SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-11-036133-094

DATE : **MAY 8, 2009**

PRESENT : THE HONOURABLE Mme JUSTICE DANIÈLE MAYRAND, 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 in Schedules "A", "B", "C" and "D"
Petitioners
And
Ernst & Young Inc.
Intervenor

**REASONS FOR JUDGEMENT PRONOUNCED ON THE BENCH
ON A MOTION FOR AUTHORIZATION TO SUSPEND CERTAIN PAYMENTS TO PENSION PLANS MAINTAINED BY PETITIONERS (#37)**

THE CONTEXT

[1] AbitibiBowater Inc. and its affiliated companies are asking the Court to suspend the payment of certain contributions to the pension plans of its subsidiaries Abitibi (20) and Bowater (13).

[2] At the time of the motion for issuance of an initial order, the judge responsible for supervision of the present file postponed this specific motion, contained in paragraphs 22 and subsequent of the initial application, before the undersigned and after interested parties were advised of the matter.

[3] In support of its motion, presented pursuant to s. 11(3) and (4) of the *Companies' Creditors Arrangement Act* (CCAA)[1], *Abitibi* argues that should it continue to make payments for past services and special payments (special payments for the purposes of this judgment) to the pension funds, it will be incapable of proceeding with its restructuring because it will have insufficient cash, even when taking into account the DIP financing that it has been granted.

INTERVENORS

[4] Both the Monitor and the *ad hoc* committee, which represents unsecured creditors with claims of up to $3 billion, and the DIP lender *Fairfax Financial Holdings Ltd.*, which lent $40 million to *Bowater*, support this motion submitted by *Abitibi*.

[5] The *Communications, Energy and Paperworkers Union of Canada* (CEP), the *Syndicat des employés professionnels et de bureau* (SEPB), as well as the *Fédération des travailleurs et travailleuses du papier et de la forêt* are contesting it.

[6] The regulators in charge of enforcing the laws applicable to the pension plans affected by the present motion, namely the *Régie des rentes du Québec*, the *Financial Services Commission of Ontario*, the *Superintendant of Pensions of British Columbia* and the *Superintendant of Pensions of Canada* are also intervening.

[7] They are not supporting or contesting the motion. They are considering, however, that in the event that the special payments are suspended, these cannot become an object of compromise during the restructuring. At their request, *Abitibi* agreed to the addition of the following conclusion:

> Nothing in this order shall be taken to extinguish or compromise the obligations of the Petitioners or Partnerships, if any, regarding payments under the Pension Plans.

[8] Counsel for these organizations has, furthermore, informed the Court that they are preparing to file a motion to establish the current service contributions in a manner different than that of *Abitibi*.

PROLOGUE

[9] At this time, further details must be provided in order to better understand the issues argued by the parties. Indeed, there is a distinction between the financing of a pension plan and the rights and benefits that it provides.

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[1] *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36)

[10] The motion for suspension involves a portion of the legal and contractual obligations of *Abitibi* with respect to the funding of the pension plans that it implemented for the benefit of its employees and for which it has the obligation to make up any actuarial difference.

[11] In other words, *Abitibi* is not asking to modify the terms of the pension plans or the collective agreements, but instead to suspend the execution of a part of its financing obligations, namely the payment of the special contributions. There is no question of suspending the current contributions, meaning for current service, that *Abitibi* will continue to make during the restructuring.

THE SPECIAL PAYMENTS

[12] The size of the amounts in question is considerable.

[13] Actuarial valuations conducted for each pension plan identify the actuarial deficits and the payments to be made. These valuations are necessary in order to take into account the performance and the fluctuations of the pension fund and the events that arise over the course of the plan.

[14] According to these actuarial valuations, at the time of the initial application, the solvency deficit (assuming the pension plans terminated today) is of the order of $1.383 billion for the aggregate of all the pension plans of *Abitibi* and *Bowater*.

[15] The special payments aim to make up the solvency deficit of the pension fund and are amortized over a period of five years.

[16] The solvency deficit of the *Abitibi* plan is $962 million. For the *Bowater* plan, it reaches $419 million. One must add to this the actuarial deficit of approximately $70 million pursuant to improvements made to the pension plans which came into effect on May 1, 2009, that Justice Gascon refused to modify in his judgment of May 4.

[17] According to the report of the monitor and the testimony of the actuary overseeing the plans, the special payments, required to amortize the solvency deficit over a period of five years, are $102.4 million per year for *Abitibi* ($8.5 million per month) and $56.9 million per year for *Bowater* ($4.7 million per month), for a total monthly payment of $13.2 million.

