CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO : 500-11-036133-094

SUPERIOR COURT
(Commercial Division)
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.

and

ABITIBI-CONSOLIDATED INC.

and

BOWATER CANADIAN HOLDINGS INC.

and

the other Petitioners listed

Petitioners

and

ERNST & YOUNG INC.

Monitor

and

THE ROYAL TRUST COMPANY

Mise en cause

and

Clifford R. Bowles
Donald Bridges
Serge Bureau
Robert Chambers
Emmanuelle-Andrée Collin
Paul J.E. Gagné
Anthony Iasenza
Norman W. Lord
John Poleschuk
Marc Charles Régnier
David and Bette Toole

Wallance M. Vrooman
John Hubert Whalen
Edward Broadhurst
Donald Campbell
Fernand Landry
David J. Steuart

Respondents

CONTESTATION OF THE AMENDED MOTION FOR DIRECTIONS ON THE IDENTITY OF THE PERSONS WHOSE BENEFITS UNDER THE BOWATER SUPPLEMENTAL EXECUTIVE RETIREMENT PLANS WERE SECURED BY A LETTER OF CREDIT (MOTION # 484)

IN CONTESTATION OF PETITIONER'S *AMENDED MOTION FOR DIRECTIONS ON THE IDENTITY OF THE PERSONS WHOSE BENEFITS UNDER THE BOWATER SUPPLEMENTAL EXECUTIVE RETIREMENT PLANS WERE SECURED BY A LETTER OF CREDIT*, RESPONDENTS SUBMIT THE FOLLOWING:

PREAMBLE

1. On May 7, 2010, Petitioner Bowater Canadian Forest Products Inc. ("**BCFPI**") filed an *Amended Motion for Directions on the Identity of the Persons Whose Benefits Under the Bowater Supplemental Executive Retirement Plans Were Secured by a Letter of Credit* (the "**Motion for directions**") by which it seeks the Court to declare and order:

   a) That the only persons entitled to continue to receive monthly Supplemental Executive Retirement Plans ("**SERPs**") payments from the proceeds of the letter of credit held by RTC (the "**Letter of Credit**") are the following:

      (i) Canadian resident members of the SERPs who retired before December 31, 2003 (Schedule A);

      (ii) Canadian resident members of the SERPs who retired after December 31, 2003 but before May 26, 2009, including Mr. Douglas Campbell, but only on the value of their SERPs benefits accrued up to December 31, 2003 (Schedule B); and

(iii) U.S. resident members of the SERPs, including Mr. Jerry Soderberg (Schedule C);

b) That RTC should pay the full monthly SERPs payments to those persons who are entitled to receive such payments from the proceeds of the Letter of Credit until such proceeds are exhausted, in accordance with Schedule F, or until a further order from a court.

I. THE RESPONDENTS

2. The present Contestation is filed on behalf of the following members of the Senior Executive Retirement Plan (the "**SERP**") (the "**Respondents**"):

- Schedule A members:

  Clifford R. Bowles
  Donald Bridges
  Serge Bureau
  Robert Chambers
  Emmanuelle-Andrée Collin
  Paul J.E. Gagne
  Anthony Iasenza
  Norman W. Lord
  John Poleschuk
  Marc Charles Régnier
  David and Bette Toole
  Wallance M. Vrooman
  John Hubert Whalen

- Schedule B members:

  Edward Broadhurst
  Donald Campbell
  Fernand Landry
  David J. Steuart

3. All the Respondents are members either of the Employees' Retirement Plan (1988) of Avenor Inc., Executive Staff Retirement Plan (1976) of Avenor Inc. or Supervisory Employees' Retirement Plan (1976) of Avenor Inc. (hereafter collectively : "**BCFPI Canadian Registered Pension Plans**").

4. Due to confidentiality issues and other preoccupations, limited information was made available to the Respondents in respect of the Motion for directions.

5. The present Contestation is based on the limited information to which the Respondents were able to access and may be amended to take into account further information which may become available to the Respondents prior to the hearing on the Motion for direction.

