catalyst obtained an order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") granting it protection from its creditors (the "Initial Order").

*Companies Creditors Arrangement Act*, RSC, 1985, c. C-3,  
CSEP/RSEA Book of Authorities, Tab 26

5. On May 23, 2012, the Plan of Arrangement failed to be approved by the requisite majorities of the classes of creditors.

Affidavit #1 of William A. Sharkey, made June 1, 2012, at para. 47  
("Affidavit #1 of W. Sharkey")

6. The failure of the Plan triggered the Sale and Investor Solicitation Process (the "SISP"), established pursuant to the order of this Court, dated March 22, 2012. As part of the SISP, Catalyst has been directed to enter into the Stalking Horse Purchase Agreement (the "SHPA"), a form of which was approved by this Court on April 4, 2012.

Affidavit #1 of W. Sharkey  
Affidavit #3 of Gary McCaig, made on April 13, 2012, at Ex. H  
("Affidavit #3 of G. McCaig")

7. The SISP process will conclude with either the sale of substantially all of the assets of Catalyst to the Stalking Horse Purchaser under the terms of the SHPA or a sale of the assets to another purchaser with a superior bid, following an auction amongst the Qualified Bidders.
8. Under the terms of the SHPA, the Stalking Horse Purchaser does not assume liability for the Salaried Plan. In particular, under the SHPA:
  - (a) the Salaried Plan is part of the "Excluded Liabilities" that the Purchaser does not have to assume;
  - (b) the SHPA exempts the Salaried Plan from the definition of "Transferred Plan" and therefore, the administration of the Salaried Plan will not pass to the Purchaser; and
  - (c) the SHPA contains a condition that on closing, the granting of the Final Order by a Canadian Court will discharge the Purchaser from any liabilities or obligations of Catalyst under the Salaried Plan.

Affidavit #1 of W. Sharkey, at para. 51

9. The SHPA, as a going concern sale, serves to maximize recovery from the assets of Catalyst for all of the creditors and will also allow the enterprise to continue as a going concern, providing continuing employment for its employees.

### **PART 3: ISSUES AND THE LAW – RSEA APPLICATION**

#### **A. RSEA Application**

1. Whether Section 1.9.2 of the Salaried Plan created a true trust in favour of the Plan beneficiaries over assets of Catalyst equal to the solvency deficiency.

2. Whether the assets of Catalyst equal to the solvency deficiency were deemed to be held in trust for the pension beneficiaries from the review date that first established the solvency deficiency.
3. Whether there are assets of Catalyst equal to the solvency deficiency that will be deemed to be held in trust upon termination of the Salaried Plan.
4. Whether Section 51(1) of the *PBSA* at minimum creates a debt in the amount of the solvency deficiency which ranks equally to all other unsecured creditors.

We will deal with each of these in turn.

1. **Whether Section 1.9.2 of the Salaried Plan created a true trust in favour of the Plan beneficiaries over assets of Catalyst equal to the solvency deficiency**
  1. The solvency deficiency in the Salaried Plan disclosed at December 31, 2010 is not a crystallized deficit, but merely a forecasted, hypothetical deficiency based on a host of assumptions.
  2. The solvency deficiency is not a result of Catalyst failing to make normal cost contributions or special payments. Catalyst is current on all required pension payments to the Salaried Plan including special payments. The solvency deficiency is a result of unfavorable market conditions which have had an adverse affect on the value of the assets of the Salaried Plan.
  3. The Salaried Plan has not been wound-up and remains ongoing.
  4. It is submitted that Section 1.9.2 of the Salaried Plan does not create a true trust because there is no certainty of intention and no certainty of subject matter.
  5. There is no certainty of intention because Section 43.1(1)(a) of the *PBSA* does not require that any employer set aside the notional amount of a solvency deficiency. It is respectfully submitted that Section 1.9.2 merely incorporates the language of

Section 43.1. If a trust exists, it is only with respect to "contributions", not a notional solvency deficiency.

