# SUPERIOR COURT

## COMMERCIAL DIVISION

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

**CANADA**
**PROVINCE OF QUÉBEC**
**DISTRICT OF OF MONTRÉAL**

**No. 500-11-036133-094**

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**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 herein,**

Petitioners

and

**ERNST & YOUNG INC.,**

Monitor

and

**THE ROYAL TRUST COMPANY,**

Mise en cause

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**CONTESTATION OF THE MISE EN CAUSE, THE ROYAL TRUST COMPANY, 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**

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IN CONTESTATION OF PETITIONER'S AMENDED MOTION FOR DIRECTIONS, THE ROYAL TRUST COMPANY SUBMITS THE FOLLOWING:

**BACKGROUND**

1. The Petitioner Bowater Canadian Forest Products Inc. ("BCFPI") is the sponsor of three Supplemental Executive Retirement Plans ("SERPs") to provide post-retirement benefits to eligible employees ("participants") and to the beneficiaries of any deceased participants ("beneficiaries"), (together, the "members");

2. On August 14, 1996, BCFPI (previously Avenor) entered into a trust agreement with Montreal Trust Company ("MTC") (the "Trust Agreement") so that MTC would hold a letter of credit initially in the amount of $30,000,000 to secure the payment of the benefits under the SERPs, the whole as appears from Exhibit R-5 filed in support 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 (the "Amended Motion");

3. Essentially, the Trust Agreement provided that MTC was to hold the letter of credit until such time as BCFPI defaulted in the payment of the benefits under the SERPs. MTC was then to call the letter of credit and hold the proceeds in trust for all eligible members of the SERPs, and distribute the proceeds to the eligible members of the SERPs to the extent that the proceeds were sufficient for that purpose;

4. Or January 1, 2003, MTC was replaced by The Royal Trust Company ("RTC") as trustee of the Trust Agreement holding the letter of credit, as appears from Exhibit R-6 filed in support of the Amended Motion;

5. On April 16, 2009, Petitioners filed for protection from their creditors under Chapter 11 of the Bankruptcy Code of the United States and under the Companies' Creditors Arrangement Act ("CCAA") on April 17, 2009 (the "CCAA filing"), and stopped paying the SERPs benefits shortly thereafter;

6. RCT called for payment on the letter of credit that it held under the terms of the Trust Agreement to secure the payment of the benefits under the SERPs, and received an amount of approximately $23,065,000;

7. RCT holds in trust the proceeds of the letter of credit together with earnings, interests and increment (the "RCA Plan Trust Fund") for the members;

8. According to the Trust Agreement, RTC is entitled to rely on instructions from BCFPI as to the distribution of the RCA Plan Trust Fund and the identification of the beneficiaries of the SERPs, and has, in fact, requested such instructions in April 2010 from BCFPI ;

9. On or about May 28, 2010, BCFPI filed an Amended Motion to determine the members of the SERPs whose benefits under the SERPs are secured by the RCA Plan Trust Fund;

10. Since the filing of the Amended Motion, contestations and responses have been filed by Woods LLP, De Grandpré Joli-Coeur, Greenspoon Perreault LLP and Langlois Kronstrom Desjardins LLP, on behalf of members, seeking notably further amendments to the Trust Agreement;

**DECLARATIONS AND ORDERS SOUGHT**

**A) Amendments to the Trust Agreement**

11. In the Amended Motion, Petitioners ask this Court to authorize BCFPI to amend the Trust Agreement in accordance with Amendment No 1 (the "Amended Trust Agreement"), as appears from Exhibit R-29 filed in support of the Amended Motion;

12. More particularly, Petitioners and Respondents want to create a committee of beneficiaries who would take over from BCFPI the power to give directions to RTC and to make all decisions regarding the RCA Plan Trust Fund;

13. Petitioners want to delegate all of their obligations towards the members to a committee of three beneficiaries as well as to actuaries, to Aon Consulting and to Phillips, Hager & North Investment Manager ltd.;

14. Petitioners also want to remove from the Trust Agreement provisions relating to the indemnification of RTC by BCFPI;

15. At the outset, it is for BCFPI to manage the RCA Plan Trust Fund and to assume the obligations in this regard;

16. Although BCFPI is currently under the protection of the CCAA, it has not filed an assignment in bankruptcy and may emerge from the CCAA protection;