CURRENT SERVICE CONTRIBUTIONS

[18] These consist of payments required by *Abitibi* for the purposes of financing the current service of its active employees. They are $43.7 million per year, $28.6 million for the *Abitibi* plan and $15.1 million for the *Bowater* plan.

[19] To this must be added the payment of $400 000 for all plans in effect since May 1, 2009.

[20] Abitibi will continue to make these payments to the pension plan during the restructuring.

THE ISSUES

[21] Three issues are in dispute in the present case, namely:

1) Does the Superior Court have jurisdiction?

2) Are the special payments aimed at rectifying a deficit for services rendered prior to the application for an initial order?

3) If yes, is it thus appropriate, in the circumstances, to suspend the special payment for the period of restructuring?

ANALYSIS

1. Does the Superior Court have jurisdiction?

[22] The objectives of the CCAA were expressed by Justice Gascon[2] in the judgment he rendered on May 4 in the present case. The court fully agrees with this meaning and endorses what he set out in paragraphs 3 to 14 of his judgment.

[23] The Court adds that the CCAA was introduced in 1933, during the Great Depression, to deal with the global economic crisis. Used frequently at the outset, it thereafter entered a quiet period. Nevertheless, in the last twenty years it has enjoyed a remarkable resurgence. Many doubted the relevance of returning to this unique law in the context of a more flourishing economy. In the face of international economic and financial chaos, it can be said today without a doubt that this legislation has regained its stature.

[24] Addressing now the issue of the jurisdiction of the Court pursuant to the CCAA, the nature and the scope of the desired conclusions must be understood.

[25] The Court reiterates that the benefits and advantages that flow from the pension plans and that form part of the collective agreements cannot be unilaterally modified. This issue was already resolved by the Court of Appeal of Quebec in three different cases: *Mine Jeffrey*[3], *Uniforet*[4] and *TQS*[5]. Justice Gascon confirmed it once again on May 4, in the present case.

[26] The application concerns the financing of the pension plans. Effectively, *Abitibi* is asking to suspend its obligation to finance in part the pension plans, by suspending its special payments.

[27] The Superior Court has jurisdiction to decide if there is reason to order the suspension of the special payments to the fund of a supplemental pension plan. This is not a new issue and has been ruled upon by courts in both Quebec and Canada.

[28] In *Mine Jeffrey*[6], the debtor had obtained protection under the CCAA in order to restructure. The Court of Appeal of Quebec decided that the employer could not unilaterally modify the collective agreement, but granted the request to suspend special payments during the restructuring period.

[29] The suspension of special payments was also ordered in *Papiers Gaspesia*[7] by Justice Chaput of this Court.

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[2] May 4, 2009 judgment of Justice Clément Gascon on the motion for declaratory judgment, in the present case.
[3] *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.* [2003] R.J.Q. 420 (C.A.).
[4] *Unifôret inc. c. 9027-1875 Québec inc.* [2003] R.J.Q. 2073 (C.A.).
[5] *Syndicat des employées et employés de CFAP-TV (TQS-Québec), section locale 3946 du Syndicat canadien de la fonction publique c. TQS inc.*, J.E. 2008-1578 (C.A.) [2008] QCCA 1429.
[6] Ibid note 3.
[7] *Papiers Gaspésia inc.* [2004] Cam: 00 40296 (QC S.C.).

[30] More recently, in *Collins v. Eickman Automotive Canada Inc.*[8], Justice Spence of the Superior Court of Ontario conducted an exhaustive review of the Canadian jurisprudence on the issue (including the judgment of the Court of Appeal in *Mine Jeffrey*)[9].

[31] Justice Spence highlights the important distinction between the rights that flow from a collective agreement, particularly those set out in the pension plan, and the performance of obligations to give them effect. From a jurisdictional point of view, he adds that, despite the provincial statutory framework that obliges the employer to make special payments on an as-needed basis, such payments still remain claims that can be suspended and that will be addressed once the protection offered by the CCAA has ended.

[32] The Court shares this opinion and henceforth considers that it has jurisdiction to settle the issue that is before it.

[33] Before approaching the second issue at hand, it is necessary to respond to one of the submissions of the unions. They claim that pension plan participants have a distinct status and that they should thus be treated differently from other creditors.