6. There is also no certainty of subject matter. For a certainty of subject matter to exist, the trust fund must be kept separate from the general funds of the employer. If the funds cannot be "traced", there is no certainty of subject matter.

*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 at para. 18,  
CSEP/RSEA Book of Authorities, Tab 6

7. The solvency deficiency amounts are not "traceable". The employer does not set aside the notional amount of the solvency deficiency in a manner that would satisfy the requirement of there being a certainty of subject matter.

8. It is important to note that the circumstances in *Edmonton Pipe Industry*, relied upon by the RSEA, are different than in the present case. In that case, the employer had gone bankrupt. The members of the union then brought a motion arguing that any monies held by the employer as of the date of that bankruptcy ought to have been remitted to the pension trust funds and that those funds that had not been so remitted were trust monies not distributed in bankruptcy pursuant to Section 67(1)(a) of the *BIA*.

*Edmonton Pipe Industry Pension Plan*, [2000] A.J. No. 583,  
CSEP/RSEA Book of Authorities, Tab 11

9. That case is distinguishable from the present case, where, for the moment, Catalyst is an ongoing concern. It is clear that if a true trust is imposed on the property of Catalyst, the SISF is much less likely to complete. It is respectfully submitted that this is a factor that the Court should consider in the present case that did not exist in the *Edmonton Pipe Industry, supra*, case.
10. In addition, in *Edmonton Pipe, supra*, the Court found that the amounts were ascertainable and identifiable. Such cannot be said with respect to the solvency deficiency in the present case. That deficiency is a notional, actuarial calculation.

**II. Whether the assets of Catalyst equal to the solvency deficiency were deemed to be held in trust for the pension beneficiaries from the review date that first established the insolvency**

1. The relevant provisions of the *Pension Benefits Standards Act*, RSBC 1996, c. 352 ("*PBSA*") are Sections 43.1 and 51. They provide, in turn:

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.

51 (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.

2. In addition, the *Pension Benefits Standards Regulation*, B.C. Reg. 433/93, Section 35 is relevant with respect to an interpretation of the meaning of this statute as a whole.

3. In contrast to these provisions of the British Columbia statutes, Section 57(3) and 57(4) of the *Ontario Pension Benefits Act*, R.S.O. 1990, c. P-8 ("*PBA*") provide as follows:

57(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

57(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

4. If the *PBSA* were to be interpreted in the manner alleged by the Applicants, every time there existed a notional solvency deficiency (say for example due to a decrease in interest rates) an employer in British Columbia would have to set aside that amount in a segregated fashion. That is clearly not the practice in British Columbia nor is it a proper interpretation of the *PBSA*.

5. The provisions of Section 43.1(1) of the *PBSA* create an obligation to set aside "contributions" owing and "amounts" received but not yet remitted to the plan. These amounts are not to be used to operate the business. Section 43.1 does not create a further obligation respecting a solvency deficiency. This is not altered by the scope of Section 43.1(3) of the *PBSA*.

6. It is submitted that a solvency deficiency is also not "owing" under the *PPSA*. A solvency deficiency is simply a notional actuarial calculation based on various assumptions on a

theoretical wind up of the plan. A solvency deficiency is not evidence of any failure on the part of the employer, nor is it outside the scope of the *PBSA*. The *PBSA* allows the employer to make "special payments" to gradually reduce the amount of the solvency deficiency.