17. BCFPI should, as envisaged originally, assume all responsibilities under the RCA Plan Trust Fund and should be replaced by a committee of beneficiaries only if it files an assignment in bankruptcy;

18. It is in the interest of RTC and of the members that BCFPI continues to administer the RCA Plan Trust Fund for the following reasons:

    (a) Since BCFPI created the SERPs, it has superior knowledge and understanding of them;

    (b) Before the CCAA filing, BCFPI was making the SERPs payments to the beneficiaries and therefore knows what amounts are due to the beneficiaries under the SERPs;

    (c) BCFPI has the required resources and tools to administer the SERPs;

    (d) BCFPI is independent and has no direct interest in the RCA Plan Trust Fund;

(e) The expenses that will be deducted from the RCA Plan Trust Fund will increase if the administration of the RCA Plan Trust Fund is divided between the committee, the actuaries, Aon Consulting and Phillips, Hager & North Investment Manager Ltd;

(f) The administration of the RCA Plan Trust Fund would be complicated by the creation of a committee of beneficiaries and the delegation of responsibilities to various professionals;

19. As trustee of the RCA Plan Trust Fund, RTC wants to ensure that it will obtain clear directives that will enable it to properly assume its responsibilities under the Trust Agreement and, as such, RTC proposes amendments to clarify its responsibilities under the Trust Agreement and to conform to the applicable legislation;

20. Therefore, the Amended Trust Agreement (Exhibit R-29 filed in support of the Amended Motion) should be amended to reflect the following:

(a) BCFPI should continue to assume all of its obligations under the Trust Agreement, including its obligation to indemnify RTC;

(b) However, if BCFPI files an assignment in bankruptcy, a committee of beneficiaries should take over BCFPI's responsibilities in relation to the management of the RCA Plan Trust Fund;

(c) It is appropriate to establish the rules that would govern the committee of beneficiaries as well as its authority, powers and duties in the event that BCFPI files an assignment in bankruptcy;

(d) The Amended Trust Agreement should include clauses on confidential information, non exclusivity of services of RTC, money laundering and other legislation applicable to RTC;

the whole as appears from the Amended and Restatement Retirement Compensation Arrangement Trust Agreement filed as **Exhibit RTC-1**;

21. The proposed amendments to the Amended Trust Agreement aim at clarifying the role of RTC which is limited to holding the RCA Plan Trust Fund and distributing it in accordance with the instructions of BCFPI;

**B) Service of the Amended Motion**

22. The members of the SERPs were not made parties to the Amended Motion and were not served with the Amended Motion by bailiff;

23. However, the Amended Motion was sent by mail and registered mail by BCFPI to the latest known address of each of the members since the judgment to be rendered by this Court will affect their rights in the proceeds of the letter of credit;

24. In the Amended Motion, Petitioners ask the Court to exempt them from any further service of the Amended Motion and from any further notice and to declare that the service of the Amended Motion by registered mail or mail to the SERPs members who are not represented by attorneys is valid;

25. RTC seeks the following declarations:

    (a) that if this Court validates service of the Amended Motion by mail or registered mail to the members, a proof of reception by members be obtained;

    (b) that RTC shall not be liable towards members for any damage or complaint relating to insufficiency of service of the Amended Motion;

    (c) that the decision to be rendered by this Court on the Amended Motion be opposable to all members;

**C) Investment of the proceeds of the letter of credit held by RTC**

26. The agreement currently governing the rights and obligations of RTC is the Trust Agreement, exhibit R-5 filed in support of the Amended Motion;

27. In the Trust Agreement, there is no specific investment policy defining in what vehicle the proceeds of the letter of credit can be invested;

28. As of today, the proceeds of the letter of credit have been invested in 30-day Government of Canada Treasury Bills;

29. In the Amended Motion, Petitioners ask the Court to authorize RTC to invest the RCA Plan Trust Fund in accordance with the investment policy to be produced as Exhibit R-30 in support of the Amended Motion and to appoint Phillips, Hager & North Investment Manager Ltd. as investment manager until such time as the committee of beneficiaries is established and gives contrary instructions;

30. RTC is not responsible for determining how the assets are to be invested; these decisions being made by BCFPI or, if BCFPI becomes bankrupt, by the committee of beneficiaries;

31. RTC seeks the following declarations:

    (a) that the RCA Plan Trust Fund were properly invested in 30-day Government of Canada Treasury Bills;

