

COURT FILE NO.: CV-09-8241-OOCL

DATE: 20090630

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC.,
FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS
LIMITED and FRASER N.H.LLC (collectively, the "Applicants")

BEFORE: PEPALL J.

COUNSEL: *M. Barrack and R. Thornton*, for the Applicants
R. Chadwick and C. Costa for the Monitor
P. Griffin for the former Directors
D. Chernos for Brookfield Asset Management Inc.
K. McEachern for CIT Business Credit Canada Inc.
T. Wallis for la Régie des rentes du Québec
D. Wray and J. Kugler for the Communications, Energy, and Paper Workers Union
of Canada
C. Sinclair for the United Steelworkers
J. Michaud for the New Brunswick Regional Council of Carpenters, Millwrights and
Allied Workers, Local 2540

ENDORSEMENT:

The relief requested by the Applicants is granted. Reasons to follow.



PEPALL J.

Released: June 30, 2009

COURT FILE NO.: CV-09-8241-OOCL

DATE: 20090716

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS
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REASONS FOR DECISION

PEPALL J.

Relief Requested

[1] The Fraser Group ("the Applicants") consists of a number of related companies that carry on an integrated specialty paper business with paper, pulp and lumber operations. For fiscal 2008, the Applicants had consolidated net sales of approximately \$688.6 million and suffered a net loss of \$71.9 million. For the four months ended May 2, 2009, the Applicants recorded a net loss of \$22.1 million on consolidated net sales of \$202.8 million. On June 18, 2009, Morawetz J. granted the Applicants protection from their creditors and a stay of proceedings pursuant to the *Companies'*

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Creditors Arrangement Act (the “Initial Order”). He adjourned the Applicants’ request that the stay applied to special payments in respect of unfunded and going concern and solvency deficiencies with respect to certain pension plans. On June 18, 2009, the Applicants obtained recognition and provisional relief in an ancillary proceeding pursuant to Chapter 15 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

[2] This motion addresses the need for the Applicants to make past service contributions or special payments to fund any going concern unfunded liability or solvency deficiencies (“special payments”) of certain pension plans during the stay period as that term is defined in the Initial Order. The Applicants seek to suspend those payments. Current service payments or normal cost contributions are not in issue. The Applicants are supported by the Monitor, PricewaterhouseCoopers Inc., the Directors and one of the DIP lenders, Brookfield Asset Management Inc. Brookfield also directly or indirectly owns 70.5% of the outstanding common shares of Fraser Papers Inc. The other DIP lender, CIT Business Credit Canada Inc., the Superintendent of Pensions for New Brunswick, the Minister of Business New Brunswick, and la Régie des rentes du Québec¹ are all unopposed to the relief requested. The Communications, Energy and Paper Workers Union of Canada and its local unions 4N, 6N, 29,189,894, and 2930 (“the CEP”) who represent approximately 660 employees at facilities in New Brunswick and Quebec oppose the request. They are supported by the United Steelworkers and the New Brunswick Regional Council of Carpenters, Millwrights and Allied Workers, Local 2540.

[3] On June 30, 2009, I granted the relief requested which was limited to special payments and ancillary relief with reasons to follow. These are the reasons in support of the order granted.

Facts

[4] The Applicants sponsor five defined benefit pension plans in three jurisdictions: two in New Brunswick (an hourly and a salaried plan), two in Quebec (an hourly and a salaried plan) and one in the United States. 2297 retirees and 1412 active employees are members of the plans. The Applicants also sponsor one defined contribution plan in the U.S. with 2 active members and 7

¹ It reserves its rights to return to Court if necessary to address any issues relating to current service payments to be made.

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retirees and three unfunded supplementary employee retirement plans ("SERPs"), one in Canada and two in the US. The Applicants' accrued pension benefit obligations in the five plans and the SERPs exceed the value of the plans assets by approximately \$171.5 million as at December 31, 2008. This figure is based on information received by Fraser Papers Inc. from its actuaries for the purpose of preparing annual audited financial statements. The Applicants are not required to fund the U.S. defined contribution plan for the balance of 2009 and 2010.

[5] Changes in global capital markets and borrowing rates have affected the funded status, funding requirements, and pension expense for the plans. Based on market conditions, regulatory filing requirements and preliminary estimates, the Applicants expect that they will be required to make special payments in the amount of \$13.5 million in 2009 in respect of the pension deficits with respect to the plans. This is in addition to the \$3.3 million required to be paid in 2009 on account of normal cost contributions to the plans.

[6] In 2010, the Applicants estimate that they will be required to pay approximately \$34.7 million to fund the pension deficits and \$5.1 million for normal cost contributions. The Applicants have no ability to pay the special payments or the combined 2010 funding obligations from cash flow generated by the business.