II. THE PARTICIPATION IN BCFPI CANADIAN REGISTERED PENSION PLANS IS A *SINE QUA NON* PREREQUISITE TO BEING A PARTICIPANT IN THE SERPS AND BENEFICIARY OF THE LETTER OF CREDIT

6. From the limited information available, it appears that some or all of the members listed in Schedule C of the Motion for directions (US members) were not participants in one of BCFPI Canadian Registered Pension Plans.

7. The Respondents contest that benefit of the Letter of Credit be extended to individuals who are not members of BCFPI Canadian Registered Pension Plans.

A) THE SHORTFALL

8. Treating non participants in the BCFPI Canadian Registered Pension Plans as if they were participants in such plans and thus beneficiaries of the Letter of Credit accounts for a significant portion of the shortfall which seriously impairs Respondents' SERP benefits on a long term basis.

9. Extending the benefits of the Letter of Credit to individuals who are not members of a BCFPI Registered Plan would be contrary to the purpose, terms and intent of the August 14, 1996 Retirement Compensation Arrangement ("**RCA**") Trust Agreement (the "**Trust**") and to the applicable legal provisions.

10. Such an extension would unfairly and unreasonably put in jeopardy the rights and reasonable expectations of the beneficiaries in favour of whom the Letter of Credit was validly secured in the Trust;

B) THE LETTER OF CREDIT EXCLUSIVELY SECURES SOME OF THE BENEFITS PAYABLE TO SERPS PARTICIPANTS

11. The clear intent of the settlor of the Trust is to include as beneficiaries only participants in the SERPs.

Trust Agreement (Exhibit P-5)

> *WHEREAS the Company has established the Senior Executive Retirement Plan (SERP), the Supplemental Retirement Benefit Plan for Grade 12 and over Employees of Avenor Inc. and the Supplemental Retirement Benefit Plan for Grade 11 and under Employees of Avenor Inc. (collectively referred to as « SERPs ») which, together with the Agreement constitute a Retirement*

Compensation Arrangement (herein referred to as « RCA Plan ») as defined in the Income Tax Act (Canada);
[Our emphasis]

1.06 All eligible participants of the SERPs from time to time shall be the beneficiaries of the Trust created by this Agreement.

1995 SERP (Exhibit R-2) and 1997 SERP (Exhibit R-3)

4.03 (...) [T]he Corporation will arrange for the payment of benefits provided under the Supplemental Plan [(defined in s. 1.01 as the SERP)] to be secured through a letter of credit from a financial institution.
[Our emphasis]

C) INDIVIDUALS WHO ARE NOT MEMBERS OF THE BCFPI CANADIAN REGISTERED PENSION PLANS ARE NOT SERPS PARTICIPANTS

12. The purpose, terms and structure of the SERPs clearly demonstrate that membership is one of the BCFPI Canadian Registered Pension Plans is a *sine qua non* prerequisite to being a participant in the SERPs and a beneficiary of the Letter of Credit as appears, *inter alia*, from the following:

1995 SERP (Exhibit R-2) and 1997 SERP (Exhibit R-3)

1.01 The purpose of the Senior Executive Retirement Plan (SERP) (hereinafter the "Supplemental Plan") is to provide to the eligible employees retirement benefits in addition to those payable from any registered plan of the Corporation.
[Our emphasis]

2.04 Registered Plan shall mean any of the following:

a) the "Executive Staff Retirement Plan (1976) of Avenor Inc."

b) the "Supervisory Employees' Retirement Plan (1976) of Avenor Inc." and

c) the "Employees' Retirement Plan (1988) of Avenor Inc."

Any reference to the Registered Plan shall, in respect of a given Participant, be deemed to be a reference to the Registered Plan of which he is a member.
[Our emphasis]

2.06 *The terms Actuarial Equivalent (...) and Total and Permanent Disability when used herein, shall have the same meaning as defined in the Registered Plan of which the Participant is a member.*
[Our emphasis]

5.02 *"Each Participant who retires on his Normal Retirement Date shall, provided he has completed 2 or more years of Continuous Service, be entitled to receive an annual supplementary retirement allowance payable in equal monthly instalments and commencing on his Normal Retirement Date in an amount equal to the excess, if any, of (a) over (b) below:*

(a) the aggregate of 2% of his Final Average Earnings (...) multiplied by his number of years and fractions of year of Credited Service (...)

