SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-11-036133-094

DATE : **MAY 26, 2009**

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

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT RELATING TO:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
THE OTHER DEBTORS LISTED ON SCHEDULES "A", "B", and "C"
Debtors (Respondents)

AND
JEAN-SYLVAIN LEBEL
Petitioner

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

REASONS FOR JUDGMENT DELIVERED ON THE BENCH ON A DE BENE ESSE MOTION FOR DECLARATORY JUDGMENT (# 104)

INTRODUCTION

[1] Does the Initial Order of this Court dated April 17, 2009 force the Debtors to respect the severance agreements previously concluded and, more specifically, does it force the Debtors to continue paying the severance pay set out in these agreements?

[2] In short this is the issue raised by the motion[1] filed by Jean-Sylvain Lebel, who is a former vice president, Forestry (Canada) and vice president, Fiber supplies (Quebec) of the Debtors, whose employment was terminated on April 7, 2008.

[3] As everyone knows, Mr. Lebel's motion was filed in the context of the restructuring process undertaken by the Debtors under the CCAA[2].

[4] The relevant facts are admitted. They can be summarized as follows.

THE FACTS

[5] On March 28, 2008, after twenty three (23) years of service for the Debtors, Mr. Lebel's position is eliminated. On April 7, the parties sign a severance agreement[3] that provides for the payment of Mr. Lebel's salary every two (2) weeks for a period of two (2) years, until April 1st, 2010.

[6] Employer and employee contributions to the pension plans are maintained on the same terms, as well as certain other benefits.

[7] The agreement clearly stipulates that Mr. Lebel's position has been eliminated and that his status as an active employee ends on March 31, 2008.

[8] On April 7, Mr. Lebel also signs a release that includes a two (2) year non-competition commitment, unless he obtains prior approval from AbitibiBowater, which approval cannot be denied without valid reason.[4]

[9] On April 21, 2009[5], following the Initial Order, AbitibiBowater stops making the payments and contributions set out in the severance agreement, with one year left to the agreement. This represents more than two hundred thousand dollars ($200,000) for Mr. Lebel.

[10] This being said, it is undisputed that Mr. Lebel's situation is by no means unique. AbitibiBowater represents that all severance pay of unionized or non unionized employees of the company are dealt with on the same footing. From the former President and Chief Executive Officer to the most modest of employee, no exceptions apply. The Monitor's first report confirms this to a certain extent, at paragraphs 66 and 67.

THE PARTIES' POSITION

[11] To support his position, Mr. Lebel cites paragraph 21a) of the Initial Order, that reads:

---

[1] De bene esse motion for declaratory judgment and orders for compliance with and enforcement of a severance agreement dated May 14 2009.
[2] Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
[3] Exhibit R-1
[4] Exhibit R-2
[5] Exhibit R-3

> [21] ORDERS that the Petitioners and the Partnerships shall be entitled to pay the following expenses whether incurred prior or after this Order:
>
> > a) all outstanding and future wages, salaries, commissions, vacation pay, current pension contributions and other benefits, reimbursement of expenses (including, without limitation, amounts charged by employees to credit cards) and other amounts payable to former, current or future employees, officers or directors on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

[12] Consequently, from his point of view, AbitibiBowater is compelled to continue making the payments relating to his outstanding severance pay.

[13] AbitibiBowater replies that this wording is not imperative, that the payment in question does not fall under what is allowed by section 11.3 of the CCAA and that the Court's statutory discretion should not be exercised in the way that is hoped for here.

ANALYSIS AND DISCUSSION

[14] Although the Court can sympathize with the sad situation that Mr. Lebel faces, in this Court's opinion the motion is groundless.

[15] Firstly, paragraph 21a) of the Initial Order does not have the meaning or scope that Mr. Lebel gives it.

[16] Secondly, payment of a severance pay, such as the one at issue here, does not fall under section 11.3 of the CCAA.