[34] With all due respect, whether by virtue of the CCAA or s. 49 of the *Supplemental Pension Plans Act* (SPPA)[10], the creditors involved are ordinary creditors, that the legislator did not choose to protect in the context of the present restructuring. The wording of s. 49 of the SPPA is not sufficient in itself to imply that a genuine trust having priority over other creditors is created. Furthermore, the Court of Appeal of Ontario, in *Ivaco*[11], while deciding on the scope of s. 57(3) of the *Pension Benefit Act*[12] (the terms of which are to the same effect as those of s. 49 of the SPPA), states the following with respect to deemed trusts:

> *[…] This Legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so.*

[35] While it is true that s. 81.5 of the *Bankruptcy and Insolvency Act* (BIA) sets out a super priority for employee contributions that are deducted at source by the employer and the current contributions that the employer must make to the pension plan for current service, the BIA is nevertheless not applicable in this instance.

[36] For one thing, the restructuring is conducted pursuant to another statute that does not set out such a priority and, for another, this priority does not contemplate special payments, since it is limited to deductions at source and current service contributions.

2. <u>Are the special contributions aimed at reversing a deficit incurred for services rendered prior to the motion for an initial order?</u>

[37] Under s. 11(3) of the CCAA, the initial order cannot suspend the rights or claims that result from obligations related to goods and services supplied <u>after</u> the initial order.

[38] The unions allege that the special contributions are aimed at satisfying obligations that flow from services rendered by employees after the motion for initial order.

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[8] *Collins & Aikman Automotive Canada Inc. (Re)* [2007] O.J. N^{o} 4186 (Ont. S.C.).
[9] Ibid note 3.
[10] R.S.Q., c. R.-15.1.
[11] *Ivaco Inc. (Re)*, 2006-275 D.L.R. (4th) 132 (Ont. C.A.) paragr. 46.
[12] R.S.O. 1990 c. P.8.

[39] With all due respect, this argument has no basis.

[40] The unions base themselves on a comment by Justice Farley of the Superior Court of Ontario who, in *Ivaco*[13] in the first instance, said as follows:

> *Notwithstanding that past service contributions could be characterized as functionally a pre-filed obligation, legally, the obligation pursuant to the applicable pension legislation is a "fresh obligation".*

[41] With respect, this assertion is not determinative and furthermore was removed by Justice Spence in *Collins*[14], who wrote as follows:

> *The amount of the outstanding special payments in the present case appears to have been determined prior to the initial order based on information relating to the pre-filing period.*

[42] Further along, he adds:

> *It is not apparent that the continuation of the operation of the applicant in the post-filing period has given rise to the increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-fling experience.*
>
> *Consequently, it seems tendentious to characterize the outstanding special payments as the cost of operating in the post-filing period.*

[43] In the case at hand, the actuarial valuations, that determined the amount of the special payments and for which suspension is being requested, all originate prior to the motion for the initial order. Furthermore, the actuarial valuation of the *Régime de retraite applicable aux employés syndiqués de la compagnie Abitibi-Consolidated Company of Canada*, by far the largest, is dated December 2, 2006.

[44] As in *Papiers Gaspésia*[15] and *Mine Jeffrey*[16], the suspended special payments were identified prior to the filing of the motion for initial order and are not outstanding for services rendered after the filing of the motion.

3. <u>If yes, is it appropriate, in the circumstances, to suspend payment for the restructuring period?</u>

[45] Although the Court, which supervises and is called upon to adjudicate issues in the context of a restructuring of this scope, enjoys vast judicial discretion, this discretion still has its limits.

[46] Judicial discretion must be exercised in compliance with existing laws that the Court cannot modify.

[47] The core objective of the CCAA is to allow the company to emerge from its slump and to come to a possible agreement with its creditors. To accomplish this goal, the support, and even the sacrifice of all the stakeholders is essential.

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[13] *Ivaco Inc. (Re)* [2005] O.J., No 3337 (Ont. S.C.) paragr. 4.
[14] Ibid note 8, paragr. 103.
[15] Ibid note 7.
[16] Ibid note 3.

[48] The conflict arises here between *Abitibi*, insolvent and confronted with a global economic crisis, its ordinary creditors who support it and its employees.

[49] The consequences of the measures sought and contested by the two groups are significant. If *Abitibi* cannot restructure because the special payments it is making are jeopardizing its survival, then this raises the danger of a closing of the business, the loss of jobs, the termination and the liquidation of the pension plans.