Over

(b) the aggregate of

i. the annual amount of the lifetime pension (...) payable to the Participant under the Registered Plan of which he is a member (...);

ii. the annual amount (...), of the other lifetime pension or equivalent value thereof, if any, that the Participant is entitled to receive under any pension plan or plans, or similar arrangement if any, of the Corporation or of a prior employer (...).

[Our emphasis]

6.04 *In the event a Participant's Credited Service includes service with a prior employer other than the Corporation as defined in Appendix A hereto and which is not recognized for purposes of the Registered Plan of which he is a member, such Participant who retires early in accordance with subsection 6.01 after completion of 15 years of Continuous Service shall receive (...).*
[Our emphasis]

9.03 *If the form of pension received by the Participant under the Registered Plan of which he is a member is different than the form described in Subsection 9.01 above, or 9.02, as the case may be, he shall be deemed to have elected the same form of pension for purposes of this Supplemental Plan. (...)*
[Our emphasis]

10.01 *(...) Such death benefit shall, subject to applicable legislation, be paid in the same manner and subject to same conditions as the death benefit*

payable in similar circumstances under the Registered Plan of which the Participant is a member, (...).
[Our emphasis]

10.03 (...) Such death benefit shall, subject to applicable legislation, be paid in the same manner and subject to the same conditions as the death benefit payable in similar circumstances under the Registered Plan of which the Participant is a member, (...).
[Our emphasis]

13. The fact that the participation in the SERPs was restricted to members of a BCFPI Canadian Registered Pension Plan was reiterated in the 2003 draft Restatement (Exhibit R-11).

2003 Draft Restatement (Exhibit R-11)

3.01 An Employee who is a member of a Registered Plan as defined in Subsection 2.04 shall become a Participant in this Supplemental Plan if he occupies a Senior Executive Position with the Corporation and is designated by the Corporation as being eligible to participate in this Supplemental Plan.
[Our emphasis]

14. The above-quoted provisions of the 1995 and 1997 SERP remained essentially unchanged in the 2003 draft restatement.

15. The relevant actuarial reports also confirm the understanding and intent of the settlor of the Trust to the effect that membership in one of the BCFPI Canadian Registered Pension Plans was a *sine qua non* prerequisite to being a participant in the SERPs and beneficiary of the Letter of Credit:

June 1, 2005 actuarial valuation of Mercer (Exhibit R-15), pp. 1-2

(...)
For tax reasons U.S. residents and U.S. citizens are not covered by the letter of credit.

The Supplemental Retirement Plans as they apply to benefits covered by the letter of credit automatically provide benefits to members of the following registered plans:

- *Employees' Retirement Plan (1988) of Bowater Canadian Forest Products Inc.*
- *Executive Staff Retirement Plan (1976) of Bowater Canadian Forest Products Inc.*
- *Supervisory Employees' Retirement Plan (1976) of Bowater Canadian Forest Products Inc.*

Who are impacted by the limits of the Income Tax Act. (...)
[Our emphasis]

March 31, 2008 actuarial valuation of Mercer (Exhibit R-16), p. 1

The Supplemental retirement Plans covered by the letter of credit are:

1. *Supplemental Retirement Benefit Plan for Grade 27 and under Employees of Bowater Canadian Forest Products Inc.*
2. *Supplemental Retirement Benefit Plan for Grade 28 and over Employees of Bowater Canadian Forest Products Inc.*
3. *Senior Executive Retirement Plan (SERP) of Bowater Canadian Forest Products.*

These plans cover only members of the registered pension plans of the former Bowater Pulp and Paper Canada Inc.