[17] Finally, exercising the Court's statutory discretion in the sense asked for would ultimately go against the goal and purpose of the CCAA, which is to facilitate the conclusion of a possible arrangement between the Debtors and their creditors, by maintaining in the meantime the status quo and a fair but delicate balance between the positions of everyone, no matter how painful it could sometimes be.

[18] The reasons for this are the following.

[19] To begin with, paragraph 21a) is not imperative. It is permissive. Contrary to what Mr. Lebel argues, it does not force the Debtors to pay the severance pay "*outstanding… on the date of this Order*". It only entitles them to do so ("*shall be entitled*").

[20] With respect, the argument made by Mr. Lebel's attorney based on a comparison of the wording of paragraphs 21 and 25 of the Initial Order is groundless. At the hearing of April 17, 2009, the Court struck out the words "*but not required*" of proposed paragraph 21 for a single reason that the Court explained as follows.

[21] The Court wanted the Initial Order not to be construed as authorizing the Debtors not to pay the active employees' salaries to come, contrary to section 11.3 of the CCAA.

[22] At the time, the Court stated not being in favor of the wording of this paragraph, which it considered a source of potential confusion. This paragraph is actually not used in the model orders applied for in this province. It is borrowed from the "*Template Orders*" used in the provinces of Ontario and of British-Columbia.

[23] In fact, on the one hand, the wording of this paragraph seems to give the Debtors unwarranted and inappropriate discretion in the payment of severance pays owed prior to the Initial Order.

[24] AbitibiBowater acknowledges this, but adds that all concerned employees have been until this day treated the same way as Mr. Lebel. It is out of the question to waive this principle for whomever in the future.

[25] Be that as it may, the Court considers that if the paragraph can allow such an interpretation and such discretion, it must be corrected right now to avoid any ambiguity or, worse, any wrongful usage of its terms.

[26] Neither the Court nor AbitibiBowater wanted this paragraph to confer to the Debtors complete and unfettered discretion to decide if the severance pay prior to the Initial Order had to be paid to some and not to others.

[27] The Court will thus clarify the situation for the future, in the interest of everyone.

[28] On the other hand, the wording of this paragraph 21 borrowed from the "*Template Orders*" of Ontario and British Columbia goes much further than the goal actually aimed for. In fact, the Court is of the opinion that this wording goes way to far.

[29] The explanatory notes attached to these "*Template Orders*" are revealing. They state as follows on page 3 of the Ontario "*Template Order*":

> *Three paragraphs in each order deal first with permitted payments of liabilities whether incurred* ***before or after*** *the making of the initial order and second with the payment of liabilities incurred* ***only after*** *the making of the initial order. The category of permitted payments for pre-filing liabilities is intentionally limited, on the general theory (…) that all pre-filing payments should be treated equally pending the filing and approval of a Plan, which usually means that payments regarding pre-filing liabilities are suspended until the Plan is approved, and that such payments are then made only in accordance with an approved Plan. These forms of CCAA orders permit payment of some pre-filing liabilities simply to avoid the administrative issues which would otherwise arise from the halting of payments which relate to "stub periods" 3 for regular and frequent payments such as wages. The Committee discussed the need to have a clause allowing the payment of pre-filing "critical" supplier accounts, either with a cap or some form of Monitor approval (or both). The Committee decided that the authorization to pay specific pre-filing creditors should be addressed on a case-by-case basis and that it would be appropriate for such a clause to be highlighted to the Court in a blackline to the model order.*

[30] As for the explanatory notes included with the British Columbia "*Template Order*", they state the following on this type of clause:

> *[1] Paragraphs 5 and 6 were separated to make it clear that only very limited payments may be made on account of pre-filing accruals and expenses. The Petitioner may consider seeking authority to make other payments during the stay, such as an amendment to paragraph 6 allowing certain payments to creditors, including critical supplier payments…*
>
> *[…]*
>
> *The definition of Wages in paragraph 5(a) is intended to allow payment of these amounts even if owed prior to the Filing Date in recognition of the fact that Wages are paid at the termination of a stub period and that continued employment is critical to the ongoing operations of the Petitioner…*

[31] These explanatory notes make it obvious that the paragraph's objective is not to force the payment of the severance pay owed before the Initial Order, nor to confer complete discretion to the Debtors in this regard.

