CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

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

No. : 500-11-036133-094

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

JERRY SODERBERG

Respondent

RESPONSE OF RESPONDENT JERRY SODERBERG TO THE CONTESTATION FILED BY RESPONDENTS CLIFFORD R. BOWLES *ET AL.*

IN RESPONSE TO THE CONTESTATION FILED BY RESPONDENTS CLIFFORD R. BOWLES *ET AL*, RESPONDENT JERRY SODERBERG SUBMITS THE FOLLOWING:

PREAMBLE

1. On or about March 19, 2010 Petitioner Bowater Canadian Forest Products Inc. ("**BCFPI**") filed a *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*, as appears from the court record;

2. On or about May 28, 2010 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**");

3. By way of its Motion for directions, Petitioner seeks a declaration and order from the Court:

   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 (the "**Letter of Credit**") held by the Royal Trust Company ("**RTC**") 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. Donald 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 Respondent 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;

4. On May 19, 2010, some members listed on Schedule A and Schedule B of the Motion for direction filed a Contestation (the "**Contestation**") by which they seek the partial dismissal of the Motion for direction and a declaration from the court that the individuals listed at Schedule C of the Motion for directions, including Respondent Soderberg, should not benefit from the Letter of Credit;

OUTLINE OF ARGUMENT

5. The payment of benefits provided to SERP's participants is secured through a Letter of Credit. Respondent Soderberg has been designated and recognised by Petitioner and its corporate predecessors as a SERP's participant. Consequently, Respondent Soderberg is entitled to continue to receive monthly SERP's payments from the proceeds of the Letter of Credit;

CIRCUMSTANCES RELATING TO RESPONDENT JERRY SODERBERG

6. From 1968 to 1993, for more than twenty-five (25) years, Respondent Soderberg was employed by Boise/Cascade, a large U.S. based company, operating at the time in the paper, packaging and newsprint businesses, as well as in the manufacture of wood products and distribution of building materials, employing more than 12,000 employees;

7. In the spring and summer of 1993, Respondent Soderberg was solicited by Canadian Pacific Forest Products Inc. ("**CPPF**") to leave Boise Cascade and on July 20, 1993 commenced his employment with CPFP in a senior executive position;

8. In March 1994, Canadian Pacific Forest Products Inc. changed its name to Avenor Inc. ("**Avenor**") which, following its acquisition by Bowater in 1998, became Bowater Pulp and Paper Canada Inc. ("**BPPC**");

9. On or about July 1st, 1995, as outlined in Petitioners' Motion for direction, Avenor restated the 1993 SERP, Exhibit R-1, into (2) two Supplemental Retirement Benefit Plans and one (1) Senior Executive Retirement Plan ("**SERP**"), collectively referred to as the "**1995 SERPs**", Exhibit R-2, *en liasse*;

10. Clearly, the purpose of the SERP, Exhibit R-2, is to provide to eligible employees in senior executive positions, including Respondent Soderberg, with supplementary retirement benefits, as appears, *inter alia*, from the Management Proxy Circular dated April 23, 1996, **Exhibit JS-1**, and from sections 2.02, 2.05, 3.01 and 3.03 of the SERP, Exhibit R-2:

Management Proxy Circular, Exhibit JS-1:

The Corporation sponsors different registered pension plans in which the Named Executive Officers participate. Messrs. Gagné, Steuart and Toole participate in the Employees' Retirement Plan (1988) of Avenor Inc. Mr. Soderberg participates in the Employees' Retirement Plan of Avenor America Inc., while Mr. Fulton participates in the Pacific Forest Salaried Retirement Plan (the "Pacific Plan"). All of these plans are registered for income tax purposes.

Effectively July 1, 1995, the Corporation replaced its Supplementary Retirement Benefit Plan with a Supplementary Executive Retirement Plan (the "SERP") pursuant to which additional pension benefits may become payable to officers of the Corporation in senior executive positions. <u>Messrs. Gagné, Steuart, Toole and Soderberg participate in the SERP.</u> The SERP provides participants with supplementary retirement benefits determined as the excess of (a) the amount of pension calculated in accordance with the provisions of the SERP, over (b) the amount of pension payable from the registered plan in which the executive participates.

The SERP will pay pensions based on a final pay formula. The formula is 2% of average remuneration in the last three years preceding retirement times years of pensionable service with the Corporation <u>and 1.6% of said remuneration times years of pensionable service with a prior employer if such service has been recognized ("Prior Service"). When years of Prior Service are recognized and when funds were not transferred in the registered plan, there is an offset to account for the pension payable from the prior employer's pension plans.</u>

SERP, Exhibit R-2:

2.02 Participant shall mean an Employee who is eligible to participate in this Supplemental Plan in accordance with Section 3 herein.