[7] According to the Monitor, the Applicants are current with all their actuarial filings with the pension regulators. In 2008, actuarial valuations as at December 31, 2007 were filed with the New Brunswick regulator for the two plans in New Brunswick and an updated actuarial valuation as at December 31, 2006 for the Quebec salaried plan was filed in Quebec in April, 2008. Based on the latest filed actuarial valuations and the current 10 year extended amortization period with respect to the special payments, the monthly special payments in respect of pension deficits for the balance of 2009 amount to \$4,693,302 and for 2010, \$7,831,857. The next special payments were due on June 30, 2009 and amounted to \$380,397. Based on estimates prepared by the Applicants' director of pension administration, a Certified General Accountant with 25 years experience, the Applicants anticipate that they will be required to increase their 2009 special payments by an additional \$7.4 million in December, 2009 and in 2010 by an additional \$24.6 million.

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[8] The term sheets in support of the DIP financing were finalized the evening of June 17, 2009, and the financing requirements were not marketed externally to other potential lenders given the nature of the industry and the willingness of the existing lenders to fund ongoing operations. On June 18, 2009, Morawetz J. approved certain DIP term sheets and financing up to \$46 million, of which approximately \$20 million has been authorized by the lenders. He authorized the Applicants to enter DIP financing agreements with CIT Business Credit Canada Inc. and Brookfield Asset Management Inc. Under the latter's agreement, the Applicants are unable to pay the special payments without the lender's prior written consent and payment of same constitutes an event of default. Absent DIP financing, the Applicants are unable to continue in business. The cash flow forecast contemplates payment of salaries, wages, vacation pay, and current pension funding obligations but not special payments.

[9] The CEP is party to five collective agreements in New Brunswick, one of which expires on June 30, 2009, two in Quebec, and one in the U.S. They provide for pension benefits although in argument counsel did not address any particular provisions of them. Schedule "A" to these reasons sets forth the applicable statutory provisions that were attached to the factum of CEP.

Positions of the Parties

[10] The Applicants state that the special payments are pre-filing unsecured debts with no special status and relate to employment services provided prior to filing. As in other cases, the Court should stay the obligation to pay. Failure to do so would jeopardize the entire business of the Applicants and would be contrary to the purpose behind the *CCAA* order – namely, to give the Applicants the opportunity to restructure for the benefit of all stakeholders.

The CEP submits firstly that no special payments are currently required. Any such obligations will arise after the June 18, 2009 Initial Order and section 11.3 of the *CCAA* prohibits the suspension of claims resulting from obligations relating to services supplied after an Initial Order. Secondly, the special payments are grounded in the terms and conditions of CEP's collective agreements and they may not be unilaterally modified by the Applicants. Pursuant to section 11.3 of the *CCAA*, the members of CEP are entitled to the benefit of a plan provided for in the collective agreement. That is in accordance with applicable statutes. Thirdly, the relief requested by the Applicants is

premature in that actuarial valuations have not been filed. Lastly, CEP submits that the DIP agreements are unreasonable.

Issues

[11] The issues for me to address are whether I have jurisdiction to suspend the special payments and, if so, whether I should exercise that discretion and also grant ancillary relief.

Discussion

[12] In recent years, a number of Canadian cases have addressed the interaction of employment and labour claims and the obligations of insolvent employers as they relate to pensions. In analyzing these cases and the issues before me, it is helpful to first examine general principles.

[13] Employer pension contributions are described by M. Starnino, J-C Killey and C. P. Prophet in their article entitled "The Intersection of Labour and Restructuring Law in Ontario: A Survey of Current Law".

"In the case of a defined benefit plan, (i.e., a plan that promises to pay the beneficiaries of the plan a specific amount in retirement) the amount of the current service contribution is determined using actuarial estimations having regard to, among other things, the amount of the benefit to be provided, the demographics of the workforce and the anticipated returns generated by the investments in which the pension plan is invested.

Second, if the pension plan is a defined benefit plan then an employer may be required to make additional contributions to the pension plan called "special payments". The obligation to make special payments arises where the original plan experience or investment performance differed from that assumed by the actuaries in order to provide the benefit promised to employees and the plan develops either a going concern unfunded liability or a solvency deficiency.

A going concern unfunded liability arises when it appears, based on a periodic actuarial assessment of the plan, that the plan is insufficiently funded to pay the benefits that are or will become due, assuming that the pension plan continues indefinitely. Once a going concern unfunded liability is identified, the employer is required to make monthly special payments to fund the deficiency within fifteen years.