[32] In sum, because of its wording, intent and objective, paragraph 21a) does not support Mr. Lebel's claim that he is entitled to a payment that no one else, in a situation similar to his, has received.

[33] However Mr. Lebel is completely right to underline the weakness of this paragraph's wording and the inappropriate discretion that it seems to confer. His intervention has the merit of having brought this issue to the Court's attention and forced a necessary correction to the Initial Order to eliminate any ambiguity in the future.

[34] If only for this reason, costs will not be set up against him.

[35] Secondly, in the circumstances, section 11.3 of the CCAA is of no help to Mr. Lebel.

[36] Mr. Lebel claims that he is obligated under an on-going non-competition commitment towards the Debtors, which justifies the corollary payment of the severance pay that he is claiming

[37] The Court disagrees.

[38] Mr. Lebel is not providing any post-filing services to the Debtors. Since March 2008, he is no longer an active employee of the Debtors. Section 11.3 does not apply in his case.

[39] Moreover, Mr. Lebel's non-competition agreement specifically allows AbitibiBowater to grant Mr. Lebel permission to compete notwithstanding the agreement, which permission cannot be denied without a valid reason. Inasmuch as Mr. Lebel considers it necessary to obtain such consent for the future, it is hard to see how AbitibiBowater could reasonably be justified to deny it in the present circumstances.

[40] Finally, the Court believes that it should not exercise any statutory discretion in order to allow Mr. Lebel to continue receiving his severance pay.

[41] Firstly, this would give him privileged status compared to other ordinary creditors, which would be at odds with the delicate balance the Court must preserve between the rights of everyone.

[42] Secondly, as Mr. Lebel is unsurprisingly not the only one in his situation, this would place in a separate class an entire category of creditors, namely the employees having the right to a severance pay. They would consequently be subject to a different treatment than the creditors of similar ranking, for example suppliers or holders of unsecured debentures. This is unjustifiable.

[43] Lastly, there are no precedents under the CCAA that support Mr. Lebel's claims. In fact, the relevant authorities rather lean towards the opposite direction.

[44] In *Mine Jeffrey*[6] and *TQS*[7], the Court of Appeal reminds us that employee claims owed prior to the Initial Order do not have priority or privileged status. Of course, this includes the claims relating to a severance pay.

[45] As well, in *Communications, Energy, Paperworkers, Local 721 v. Printwest Communications Ltd.*[8], the Court of the Queen's Bench of Saskatchewan states that "*severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.*"[9]

[46] Therefore, no matter from what angle one considers Mr. Lebel's request, nothing justifies it. His claim, along with many others, will be the subject of the Debtors' plan of arrangement to come. This is the objective that the Court must continue to favor. Until the contrary is proven, this is the fairest and most favorable solution for all of the creditors.

[47] Thus, the Motion will be dismissed without costs, as an immediate correction of the wording of paragraph 21 of the Initial Order is necessary.

FOR THESE REASONS GIVEN VERBALLY AND REGISTERED, THE COURT:

[48] **DISMISSES** the Motion;

[49] **AMENDS** once again the Second Amended Initial Order dated May 6, 2009, in order for paragraph 21 to read henceforth as follows:

> *[21] ORDERS that the Petitioners and the Partnerships shall be entitled to pay the following expenses incurred after this Order:*

---

[6] *Syndicat national de l'amiante d'Asbestos* c. *Mine Jeffrey inc.,* [2003] R.J.Q. 420 (C.A.).