. . .

> *2.05 Senior Executive Position shall mean the President and CEO of the Corporation or a position reporting directly to it and considered as such by the Corporation.*
>
> ...
>
> *3.01 <u>An Employee shall automatically become a Participant in this Supplemental Plan if he occupies a Senior Executive Position with the Corporation</u>.*
>
> ...
>
> *3.03 Such Employee shall remain a Participant as long as he continues to be entitled to receive benefits under this Supplemental Plan.*
>
> <u>[Our emphasis]</u>

11. As appears from Exhibit JS-1 and sections 5.02 and 6.02 of the SERP, Exhibit R-2, such benefits are determined as the excess of (a) the amount of pension calculated in accordance with the provisions of the SERPs over (b) the amount of pension payable from the registered plan in which said employees participate, **including prior employer's pension plans**:

SERP, Exhibit R-2

> *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, in any, of (a) over (b) below:*
>
> *(a) The aggregate of 2% of his Final Average Earnings and 2% of his Final Average Earnings times 50% of his Average STIP Target, multiplied by his number of years and fractions of year of Credited Service, provided that <u>with respect to such portion of a Participant's Credited Service which relates to service with an employer other than the Corporation</u>, whether it is recognized or not under the Registered Plan as defined in Appendix A hereto, the percentage of 2% shall be replaced by a percentage of 1.6% in respect of such portion of the Participant's Credited Service,*
>
> *over*
>
> *(b) the aggregate of*
>
> *(i) the annual amount of the lifetime pension or equivalent value thereof payable to the Participant under the Registered Plan of which he is a member.....;*

(ii) *the annual amount of the aggregate of the annual amounts, as the case may be, of the other lifetime pension or equivalent value thereof, if any, that the Participant is entitled to receive under any pension plan or plans, of similar arrangement if any, of the Corporation or of a prior employer on account of service recognized for the purpose of calculating the supplementary retirement allowance payable under this Supplemental Plan and before election by the Participant of any prescribed optional form of payment as provided under such pension plan or plans ......*

[Our emphasis]

12. The SERP, Exhibit R-2, further provides as follows:

4.03 Notwithstanding Subsection 4.02, the Corporation will arrange for the payment of benefits provided under the Supplemental Plan to be secured through a letter of credit from a financial institution.

...

14.01 The Corporation shall decide on all matters relating to the interpretation, administration and application of this Supplemental Plan, consistently with the text of the Supplemental Plan.

14.02 To facilitate any action required to be taken by the Corporation under the Supplemental Plan, the Board of Directions of the Corporation may, at its discretion, delegate the responsibility for administration of the Supplemental Plan to any person(s) appointed specifically for this purpose to act on behalf of the Corporation.

[Our emphasis]

13. All times relevant hereto, from 1991 until 1998, Mr. Paul E. Gagné was Avenor's President, Chief Executive Officer and a member of its Board of Directors;

14. By letter dated August 4, 1995, Exhibit R-24, Mr. Gagné confirmed the conditions pertaining to Respondent Soderberg's compensation package, as well as his participation in the SERP, the whole pursuant to meetings of the Management Development and Compensation Committee which were held in June and July 1995;

15. In another letter dated August 4, 1995, also filed as Exhibit R-24, Mr. Gagné made the following representations to Respondent Soderberg:

1) *Effectively July 1, 1995, you will participate in the new Senior Executive Retirement Plan (SERP) which will provide you with retirement benefits as provided in the plan text to be completed by October 1, 1995.*

2) *Basic Retirement Pension*

Your basic retirement pension, payable under the rules of the plan, will be calculated as follow:

a) *For Service with Avenor Inc. and subsidiaries, pension benefits will be 2% x final three-year average earnings x credited years of service with Avenor Inc. and subsidiaries.*

b) *For Past Service with Boise Cascade, pension benefits will be 1.6% x final three years average earnings x credited years of service in the Boise Cascade plan (25.247 years) less pension benefits payable to you from the retirement plan of Boise Cascade Corporation.*

c) *The amount of pension payable from Boise Cascade Corporation above shall be equal to $4,907 per month ($58,884 per year) if you retire at age 60 or later and elect the five-year guarantee option. If you retire prior to age 60, it will be that amount reduced by 6% per year (1/2% per month).*

[Our emphasis]

16. On August 14, 1996, pursuant to section 4.03 of the SERP's, Exhibit R-2, Avenor entered into the Trust Agreement, Exhibit R-5, to secure the payment of the benefits under the SERP's;