7. It must also be noted that Section 6(6) of the *CCAA* provides further protection in that no Plan of Arrangement shall be approved by the Court unless the pension contributions are brought up to date:

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

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

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

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

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

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

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

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

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

8. This provision of the CCAA does not reference solvency deficiencies.
9. It is respectfully submitted that if employers in British Columbia who support pension plans are to be allowed to continue to operate and provide employment to their employees, RSEA's interpretation of the provisions of the *PBSA* with respect to solvency deficiencies cannot be accepted. There can be no deemed trust with respect to solvency deficiencies which may notionally exist on an ongoing basis.
10. It is respectfully submitted that the judgment of the British Columbia Court of Appeal in *Westergaard v. British Columbia (Registrar of Mortgage Brokers)*, 2011 BCCA 344 provides guidance with respect to how the *PBSA* ought to be interpreted in the present case. In *Westergaard, supra*, the Court stated, at paragraphs 46 through 48:

"46. The approach to statutory interpretation and the importance of context was set out by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559:

26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2<sup>nd</sup> ed. 1983):

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.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretative settings ...

27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive.

47. The context for s. 22(7) is the *Mortgage Brokers Act* as a whole. The Supreme Court of Canada commented on the legislative scheme in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 at para. 49:

The regulatory scheme governing mortgage brokers provides a general framework to ensure the efficient operation of the mortgage marketplace. The Registrar must balance a myriad of competing interests, ensuring that the public has access to capital through mortgage financing while at the same time instilling public confidence in the system by determining who is "suitable" and whose proposed registration as a broker is "not objectionable". All of the powers or tools conferred by the Act on the Registrar are necessary to undertake this delicate balancing. Even though to some degree the provisions of the Act serve to protect the interests of investors, the overall scheme of the Act mandates that the Registrar's duty of care is not owed to investors exclusively but to the public as a whole.

48. In my respectful opinion, the chambers judge and the FST did not adequately consider the context of s. 22(7) within the Act as a whole, the scheme and object of the Act, the intention of the legislature, and in particular the registrar's mandate to protect the public and instil confidence in the system of mortgage broker regulation. The application of s. 22(7) to a suitability hearing would seriously impair the ability of the registrar to perform the role described above. For example, an applicant with a lengthy record of fraudulent criminal behaviour could apply for registration, be found unsuitable, allow for the passage of two years and apply again, with the registrar then being unable to consider any of the past criminal behaviour, having had knowledge of it for more than two years. This would be completely inconsistent with the purpose of the Act, and could not have been intended by the legislature.

Superintendent's Book of Authorities, Tab 2: *Westergaard v. British Columbia (Registrar of Mortgage Brokers)*, 2011 BCCA 344, at paras. 46 - 48

11. This focus on "context" is particularly appropriate in the present case. If the RSEA's second argument were to be accepted, it would create a significant financial strain on employers in the Province of British Columbia who are attempting to continue to operate their businesses as a going concern. This would put into jeopardy the employment of many employees in various companies in various industries. Catalyst would have been required to segregate \$73.5 million at the time when it was under tremendous economic pressure.
12. It is respectfully submitted that this "context" must be considered by the Court in determining the appropriate interpretation of the *PBSA*. Had the legislation intended employers to take this step, that requirement would be specifically set out in the *PBSA*. The language of Section 43.1(1)(a) cannot be interpreted to indicate that the Legislature intended that result.

**III. Whether there are assets of Catalyst equal to the solvency deficiency that will be deemed to be held in trust upon termination of the Salaried Plan**

1. We will provide oral argument on this issue at the hearing of this matter.

**IV. Whether Section 51(1) of the PBSA at minimum creates a debt in the amount of the solvency deficiency which ranks equally to all other unsecured creditors**

1. We will provide oral argument on this issue at the hearing of this matter.

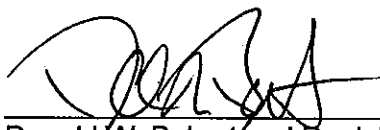
**B. CSEP Application**

1. The Application Respondents oppose the orders sought by the CSEP for the same reasons set out in the response to the RSEA's second argument, above.

**PART 4: ORDER REQUESTED**

1. The Applicant Respondents respectfully request an order of the Court dismissing the applications.

All of which is respectfully submitted this 22<sup>nd</sup> day of June 2012.



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