Court File No. CV-11-9367-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

INTERNATIONAL FOREST PRODUCTS LLC (formerly known as INTERNATIONAL FOREST PRODUCTS CORPORATION)

Applicant

- and -

ST. MARYS PAPER CORP.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C.B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

FACTUM OF ORLANDO ROSA, GORD ACTON, JEFF AVERY, TONY PORCO & VANCE HENSEN IN OPPOSITION TO THE RECEIVER'S MOTION TO DISTRIBUTE FUNDS TO INTERNATIONAL FOREST PRODUCTS

PART I – OVERVIEW

1. Ernst & Young, the Receiver for St. Marys Paper Corp ("SMP"), seeks the Court's approval to, *inter alia*, distribute $4.22 million to International Forest Products ("IFP") in partial satisfaction of SMP's indebtedness to IFP. This distribution is contemplated in light of IFP's bankruptcy application vis-à-vis SMP.

2. At the time of its entry into receivership, SMP had seven members of its Board of Directors, two of which were also officers of IFP. The five directors of SMP who were not also officers of IFP were: Orlando Rosa, Gord Acton, Jeff Avery, Tony Porco and Vance Hensen (the "non-IFP Directors").

3. While the non-IFP Directors do not oppose the proposed Bankruptcy Order, the non-IFP Directors oppose the proposed distribution as outlined in the Receiver's Third Report.

4. The proposed distribution to IFP ignores the entitlement of SMP's former employees, who are owed $576,404 in vacation pay. The obligation to pay out the vacation pay crystallized upon the recent sale of a significant portion of SMP assets; a term of the sale required the termination of SMP's laid off workers. As such, the proceeds of the sale were impressed with a common law trust and are therefore excluded from SMP's estate in bankruptcy.

5. Accordingly, the Receiver's proposed distribution to IFP should be reduced by $576,404.

PART II – FACTS

6. The relevant facts are set out in the Agreed Statement of Facts.

PART III – LAW & ARGUMENT

Vacation Pay Owing to SMP's Former Employees Does Not Form Part of SMP's Estate in Bankruptcy

7. The non-IFP Directors contend that the vacation pay owing to SMP's former employees does not form part of SMP's estate in bankruptcy.

8. SMP owes approximately $576,404.00 in vacation pay to its former employees (the "Vacation Pay").

9. Section 67(1) of the *Bankruptcy & Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provides that "[t]he property of a bankrupt divisible among his creditors shall not comprise… (a) property held by the bankrupt in trust for any other person…"

> **Reference:** *Bankruptcy & Insolvency Act*, R.S.C. 1985, c. B-3 s. 67(1) [*BIA*]

10. Section 40 of the *Employment Standards Act*, S.O. 2000, c. 41 ("*ESA*") creates a trust over all vacation pay owed by and employer to an employee:

> (1) Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the employer has kept the amount for it separate and apart.
>
> (2) An amount equal to vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account, even if it is not entered in the books of account.
>
> **Reference:** *Employment Standards Act*, S.O. 2000, c. 41, s. 40 [*ESA*]

11. The *ESA* further precludes employers from contracting out of the protections provided under the statute:

> 5. (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

Reference: *ESA*, s. 5(1)

12. Deemed trust provisions in provincial statutes will impress property with a trust, thereby excluding the trust property from the estate of a bankrupt under s. 67 of the *BIA*, where the statutory trust satisfies the requirements of a common law trust.

Reference: *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] S.C.J. No. 78 at para. 18

Re Graphicshoppe Ltd., [2005] O.J. No. 5184 (C.A.) at para. 122 [*Graphicshoppe*]

13. Provided that the assets remain traceable, the trust will continue to protect the assets so deemed by the provincial statute. Co-mingling of assets will not, by itself, dissolve the trust.

Reference: *Graphicshoppe, supra* at paras. 119-120, 123.

14. In the present case, SMP's workers were laid off as a result of the shut-down of SMP's specialty mill in 2011. However, because SMP's unionized workers were laid off subject to the right of recall, they maintained an employment relationship with SMP.