17. As appears from Exhibit R-5, the Trust Agreement together with the SERP's, Exhibit R-2, constitute a Retirement Compensation Arrangement ("**RCA Plan**");

18. Section 1.06 of the Trust Agreement, Exhibit R-5, reads as follows:

"*1.06 Benefits under the RCA Plan, to the extent payable from the RCA Plan Trust Fund, shall be so payable to the extent that the RCA Plan Trust Fund shall suffice for such purpose. All eligible participants of the SERP's from time to time shall be beneficiaries of the Trust created by this Agreement*";

[Our emphasis]

19. By letter dated January 6, 1997, Exhibit R-25, filed *en liasse* together with two attachments entitled respectively "Supplemental Retirement Benefit Plan" and "Change of Control Agreement", Mr. Gagné represented to Respondent Soderberg that his SERP benefits were secured by a letter of credit:

> *"Following modifications approved by the Board of Directors, I am pleased to confirm the following as it applies to your compensation package.*
>
> ....
>
> ***Supplemental Retirement Benefit Plan***
>
> *Avenor has entered into a Trust Agreement with Montreal Trust supported by a Credit Agreement with a Schedule A Canadian Bank. This arrangement supports the payment of pension benefits to you under the Senior Executive Retirement Plan (SERP) that exceed the Department of National Revenue maximum."*

20. In a letter dated February 25, 1997, Exhibit R-26, Mr. Gagné confirmed, yet again:

    a. that Respondent Soderberg was "*covered by the Senior Executive pension and benefits plans*";

    b. that his "*total pension benefits upon retirement will be calculated as explained in his* [Mr. Gagné's] *letter of August 4, 1995....*"; and,

    c. that his "*pension benefits will not be affected by (your) country of residence at time of retirement.*";

21. In April 1997, the status of Respondent Soderberg as a senior executive and his participation in the SERP were confirmed and publicly disclosed, once again, as appears from the Management Proxy Circular dated April 22, 1997, **Exhibit JS-2**;

22. On or about November 28, 1997 the rules of the 1995 SERP's, Exhibit R-2, were restated, Exhibit R-3 (the "**1997 SERP's**");

23. The rights of Respondent Soderberg under the 1997 SERP's remained unchanged from those pursuant to the 1995 SERP's;

24. In the first half of 1998, Bowater acquired Avenor, which was renamed BPPC;

25. As a consequence of said acquisition, the employment of Respondent Soderberg was terminated as at September 27, 1998;

26. On August 12, 1998 Respondent Soderberg waived his right to receive a lump sum amount of $1,464,976 in lieu of his entitlement under the SERP, opting instead to receive normal SERP benefits in accordance with said plan, as appears from a letter from BPPC dated July 27, 1998, together with the waiver signed by Respondent Soderberg, **Exhibit JS-3**;

27. On October 2, 1998, BPPC confirmed, *inter alia*, that Respondent Soderberg was to benefit from a monthly pension payment from the SERP's, as appears from a letter from Mrs. Morin-Massicotte, Manager, Retirement and Group Insurance Human Resources, **Exhibit JS-4**;

28. Respondent Soderberg has been collecting said monthly pension payments from the SERP's for more than ten (10) years, since October 1998 until April 1st, 2009, shortly before this Honourable Court issued an order pursuant to the *Companies' Creditors Arrangements Act* in respect of the Petitioners;

29. In this respect, the benefits that Respondent Soderberg has been entitled to and indeed has been receiving pursuant to the SERP, have in fact been reduced by a sum of approximately $5,800 per month, in order to take into account benefits payable to Respondent Soderberg from the retirement plan of Boise Cascade, his former employer, and that of Avenor America Inc., the whole in accordance with the SERP's conditions and the letter of Mr. Gagné, Exhibit R-24;

30. In addition, the relevant extracts of the 1998 Management Proxy Circular published by BPPC confirmed that Respondent Soderberg was a senior executive of BPPC and is a participant of the SERP's, **Exhibit JS-5**;

31. In 2002, BPPC merged with Bowater Canadian Forest Products Inc. ("**BCFPI**") and as a result, the combined entity, BCFPI, became the sponsor of the SERP's, as discussed in Petitioners' Amended Motion and as appears *inter alia*, from Exhibits R-4 and R-12;

32. On or about November 11, 2009, Respondent Soderberg, then represented by Woods LLP, filed a Canadian CCAA Proof of claim in relation to the present matter **as a secured creditor**, **Exhibit JS-6**;