    (b) that RTC shall not be liable for any damage or complaint relating to the investment of the RCA Plan Trust Fund;

**D) Reliance on instructions of BCFPI and of the Court**

32. According to the Trust Agreement, RTC must rely on BCFPI for instructions and has requested instructions from BCFPI as to the distribution of the proceeds of the letter of credit held in trust;

33. Following this request for instructions from RTC, BCFPI filed the Amended Motion;

34. The filing of the Amended Motion may generate delays in the distribution of the proceeds to the members;

35. In the Amended Motion, Petitioners ask the Court to declare that, for the purpose of the Trust Agreement, RTC acting in accordance with this order shall be construed and have the same effect as if RTC relied and acted upon the written instructions of BCFPI;

36. RTC seeks the following declarations

    (a) that RTC shall not be liable for any delays caused by the filing of the Amended Motion by Petitioners;

    (b) that RTC is authorized to rely and act upon the decision to be rendered by this Court on the Amended Motion and that it cannot be held liable for any consequence of such reliance;

**E) Payment instructions**

37. Before the CCAA filing, the only role of RTC pursuant to the Trust Agreement was to hold the letter of credit in accordance with the Trust Agreement;

38. Therefore, RTC has never made any payment to the members as Petitioners were in charge of making such payments to the beneficiaries;

39. Therefore, RTC has no information as to what amount should be paid to each member and does not have the information that would allow it to make monthly payments to the members;

40. RTC needs to obtain clear guidelines as to who it should pay and what amount has to be paid to each of the members;

41. In order for RTC to make set up monthly payments, the following information is required:

    (a) Name of each member entitled to receive payment from the RCA Plan Trust Fund;

    (b) Home address of each member;

    (c) Social insurance number of each member;

    (d) The amount of the payment for each member;

(e) Payment instructions (i.e. cheque or Electronic Funds Transfer (EFT) – if by EFT, a void cheque is required. If a cheque is not available, a sample of the MICR (Magnetic Ink Character Recognition) line encoding for the bank account is required.)

(f) Payment frequency;

(g) TD1 information for the calculation of withholding tax;

(h) Additional tax to be withheld, if requested;

(i) Payment termination date, if applicable;

42. RTC seeks an order from this Court that the information mentioned at paragraph 41 of the present Contestation be provided to the Trust;

43. The present Contestation is well founded in fact and in law;

**WHEREFORE MAY THIS COURT:**

**GRANT** the present contestation;

**ORDER** that the Trust Agreement be amended in accordance with the Amended and Restatement Retirement Compensation Arrangement Trust Agreement filed as Exhibit RTC-1;

**ORDER** that a proof of reception of the Amended Motion by the members be obtained if the Amended Motion is served to the members otherwise than by bailiff;

**DECLARE** that RTC shall not be liable towards members for any damage or complaint relating to insufficiency of service of the Amended Motion;

**DECLARE** that the decision to be rendered by this Court on the Amended Motion be opposable to all members;

**DECLARE** that the RCA Plan Trust Fund was properly invested in 30-day Government of Canada Treasury Bills;

**DECLARE** that RTC shall not be liable for any damage or complaint relating to the investment of the RCA Plan Trust Fund;

**DECLARE** that RTC shall not be liable for any delays caused by the filing of the Amended Motion by Petitioners;

**DECLARE** that RTC is authorized to rely upon and act upon the decision to be rendered by this Court on the Amended Motion and that it cannot be held liable for any consequence of such reliance;

**ORDER** that the following information be provided to RTC within five days of the order to be rendered by the Court:

(a) Name of each member entitled to receive payment from the RCA Plan Trust Fund;

(b) Home address of each member;

(c) Social insurance number of each member;

(d) The amount of the payment for each member;

(e) Payment instructions (i.e. cheque or Electronic Funds Transfer (EFT) – if by EFT, a void cheque is required. If a cheque is not available, a sample of the MICR (Magnetic Ink Character Recognition) line encoding for the bank account is required.)

(f) Payment frequency;

(g) TD1 information for the calculation of withholding tax;

(h) Additional tax to be withheld, if requested;

(i) Payment termination date, if applicable;

**THE WHOLE WITHOUT COSTS**, save and except in case of contestation.

Montréal, June 10, 2010

McCarthy Tétrault

**McCARTHY TÉTRAULT LLP**
Attorneys for the Third Party The Royal Trust Company

No. 500-11-036133-094
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**ORIGINAL**

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