SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **MAY 26, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

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 on Schedules "A", "B" and "C"
Debtors (Respondents)

And
COMMUNICATIONS, ENERGY & PAPEWORKERS UNION OF CANADA (CEP) AND ITS LOCAL 60-N AND 161
And
GEORGE RANDELL
And
WILSON PIKE
And
EVERETT LAMBERT
And
LEO ATWOOD
And
RAYMOND TAYLOR
And
WILLIS BLAKE
And

JG1793

WILLIAM BUTT
And
GERALD PEARCE
And
LEONARD HIGGINS
And
LLOYD PINSENT
And
HARRIS ROWSELL
And
SANDY LOVELESS
Petitioners

And
ERNST & YOUNG INC.
Monitor (mis en cause)

REASONS FOR JUDGMENT RENDERED ORALLY ON MOTION TO LIFT STAY OF PROCEEDINGS (# 96)

INTRODUCTION

[1] The Petitioners, the Communications, Energy and Paperworkers Union of Canada (**CEP**), its locals 60N and 161, as well as some of its members, present a Motion to lift the stay of proceedings[1] imposed by the Initial Order of this Court dated April 17, 2009.

[2] This Initial Order was issued under the terms of the *CCAA*[2]. One of its purposes is to notably allow the Debtors to file a plan of arrangement for the benefit of all their creditors and, potentially, the communities in which they operate as well.

[3] The CEP and its members are amongst those creditors. Here, 122 of these members, all former employees of the Debtors, seek the Court's exercise of its statutory discretion to lift the stay of proceedings, so as to order the Debtors to fulfil their obligations under two Early Retirement Incentive Programs (**ERIPs**) established for the benefit of Petitioners[3].

THE FACTS

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1 Motion to Lift Stay of Proceedings dated May 13, 2009.
2 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
3 Exhibits P-1 and P-2.

[4] In a nutshell, the purpose of the ERIPs signed respectively in 1999 and 2004 was to help diminish the impact of the reorganization of the Debtors' workforce through the advancement of mechanization of harvesting on their operations, as well as the automation and technical changes that continued to impact their employees.

[5] As a result, under the ERIPs, employees who had reached age 58 and over and who met the criteria of eligibility received $1,600 or $1,400 per month under age 60 and $1,400 or $1,200 per month until age 65.

[6] As well, employees participating in the ERIPs were covered by benefits (such as life insurance and prescription drugs) paid either 100% by the employer or 65% by the employer and 35% by the employee, depending upon the applicable program.

[7] Prior to entering the ERIPs, employees were required to cash in all their accumulated vacations, exhaust their long-term disability benefits, and exhaust as well all employment insurance benefits.

[8] Presently, a total of 122 employees remain covered under the two (2) ERIPs.

[9] Yet, further to the stay of proceedings that forms part of the Initial Order, the Debtors ceased all payments under the ERIPs as they no longer had the funds necessary to make such. According to the Debtors, the sums owed pursuant to the ERIPs form part of pre-filing collective bargaining agreements in respect of what are now permanently closed facilities.

[10] It is the Court's understanding that the Petitioners' situation is by no means unique. Unfortunately, a similar decision has been applied by the Debtors with respect to all its severance obligations or other early retirement incentive programs, in all cases for the same reasons.

THE POSITIONS OF THE PARTIES

[11] The CEP contends that the stay of proceedings should be lifted for the 122 former employees involved because they all show necessity for the ERIPs payments, they suffer undue hardship and they are severely prejudiced.

[12] The CEP argues that they do not receive sufficient income to cover their basic essentials. Numerous detailed affidavits support these assertions.

[13] The Petitioners claim that their situation is special, their circumstances uncommon, and their sacrifices greater than that of other creditors of the Debtors.

[14] AbitibiBowater replies that it does not have the means to pay. Furthermore, it could not treat the Petitioners any different than the other stakeholders. AbitibiBowater believes that maintaining the equilibrium between everyone is the best manner to achieve a

successful restructuring that would benefit everyone better than a bankruptcy, including the Petitioners.

ANALYSIS AND DISCUSSION

[15] This is not an easy situation. No Court, including this one, is insensitive to the real difficulties, socially, economically or personally, in which a matter like this one places many individuals, first and foremost the Petitioners in this case.

[16] Yet, the sympathy a Court may feel towards the sad situation of many should not and could not distract it from its supervisory role, and particularly, from its key objective of maintaining, during this restructuring process, a fair but delicate balance between the positions of everyone, no matter how painful it could sometimes be.

[17] In the Court's opinion, and notably with respect to the individual Petitioners involved here, no doubt a successful restructuring is most likely a better end result than a bankruptcy of the Debtors.