ARGUMENT

33. It is admitted, and indeed undeniable, that the Letter of Credit secures some of the benefits **payable to any and all SERP's participants**;

34. However, pursuant to the letter and spirit of the SERP's and contrary to the suggestion made in the Contestation, participation in BCFPI Canadian Registered Pension Plans is not a *sine qua non* prerequisite to being a participant in the SERP's;

35. Furthermore, the suggestion that Respondent Soderberg is not a participant in the SERP's cannot be reconciled with the facts and circumstances discussed in the Motion for directions, the present Response and the documentary evidence filed in support thereof;

36. Hence, it is very clear that Respondent Soderberg automatically became a Participant in the SERP's from their inception given his position as a senior executive;

37. Furthermore, Respondent Soderberg was designated and recognised on numerous occasions as a Participant in the SERP's, the whole pursuant, *inter alia,* to the powers of the Petitioners of their predecessors to decide on matters relating to the interpretation, administration and application of the SERP's;

38. Moreover, the status of Respondent Soderberg as a SERP's Participant has been publicly acknowledged since at least April 23, 1996 through the Management Proxy Circular, Exhibit JS-1;

39. Therefore, any rights to contest the right of Respondent Soderberg to participate in the SERP's are clearly prescribed;

40. It is obvious that according to the intention of Avenor and its successors, Respondent Soderberg is a participant in the SERP's and his benefits are to be guaranteed by the Letter of Credit;

41. In addition, while there seems to have been some attempts since 2003 to bring some amendments to the SERP's ("**2003 SERP's**"), as appears, *inter alia*, from Petitioners' Amended Motion and some Exhibits filed in support thereof, including more particularly Exhibits R-11 and R-13, these modifications are not opposable to Respondent Soderberg, as outlined, *inter alia*, in a letter from Woods LLP, Exhibit R-20;

42. Furthermore, the Trust Agreement was arguably not intended to constitute a Trust within the meaning of Chapter II of Title Six of Book Four of the Civil Code of Quebec ("***CCQ***"), as appears from section 9.04 of the Trust Agreement, Exhibit R-5;

43. Consequently, the provisions of articles 1260 *CCQ* and following pertaining to trusts are not applicable in the present instance;

44. Alternatively, in the eventuality that the Trust Agreement, Exhibit R-5, constitutes a trust pursuant to said provisions, clearly Avenor and its successors, as settlor of the Trust, intended to include Respondent Soderberg as a beneficiary of said Trust;

45. In the further alternative, should the provisions of article 1294 CCQ find application in the present case, which is questionable, Respondent Sodererg would be entitled to seek and obtain from this Court amendments to the Trust Agreement confirming his status as beneficiary of the Trust Agreement as a participant in the SERP's;

46. Respondent Soderberg reserves any and all his rights to address further issues raised, directly or indirectly, by the Contestation or other procedures filed in the present matter;

CONCLUSION

47. Respondent Soderberg is clearly entitled to receive SERP's benefits from the proceeds of the Letter of Credit, Exhibit R-7, the whole in accordance with the SERP's, Exhibit R-3, and the RCA Trust Agreement, Exhibit R-5.

WHERFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the Motion for Directions;

GRANT the present Response;

DECLARE that Respondent Jerry Soderberg is entitled to continue to receive, from May 1, 2009, monthly SERP payments from the proceeds of the Letter of Credit, Exhibit R-7;

THE WHOLE, with costs against Respondents Clifford R. Bowles *et al.* who filed a Contestation on May 19, 2010 in the present matter.

Montreal, June 9, 2010

Greenspoon Perreault

GREENSPOON PERREAULT, LLP
Attorneys for Respondent Jerry Soderberg

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Respondent

LIST OF EXHIBITS OF RESPONDENT JERRY SODERBERG

EXHIBIT JS-1 : Management Proxy Circular dated April 23, 1996;

EXHIBIT JS-2: Management Proxy Circular dated April 22, 1997;

EXHIBIT JS-3: Letter from BPPC dated July 27, 1998, together with the waiver signed by Respondent Mr. Jerry Soderberg;

EXHIBIT JS-4: Letter from Mrs. Morin-Massicotte, Manager, Retirement and Group Insurance Human Resources dated October 2, 1998;

EXHIBIT JS-5: Extracts from the 1998 Management Proxy Circularl

EXHIBIT JS-6: Respondent Soderberg's Canadian CCAA Proof of claim dated November 11, 2009.

Montreal, June 9, 2010

Greenspoon Perreault

GREENSPOON PERREAULT, LLP
Attorneys for Respondent Jerry Soderberg