15. SMP's workers were ultimately terminated as a result of the sale of certain SMP property overseen by the Receiver. Article 6.4 of the Asset Purchase Agreement required the Receiver to terminate all of SMP's employees as a condition of the sale. The sale was authorized by the Court in the Sale Approval and Vesting Order issued March 26, 2012.

16. The *ESA* provides that, upon the end of employment, the employer is obligated to pay all accrued vacation pay not later than the later of (a) seven days after the employment ends; and (b) the day that would have been the employee's next pay day.

Reference: *ESA*, ss. 38(1) & 11(5)

17. As a result, it was only upon termination that SMP became liable to its laid off workers for the vacation pay that had accrued.

18. Because the termination of SMP's workers was effected by the sale of certain SMP assets, the non-IFP Directors contend that the proceeds from the sale were impressed with a trust of outstanding vacation pay. The causal nexus between the termination of SMP's workers and the sale of SMP's assets (along with the resulting proceeds) creates the factual certainty of subject-matter necessary to ground a common law trust.

19. In *Edmonton Pipe Industry Pension Plan Trust Fund (Trustees of) v. 350914 Alberta Ltd*, the Alberta Court of Appeal observed that "[t]he certainty of subject matter or property rule is also stated to include either a description in the trust instrument or 'a formula or method given for identifying it'."

Reference: *Edmonton Pipe Industry Pension Plan Trust Fund (Trustees of) v. 350914 Alberta Ltd.*, [2000] A.J. No. 583 (C.A.) at para. 21

20. To the extent that the deemed trust provision of the *ESA* lacks a formula for identifying the trust assets, a purposive interpretation of the statute and equity suggest that where an employee is terminated as a condition of a sale agreement, the assets received by the employer in that sale must first be earmarked to satisfy the outstanding obligations owed to that employee. This interpretation is supported by the facts of this case as the obligation to distribute the

Vacation Pay was causally tied (indeed a condition of) the disposal of SMP assets. Any other interpretation would amount to a circumvention of the prohibition on contracting out of the *ESA* under section 5.

PART IV – ORDER SOUGHT

21. The non-IFP Directors seek:

(a) A declaration that $576,404, representing the amount held on trust by SMP and owed to its former employees in vacation pay, not form part of SMP's estate in bankruptcy, if an Order is made directing SMP into bankruptcy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of May, 2012.

David Quayat

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SCHEDULE A
LIST OF AUTHORITIES

1. *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] S.C.J. No. 78

2. *Re Graphicshoppe Ltd.*, [2005] O.J. No. 5184 (C.A.)

3. *Edmonton Pipe Industry Pension Plan Trust Fund (Trustees of) v. 350914 Alberta Ltd.*, [2000] A.J. No. 583 (C.A.)

SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS

BANKRUPTCY & INSOLVENCY ACT, R.S.C. 1985, c. B-3

Property of bankrupt

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the Income Tax Act, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the Family Orders and Agreements Enforcement Assistance Act, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

EMPLOYMENT STANDARDS ACT, **S.O. 2000, c. 41**

HOW THIS ACT APPLIES

No contracting out

5. (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void. 2000, c. 41, s. 5 (1).

Greater contractual or statutory right

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply. 2000, c. 41, s. 5 (2).

PAYMENT OF WAGES

If employment ends

11. (5) If an employee's employment ends, the employer shall pay any wages to which the employee is entitled to the employee not later than the later of,
(a) seven days after the employment ends; and
(b) the day that would have been the employee's next pay day. 2000, c. 41, s. 11 (5).

VACATION WITH PAY

If employment ends

38. If an employee's employment ends at a time when vacation pay has accrued with respect to the employee, the employer shall pay the vacation pay that has accrued to the employee in accordance with subsection 11 (5). 2000, c. 41, s. 38.

Vacation pay in trust

40. (1) Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the employer has kept the amount for it separate and apart. 2000, c. 41, s. 40 (1).

Same

(2) An amount equal to vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account, even if it is not entered in the books of account. 2000, c. 41, s. 40 (2).

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PROCEEDING COMMENCED AT TORONTO

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