[7] *Syndicat des employées et employés de CFAP-TV (TQS-Québec), section locale 3956 du Syndicat canadien de la fonction publique* c. *TQS inc.*, J.E. 2008-1578 (C.A.), 2008 QCCA 1429.

[8] (2005), 16 C.B.R. (5th) 244, 2005 SKQB 331 (CanLII), par. 11

[9] See also *Pacific National Leaseholding Corporation (Re),* [1992] B.C.J. No. 3070 (BC S.C.); *Mirant Canada Energy Limited (Re),* 2008 CarswellAlta 352 (Alta Q.B.), and *West Bay SonShip Yachts Ltd. (Re),* 2009 BCCA 31 (CanLII).

a) all wages, salaries, commissions, vacation pay, current pension contributions and other benefits, reimbursement of expenses (including, without limitation, amounts charged by employees to credit cards) and other amounts payable to current or future employees, officers or directors after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

b) all amounts owing to or in respect of individuals working as independent contractors in connection with the Petitioners' business;

c) all amounts payable after the date of this Order in respect of (i) customer programs including, inter alia, rebates, adjustments, performance and volume discounts, and (ii) billing errors, including duplicate invoicing, improper invoicing, duplicative payment, mispricing and various other billing and payment errors;

e) the fees and disbursements of any Assistants retained or employed by the Petitioners or the Partnerships in respect of these proceedings, at their standard rates and charges; and

f) the interest, fees and expenses payable under the Canadian Credit Agreement (as defined hereinafter).

Notwithstanding the foregoing, from and after May 26, 2009, the Petitioners shall be entitled to make any payments of the same nature as those referenced in paragraphs 21a) or 21b) that were due or accruing due prior to April 17, 2009, provided that prior leave of this Court is first obtained. Exceptionally, for de minimis payments of up t0 $2, 000 per affected employee or $50,000 in the aggregate, the prior authorization of the Monitor shall be sufficient.

[50] **WITHOUT COSTS.**

(signed)
CLÉMENT GASCON, J.S.C.

Sean Dunphy, Guy P. Martel, Joseph Reynaud
STIKEMAN ELLIOTT
Attorneys for the debtors

Gilles Paquin
FLANZ FISHMAN MELAND PAQUIN
Attorneys for the Monitor

Robert Thornton

THORNTON GROUT FINNINGAN
Attorneys for the Monitor

Bernard Boucher
BLAKE CASSELS & GRAYDON LLP
Attorneys for BI CITIBANK, N.A. (London Branch) and CITIBANK, N.A.

Alain Riendeau
FASKEN MARTINEAU
Attorneys for Silver Oak Capital LLC et al., DDJ Capital Management, LLC et al.

Michael J. MacNaughton
BORDEN, LADNER, GERVAIS LLP (Toronto)
Attorneys for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Frederick L. Myers
GOODMANS LLP
Attorneys for the Ad Hoc Committee of Bondholders

Danny Venditti
TRUDEL NADEAU
Attorneys for the Communications, Energy & Paperworkers Union of Canada (CEPC) and local unions 59-N, 63, 84, 84-35, 88, 90, 92, 101, 109, 132, 138, 139, 161, 209, 227, 238, 253, 306, 352, 375, 1256 and 1455

Laval Dallaire
GAGNÉ, LETARTE
Attorneys for the Petitioner, Jean Sylvain Lebel

S. Richard Orzy
BENNETT JONES
Attorneys for the Official Committee of Unsecured Creditors of Abitibibowater Inc. et al.

Denis Clouthier
CAIN LAMARRE
Attorneys for the municipalities of: St-David-de-Falardeau, Girardville, Normandin, St-Thomas-Didyme, De La Doré, Petit Saguenay and Saguenay, Alma, Roberval and Dolbeau-Mistassini

Date 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 L IMITED PARTNERSHIP**
3. **ABITIBI-CONSOLIDATED FINANCE LP**