A solvency deficiency arises when it appears, based upon a periodic actuarial assessment of the plan, that the plan's current assets are insufficient to meet the obligations that would be due if the employer immediately discontinued its business

and the plan were wound up. In the case of a solvency deficiency, the employer is required to make special payments to fix the deficiency within a five year time frame. Pending amendments will extend this period to 10 years."²

Directors may be liable in the event of a failure by a company to make a payment to a pension fund.

[14] The *CCAA* has been and is to be broadly interpreted: *ATB Financial v. Metcalf & Mansfield Alternative Investments II Corp.*³. This is in keeping with the purpose of the *CCAA*, namely to facilitate restructuring. The *Act* is designed to avoid the negative consequences of terminating business operations and to allow a company to carry on business. As noted by Professor Janis Sarra, "There is a public policy interest in allowing for a certain transition period to allow debtors to economically adjust in difficult markets in unsettled times."⁴

[15] The *CCAA* does not directly address employment or labour claims. The power to stay claims against a debtor company is found in section 11 of the *CCAA*. Section 11.3 of the *Act* provides some limitation on the Court's discretion. It states:

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

In addition, the *Act* of course provides for the compromise of claims against a debtor company.

² 2009, Ontario Bar Association, Continuing Legal Education

³ 2008 CarswellOnt 4811 (C.A.).

⁴ "Rescue! The Companies' Creditors Arrangement Act" Toronto: Thomson Carswell, 2007 at p.9.

[16] As to the treatment of special payments in bankruptcy and insolvency proceedings, as noted by Messrs. Starnini, Killey and Prophet, a trend has developed not to make special payments in the course of *CCAA* proceedings and such payments do not enjoy any priority in bankruptcy.⁵

[17] Courts in both Ontario and Quebec have addressed the issue of special payments in the context of a *CCAA* proceeding and a debtor company that was party to a collective agreement. In *Collins & Aikman Automotive Canada Inc.*⁶, Spence J. concluded that the Court had jurisdiction to permit the debtor to refrain from making special payments. Similarly, in *Re AbitibiBowater Inc.*⁷, Mayrand J. determined that the Court had jurisdiction to authorize the suspension of Abitibi's obligation to finance the pension plan by suspending its special payments. She followed the decisions of *Syndicat National de l'amiante d'Asbestos Inc. v. Mine Jeffrey Inc.*⁸, *Papiers Gaspesia Inc.*⁹, and *Collins & Aikman Automotive Canada Inc.* Like Spence J., she distinguished between rights that flow from a collective agreement and the performance of obligations to give effect to those rights. In that case, she determined that the past service contributions or special payments related to services provided prior to the Initial Order and therefore were not barred by section 11.3 of the *Act*.

[18] In *Re Nortel Networks Corp.*¹⁰, Morawetz J.'s decision did not address the issue of special payments but certain other employee and union claims. He noted that employee claims, whether they were put forth by the union or by former employees, are unsecured claims and do not have statutory priority. He observed that section 11.3 is an exception to the general stay provision and should be construed narrowly. "The *CCAA* contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services....The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view some current activity by a service provider post-filing that gives rise to payment obligations post-

⁵ *Supra*, Note 2 at p.18 and 31.

⁶ 2007 CarswellOnt 7014.

⁷ May 8, 2009 Decision of Quebec Superior Court

⁸ [2003] R.J.Q. 420 (C.A.)

⁹ [2004] Cam:00 40296 (QC.S.C.)

filing....The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order.”¹¹ Performance of services is the determining factor, not crystallization of the payment obligation.

[19] Decisions of courts of co-ordinate jurisdiction are not binding but are highly persuasive and ought to be followed in the absence of strong reasons to the contrary: *R v. Cameron*¹² and *Holmes v. Jarrett*¹³. This is in the interests of predictability, consistency, and stability in the administration of justice. This need is particularly evident in the current economic climate where companies and their stakeholders including employees and unions require time to restructure and stability in the law is an enabler in this regard. Until such time as an appellate court provides different guidance, it seems to me that this line of cases should be followed. I also note that neither la Regie des rentes du Quebec nor the Superintendent of Insurance for the Province of New Brunswick was opposed to the order requested by the Applicants.

[20] Applying these cases, I conclude that I do have jurisdiction to make an order staying the requirement to make special payments. The evidence indicates that these payments relate to services provided in the period prior to the Initial Order and the collective agreements do not change this fact. In essence, the special payments are unsecured debts that relate to employment services provided prior to filing. Furthermore, I am not being asked to modify the terms of the pension plans or the collective agreements. The operative word is suspension, not extinction. In addition, the actuarial filings are current and the relief requested is not premature.