[18] That being so, the Court believes that, at the stay of proceedings stage, the stakeholders are better served by an equal treatment of their respective positions than by the granting of an undue advantage or preference to some.

[19] In this process, to deal with everyone in a rather similar way enhances the chances of success of the restructuring, limits the potential conflicts between stakeholders and prevents some to withdraw from or fight the process because they feel they are unfairly treated.

[20] In essence, here, Petitioners are seeking a preference over other similarly situated unsecured creditors. This should always be looked at with caution.

[21] Certainly, CEP's Counsel is right in saying that there is no statutory test under the *CCAA* to guide the Court in deciding whether or not to lift the stay of proceedings in a given circumstance.

[22] However, it remains that lifting the stay is an exception to the general rule and that convincing reasons must exist to grant it. This is even more true when, like here, the process undertaken progresses well and enjoys so far a large support from the stakeholders.

[23] As Paperny J. stated in *Canadian Airlines Corp. (Re)*[4], before granting a stay, a Court should consider the particular facts involved and remember that it is required to balance a variety of interests and problems. One should never lose sight of the global picture.

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4 (2000) 19 C.B.R. (4th) 1 (Alta Q.B.).

[24] In that regard, a Court should try to keep at its minimum the manoeuvres for positioning amongst creditors during the restructuring process. Rather, it should play its supervisory role by trying to preserve a delicate *status quo* while moving along the process swiftly towards a successful compromise or arrangement.

[25] Of course, preservation of a *status quo* does not necessarily mean inflexible rigidity. For instance, in some situations, if undue hardship caused by the stay itself is showed and strong necessity for immediate payment is established, a Court may consider it appropriate to lift the stay.

[26] However, in this Court's opinion, the situations where only these two criteria of undue hardship and immediate necessity for payment would justify the lifting of the stay will be rare.

[27] Seldom, if ever, will a restructuring process not cause definite hardship on most stakeholders. As well, rarely will stakeholders not be able to establish some level of necessity for the payment of what is owed to them.

[28] If the sole criteria of undue hardship and necessity for payment would suffice to lift the stay of proceedings in a *CCAA* restructuring, Courts, debtors and monitors would likely end up devoting indefinite time and energy trying to assess the levels of prejudice caused to one or the other, instead of focusing upon the end result, that is, to develop and submit a plan and gather consensus around a fair and reasonable compromise for all.

[29] This would undoubtedly have an adverse impact upon many restructuring efforts.

[30] From that perspective, trying to please everyone on the basis of undue hardship or utmost necessity may end up resulting in displeasing all. This is why this should be approached with caution and, in this Court's view, with great reservation.

[31] Turning to the present case, the Court is not convinced that its statutory discretion should be exercised along the lines suggested.

[32] Yes, hardship exists for many here. Yet, in many of the situations described, hardship arises, if only partially, from pre-existing conditions or independent conditions of Petitioners that the stay of the Initial Order itself did not necessarily cause.

[33] Yes, necessity for payment exists. Yet, it remains far from obvious that it is of such a magnitude as to render untenable the delay of a few months before the likely filing of a plan.

[34] In the meantime, certainly times will be difficult. Nobody denies it. But times would be worse if the Debtors were to collapse and go bankrupt.

[35] From that standpoint, the idea of saying yes to some and no to others is not the best way to deal with the situation. In fact, it would only open the door to many similar requests and destabilize the restructuring process. This should be avoided.

[36] The Court prefers to say to all: wait and be patient. The process is under way. The Court, with the help of the Monitor, closely watches and supervises the process. The Debtors realize that time is of the essence. This is the better approach.

[37] It is no consolation to Petitioners, but the situation at stake is not unheard of. Notwithstanding that, and without surprise, CEP's Counsel cannot submit any precedent in the case law that would support his position. Certainly, this is therefore not the preferred way to deal with a situation like this one.

[38] In all due respect to the contrary view, the Court believes that this matter should not be treated any differently.

FOR THESE REASONS GIVEN VERBALLY AND REGISTERED, THE COURT:

[39] **DISMISSES** the Motion;

[40] **WITHOUT COSTS**.

CLEMENT GASCON, J.S.C. J.S.C.

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Dates of hearing May 25 and 26, 2009
Reasons transcribed and revised on June 1st, 2009

SCHEDULE "A"

ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY,
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.

SCHEDULE "B"
BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

SCHEDULE "D"

PARTNERSHIPS

1. BOWATER CANADA FINANCE LIMITED PARTNERSHIP
2. BOWATER PULP AND PAPER CANADA HOLDINGS LIMITED PARTNERSHIP
3. ABITIBI-CONSOLIDATED FINANCE LP