For tax reasons U.S. taxpayers are not covered by the letter of credit unless they elect to be covered. (...).
[Our emphasis]

May 6, 2010 Mercer report relating to the March 19, 2010 (Exhibit I-1), p. 1

Generally the BCFPI SERPs provide benefits to members of the following registered pension plans whose lifetime pension benefits under these registered plans exceed the limits imposed under the Canadian Income Tax Act ("ITA"). These registered pension plans are collectively referred to as the "BCFPI Registered Plans" in this report:

- *Employees' Retirement Plan (1988) of Bowater Canadian Forest Products Inc.*
- *Executive Staff Retirement Plan (1976) of Bowater Canadian Forest Products Inc.*
- *Supervisory Employees' Retirement Plan (1988) of Bowater Canadian Forest Products Inc.*

[Our emphasis]

D) TAX CONSIDERATIONS

16. Restricting SERPs participation and Letter of Credit benefits to members of BCFTI Canadian Registered Pension Plans is incumbent on the application of the relevant Canadian tax provisions:

Trust Agreement (Exhibit P-5)

1.03 (...)
The Company may (...) direct that (...) the RCA Plan Trust Fund shall be invested in accordance with the directions of counsel. (...) Counsel shall have the sole responsibility for determining that all investments made at its direction, at the time of investment, are not inconsistent with such regulations as may be established by the Minister of National Revenue under the authority of the Income Tax Act (Canada) with respect to retirement compensation arrangements and are not inconsistent with the provisions of the SERPs. (...)
[Our emphasis]

2.09 The Trustee may elect in a return for a taxation year that the refundable tax at the end of the year be equal to the aggregate of the amounts calculated under section 207.5(2) of the Income Tax Act (Canada) or make all other applicable elections, all as directed by the Company.
[Our emphasis]

3.04 The Company undertakes to pay any refundable tax imposed by the Income Tax (Canada) associated with the issuance of the Letter of Guarantee in favour of the RCA Plan Trust Fund in accordance with this Agreement.
[Our emphasis]

17. Therefore, extending participation in the SERPs and the benefits in the Letter of Credit to non participants in the BCFPI Canadian Registered Pension Plans may contravene applicable Canadian and US tax provisions, given the tax treatment which was applied to the operations under the SERPs and the Trust Agreement to date;

18. If such is the case, the Court cannot, even acting under the *Companies' Creditors Arrangements Act* (**"CCAA"**), authorize that the Trust Agreement and SERPs be amended in a manner which conflicts applicable Canadian and US tax legislation and which may give rise to further tax claims by Canadian and US authorities;

19. The Respondents are currently seeking proper guidance on this issue and will further advise the parties and the Court of its specific arguments in this regard, if any, as soon as such guidance is received;

E) RELEVANT LEGAL PRINCIPLES

20. Pursuant to article 1280 C.C.Q., a purported beneficiary of a trust must comply with the constitutive act of the trust in order to qualify as such.

21. Pursuant to article 1294 C.C.Q., the language of the Trust may only be modified if necessary to allow a more faithful compliance with the first intent of the settlor.

22. Quebec's civil courts have systematically refused to add beneficiaries to a trust when such modification was not in compliance with the first intent of the settlor.

23. In the present matter, the first intent of the settlor of the Trust was to secure a certain sum of money in order to provide benefits to participants in the various SERPs, which only included participants in BCFPI Canadian Registered Pension Plans.

24. The settlor did not intend to include as beneficiaries of the Trust employees who are not members of a BCFPI Registered Plan.

25. Petitioner's request to amend the RCA Trust Agreement to extend benefits of the Letter of Credit to non participants in BCFPI Canadian Registered Pension Plans conflicts with article 1294 C.C.Q., as it modifies the Trust in a way that would neither allow a more faithful compliance with the first intent of the settlor nor favour the fulfilment of the Trust.

26. Moreover, extending the benefits if the Letter of Credit and participation in the SERPs to non participants in the BCFPI Canadian Registered Pension Plans may conflict with the applicable US and Canadian tax laws, given that such non participants in the BCFPI Canadian Registered Pension Plans are currently treated as such for tax purposes.

27. The inherent jurisdiction of the Court under the CCAA cannot be exercised in a manner that conflicts with a statute, the C.C.Q. in the present instance or the applicable tax laws.