[21] I must then consider whether having concluded that I have jurisdiction, I should exercise it as requested by the Applicants. Frankly, I do not consider either of the alternatives to be particularly appealing. On the one hand, one does not wish to in any way jeopardize pensions. On the other hand, the Applicants have no ability to pay the special payments at this time. Their ability to operate is wholly dependent on the provision of DIP financing. Furthermore, payment of the

¹⁰ June 18, 2009 Decision of Ontario Superior Court

¹¹ Ibid at para.

¹² [1984] O.J.No.683.

¹³ [1993] O.J. No. 679.

special payments constitutes a DIP loan event of default. A bankruptcy would not produce a better result for the employees with respect to the special payments in that they do not receive priority in bankruptcy. Claims in this regard are unsecured. The relief requested by the Applicants, importantly in my view, does not extinguish or compromise or even permit the Applicants to compromise their obligations with respect to special payments. Indeed, the proposed order expressly provides that nothing in it shall be taken to extinguish or compromise the obligations of the Applicants, if any, regarding payments under the pension plans.¹⁴ Failure to stay the obligation to pay the special payments would jeopardize the business of the Applicants and their ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained.

[22] As to the ancillary relief requested, it seems to me that it naturally flows from the aforesaid order. Given that I am ordering that the special payments need not be made during the stay period pending any further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the *CCAA* process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Directors' Charge. I further understand that the provisions of the proposed order are similar to those granted by Farley J. in *Re Ivaco Inc.*, by Campbell J. in *St. Marys Papers Ltd.* and most recently, by Mayrand J. in *Re AbitibiBowater*.

[23] The other argument raised by CEP is that the terms of the DIP financing are unreasonable. Morawetz J. did expressly approve the DIP financing and the term sheets. No motion was brought to amend his order in that regard. Even if one disregards this procedural problem, the Monitor reported to the Court that, based on a comparison of the principal financial terms of the two DIP financing arrangements with a number of other DIP packages in the forestry, pulp and paper sector with respect to pricing, loan availability and certain security considerations, the financial terms of the DIP term sheets appeared to be both commercially reasonable and consistent with current market transactions. The Monitor specifically referred to the treatment accorded to the special

¹⁴ [1993] O.J. No.679.

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payment obligations. I also observe that no evidence of any alternative DIP financing was advanced or even suggested.

[24] For these reasons, the relief requested by the Applicants was granted. CEP requested that the Applicants pay its costs of this motion and made submissions to this effect in its factum. If they are unable to agree, the Applicants are to make brief written submissions on costs in response to the request by CEP. CEP is at liberty to file a reply if it so desires.

A handwritten signature in black ink, appearing to read "J. Pepall", is written over a horizontal line. The signature is cursive and includes a small flourish at the end.

PEPALL J.

Released: July 16, 2009

Schedule "A"

Industrial Relations Act, R.S.N.B. 1973, c. I-4

56(2) A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

Pension Benefits Act, S.N.B. 1987, c. P-5.1

50(1) Subject to section 59, a pension fund is trust property for the benefit of the beneficiaries of the fund.

50(2) The beneficiaries of the pension fund are members, former members, and any other persons entitled to pensions, pension benefits, ancillary benefits or refunds under the plan.

51(1) If an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

51(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

51(3) An employer who is required by a pension plan 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 employer contributions due and not paid into the pension fund.

51(4) If 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 equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations.

51(5) The administrator of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsections (1), (3) and (4).

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51(6) Subsections (1), (3) and (4) apply whether or not the money mentioned in those subsections is kept separate and apart from other money or property of the employer.

52 If the administrator of the pension plan is the employer and the employer is bankrupt or insolvent, the Superintendent may act as administrator or appoint an administrator of the plan.

53 The administrator may commence proceedings in a court of competent jurisdiction to obtain payment of contributions due under the pension plan, this Act and the regulations.

Labour Code, R.S.O. c. C-27

67. A collective agreement shall be binding upon all the present or future employees contemplated by the certification.

The certified association and the employer shall make only one collective agreement with respect to the group of employees contemplated by the certification.

68. A collective agreement made by an employers' association shall be binding upon all employers who are members of such association and to whom it can apply, including those who subsequently become members thereof.

A collective agreement made by an association of school boards shall bind those only which have given it an exclusive mandate as provided in section 11.

Supplemental Pension Plans Act, R.S.O. c. R-15.1

6. A pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.

Every pension plan, with the exception of insured plans, shall have a pension fund into which, in particular, contributions and the income derived therefrom are paid. The pension fund shall constitute a trust patrimony appropriated mainly to the payment of the refunds and pension benefits to which the members and beneficiaries are entitled.

49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.