[50] The actuary testifies that as of the date of the motion for initial order, the solvency of the plans was at about 75%. This means that in the case of termination, the benefits payable would be discharged to a maximum of this percentage.

[51] Furthermore, *Abitibi*, together with all of its creditors, employees, lenders and suppliers, can meet this challenge and emerge from the deadlock by agreeing to an arrangement to put the business back on its feet, in the short or long term. Conditions for the reimbursement of the suspended payments could be agreed upon with the backing of the proper authorities. This will take place at a different stage.

[52] In the interim and in the absence of an agreement between the parties, the Court must rule on the third issue: whether the financial situation of *Abitibi* warrants suspension of the special payments.

[53] According to the monitor's representative, the restructuring is doomed to fail if the $13 million monthly payments are made. He filed, with his report, the cash flow projections between now and July 19, 2009, for both *Abitibi* and *Bowater*.

Bowater

[54] At the time the initial order was made, *Bowater* obtained bridge financing of $40 million from *Fairfax*, in order to permit the company to continue its current activities, as well as pay suppliers of goods and services, from the date of the motion for the initial order.

[55] *Fairfax* indicated to the Court that this financing was extended in order to finance current activities of *Bowater* and could not be used towards the payment of special contributions to the pension plans. The financing is also subject to the respect of certain solvency ratios.

[56] Although the filed forecasts include the $40 million financing from *Fairfax* and omit the monthly special payments of $4.7 million, they demonstrate the precarious financial position of *Bowater* in the short term.

[57] In July 2009, only $17.773 million will be left to maintain the *status quo*, continue the operation of the business and fuel its restructuring. If it had to make the special payments due since March 31, 2009, the result is evident: there would be no cash left.

Abitibi

[58] *Abitibi*'s situation is not any better. It was only yesterday that the company received "in extremis" temporary financing of $100 million. In fact, the amounts available to *Abitibi* from this financing represent at the most $87 million. The lender stipulated that the funds be utilized for

the sole purpose of maintaining current activities, and imposed solvency ratios that will not be satisfied if *Abitibi* must make the payments at issue.

[59] In the end, the name says it, the financing is temporary. It must be reimbursed in November 2009, pursuant to the sale of assets by the company.

[60] Apart from the DIP financing and the monthly contribution payments of $8.5 million, the forecasts filed for the period up to July 19, 2009 leave cash of $70 million. This does not include the additional payments for current service required for the current service contributions following the modifications that came into force May 1, 2009.

[61] As the monitor clearly explained in his report and testimony, *Abitibi* does not have enough leeway. The business needs oxygen in order to face the upcoming crucial months of restructuring. The Court refers particularly to paragraphs 42 to 51 and 57 to 60 and 63 of the third report of the monitor.

[62] It is thus necessary to suspend payment of the special contributions.

[63] Furthermore, after analysis, the Court will grant the conclusion identified as being paragraph 23, as well as that of paragraph 24, upon which the parties have agreed.

[64] Since the present judgment modifies the initial order drafted in English, the order is set forth in English.

FOR THESE REASONS, THE COURT :

1. **GRANTS** the Motion for Authorization to Suspend Certain Payments to Pension Plans Maintained by the Petitioners (N° 37).

2. **AMENDS** as follows the Initial Order issued by this Court in this matter on April 17, 2009, as amended on April 22 and May 6, 2009 by adding these paragraphs after Paragraph 21 of the Initial Order :

    [22] **ORDERS** that notwithstanding any other provision of this Order, the Petitioners and the Partnerships shall not make any past service contributions or special payments to funded pension plans maintained by the Petitioners or the Partnerships (the "Pension Plans") during the Stay Period, pending further order of this Court.

    [23] **ORDERS** that none of the Petitioners or the Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any Person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any Pension Plans maintained by a Petitioner or by a Partnership.

[24] **ORDERS** that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions in accordance with Sections 81.5 and 81.6 of the Bankruptcy and Insolvency Act) during the Stay Period that such Person might otherwise have become required to make to any Pension Plans but for the stay provided for herein, no such claim lien, charge or trust shall be recognized in these proceedings or in any subsequent receivership, interim receivership or bankruptcy of any of the Petitioners or the Partnerships as having priority over the claims of the CCAA Charges as set out in this Order.

[24.1] **ORDERS AND DECLARES** that nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

3. **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

4. **THE WHOLE WITHOUT COSTS.**

Danièle Mayrand, j.c.s. (signed)

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Date of Hearing : MAY 4, 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 Jonquière 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