III. SPECIFIC REPRESENTATIONS PERTAINING TO SCHEDULE B RESPONDENTS

28. In regard of the request that the Canadian resident members of the SERPs who retired after December 31, 2003 but before May 26, 2009 (the "**Schedule B Respondents**"), be declared beneficiaries of the Letter of Credit, but only on the value of their SERPs benefit accrued up to December 31, 2003, the Respondents submit to the judgment of the Court.

29. However, Respondents Fernand Landry and Donald Campbell challenge Mercer's estimation, as per schedule F to the Motion for directions, that their SERP benefits are not covered at all by the Letter of Credit.

30. Respondents Landry and Campbell both accumulated secured benefits under the SERP prior to January 1, 2004 and retired between January 1, 2004 and May 26, 2009.

IV. PROPOSED AMENDMENTS TO THE RCA TRUST AGREEMENT

31. Given that BCFPI proposes to shift most of its duties, as per the RCA Trust Agreement, to a Committee of Beneficiaries and to ensure an orderly continuation of the activities of the Trust, the Amendment (R-29) should include specific provisions pertaining to the establishment of the Committee of Beneficiaries.

32. These provisions should reflect the following guidelines:

- The fees, expenses and disbursements of the Committee of Beneficiaries will be paid out of the Trust Fund;
- The constitution and procedure for the nomination of the Committee of Beneficiaries, composed of three members should be indicated. The provisions in this regard could reflect the rationale and structure provided for in the *Supplemental Pension Plan's Act*, ss. 147 and following;
- The Trust Agreement can be amended by a majority of the 2/3 of the votes expressed in person or by way of proxy at a regular or extraordinary meeting of the members. This is necessary to avoid the current problematic which is highlighted in paragraph 78 of the Motion for directions;
- After proposed Section 10.04, the following sentence should be added: *"It is understood that the present Amendment does not affect or limit the rights of the Beneficiaries under the prior Trust Agreement to claim their unsecured SERP benefits against the Company."*
- After proposed Section 10.08, the following sentence should be added: "*Subject to the approval of the Trustee's Report of fees, expenses and disbursements by the Committee of the Beneficiaries*";

WHEREFORE, MAY PLEASE THE COURT TO:

PARTIALLY DISMISS the Motion for Directions on the Identity of the Persons Whose Benefits under the Bowater Supplemental Executive Retirement Plans Were Secured by a Letter of Credit (the "Motion for directions").

DECLARE that individuals listed in Schedule B of the Motion for directions who were not participants in either of the following Canadian Registered Pension Plans do not benefit from the Letter of Credit:

- *Employees' Retirement Plan (1988) of Avenor Inc (now Bowater Canadian Forest Products Inc.)*
- *Executive Staff Retirement Plan (1976) of Avenor Inc (now Bowater Canadian Forest Products Inc.)*
- *Supervisory Employees' Retirement Plan (1988) of Avenor Inc (now Bowater Canadian Forest Products Inc.)*

ORDER that Petitioner amends the RCA Trust Agreement to reflect the following:

- The establishment of a Committee of Beneficiaries;
- That the fees, expenses and disbursements of the Committee of Beneficiaries will be paid out of the Trust Fund;
- The constitution and procedure for the nomination of the Committee of Beneficiaries composed of three members.
- That the Trust Agreement can be amended by a majority of the 2/3 of the votes expressed in person or by way of proxy at a regular or extraordinary meeting of the members.
- An addition after the proposed Section 10.04 of the following: "*It is understood that the present Amendment does not affect or limit the rights of the Beneficiaries under the prior Trust Agreement to claim their unsecured SERP benefits against the Company.*"
- An addition after the proposed Section 10.08 of the following: "*Subject to the approval of the Trustee's Report of fees, expenses and disbursements by the Committee of the Beneficiaries*".

THE WHOLE WITH COST.

Montreal, May 19th, 2010

Woods LLP

Woods LLP
Attorneys for Respondents

No.: 500-11-036133-094

SUPERIOR COURT
(COMMERCIAL DIVISION)
DISTRICT OF MONTRÉAL
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O R I G I N A L

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