SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-11-036133-094

DATE : **MAY 4, 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 Debtors listed on Schedules "A", "B" and "C"
Debtors
And
Ernst & Young Inc.
Monitor
And
COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL SECTIONS 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
Petitioners

REASONS FOR JUDGEMENT PRONOUNCED ON THE BENCH ON A MOTION FOR A DECLARATORY JUDGEMENT (#30)

INTRODUCTION

[1] In the context of the restructuring process initiated by Abitibibowater Inc. under the *CCAA*[1], the CEP[2] presents a motion[3] aiming to have declared null and illegal Abitibi-Consolidated Inc.'s decision to suspend, commencing May 1st, 2009:

a) the right to early retirement without actuarial reduction of its employees aged 57 and counting 20 years of continuous service; and

b) the increase in the pension formula applicable to the active employees from 1,70% to 1,75%.

[2] The context is as follows.

THE CONTEXT

A) THE *CCAA*

[3] On April 17, 2009, the Court pronounced an initial order placing AbitiBowater under the protection of the *CCAA*.

[4] Although each of the numerous intervenor's familiarity with the process varies largely, the objective of this law is well known. The *CCAA* aims at allowing AbitibiBowater to restructure its business, operations and debt.

[5] The means the law gives AbitibiBowater is the development, negotiation, and implementation of a reasonable and fair plan of arrangement with its creditors on which they will vote.

[6] This process is above all the debtors' and creditors' affair. The Court's role is one of supervision. The ultimate goal is the conclusion of a successful plan of arrangement with a perspective of continuity of the operations and survival of the company. At stake is the interest of all the intervenors and that of society as a whole according to some. To paraphrase Judge Blair in *Metcalfe*[4], the *CCAA* has a "*broader social economic purpose*" and a "*wider public interest*".

[7] To achieve this objective, the *CCAA* gives the Court an important statutory discretion coupled with a certain inherent jurisdiction. These powers must be exercised in accordance with the fundamental objective of the law, which is to facilitate the conclusion of possible plan of arrangement between the debtors and their creditors.

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[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
[2] Communications, Energy and Paperworkers Union of Canada.
[3] Motion for a declaratory judgement aiming at maintaining in effect collective agreements existing until the conclusion of a new agreement between the parties.
[4] *Metcalfe & Mansfield Alternative Investments II Corp.,* (Re), 2008 ONCA 587 (CanLII), paragraph. 52 and 53.

[8] In this perspective, maintaining a certain status quo during the process is essential. As of its pronouncement, an initial order, like the one rendered in the case at bar, suspends for all creditors all rights and remedies pending against the debtors and their assets. The same applies to the payment of debts arising from these rights and remedies.

[9] However, even if the Court has to be certain that the pursuit of the *CCAA*'s objective is done at the best cost and at the best possible conditions for the creditors, an inevitable finding remains. This process cannot be conducted without hurt and sacrifice. At the end of the line, the creditors or certain classes of creditors will unavoidably pay a price.

[10] Indeed, it must be stressed that in a restructuring process where the company is insolvent from the start, it would be unrealistic to think that the process would result in an absence of sacrifice or concessions from the concerned creditors. The perspective of continuity of the operations and of survival that the law favors cannot be realized without paying a certain price.

[11] Thus, with regards to the concerned creditors, it is altogether rare that the claims of certain creditors shall not have precedence over the claims of other creditors. The supervisory role of the Court then takes all its meaning. In the search of the optimal avenue leading to a successful restructuring, the Court must be conscious of the necessity of maintaining an equilibrium, that may be fragile and is often painful, between the rights of all.

[12] AbitibiBowater's situation is no different. The company is insolvent. It claims it faces a serious liquidity crisis in a market undergoing important changes in the context of a financial and economical crisis.

[13] The importance of its debt is undeniable. It approaches US$ 6 billion for Abitibi and is around US$ 3 billion for Bowater[5].

[14] Not surprisingly, the impacts of the process are significant. They affect a wide and disparate scope of creditors, whether guaranteed or not, who may be lenders, holders of debentures or other debt securities, suppliers or employees.

B) THE LITIGATION

[15] For the time being, in the present case, the litigation only concerns Abitibi's side of the process. It is also limited to a question that is only related to the collective agreements of its unionized employees members of the CEP. However, it would be false to think that it only impacts Abitibi and Abitibi's unionized employees members of the CEP.

[5] See paragraphs 165 and 205 of AbitibiBowater's initial claim dated April 17, 2009.

[16] The issue arises from a Memorandum of Agreement[6] signed by the CEP and Abitibi in July of 2004. This memorandum has an impact on no less than 18 collective agreements negotiated by the CEP for its members[7]. It is admitted that this memorandum is part of the collective agreements and that all the collective agreements are in full force.

[17] At its page 4, the Memorandum of Agreement states the following with respect to the pension plans:

> As of May 1, 2009, the rules of the pension plan will be modified so that the pension and bridge benefit of an active employee 57 years old and counting at least 20 years of continuous service at the time of his early retirement will be payable without reduction, […].

[18] At the same page, the Memorandum states that an adjustment of the pension formula of active employees from 1,70 to 1,75 % is to take place as of May 1st, 2009. There is also an increase in the contribution of the employees to pension plans from 7 to 7,5 % as of the same date.

[19] No one doubts the validity and legality of these clauses that, of course, improve the pension plans to the benefit of the active employees of Abitibi as of May 1st, 2009.

[20] However, by e-mail and letter sent April 27th, 2009[8], Abitibi notified the CEP of the changes. Firstly, in the e-mail, it says inter alia:

> Tried now just to call you to inform you that we are suspending the pension benefit improvements scheduled for May 1st, 2009.

[21] Furthermore, in the letter, it sets forth the following:

> […], the Company is no longer in a position to process amendments to its pension plans which have the effects of increasing liabilities, including the increase in the pension formula and the changes in the eligibility criteria for early unreduced retirement benefits scheduled to come into effect on May 1st, 2009 and resulting from a Memorandum of Agreement between the Company and the unions. […]

[22] Hence, Abitibi's decision is to suspend, commencing May 1st 2009:

a) the right to early retirement without actuarial reduction of its employees aged 57 and counting 20 years of continuous service; and

b) the increase in the pension formula applicable to its active employees.

6 Exhibit S-1.
7 See pertinent extract, exhibit S-3.
8 Exhibit S-2 and S-3.

[23] However, it is admitted that Abitibi does not suspend the application of the negotiated corollary, i.e. the increase in the contribution of the employees to the pension plans from 7 to 7,5 %.

[24] It is granted that Abitibi's actions are unilateral, without any preliminary discussions with the CEP and without its consent.

[25] Abitibi's alleges two reasons for acting in this way:

- Firstly, the impossibility of bearing the cost with respect to the financing of these improvements to the pension plans;

- Secondly, the impossibility of amending the plans because of the anticipated refusal of the *Régie des rentes* taking into account the financial consequences of such modifications.

[26] Abitibi alleges[9] that the improvements would increase the already existing 960 million dollar[10] actuarial deficit of the benefit based plans by 68 million dollars.

CLAIMS OF THE PARTIES

[27] The CEP considers Abitibi's decision illegal because it would amount to a repudiation of the collective agreement's negotiated terms which are in force and apply to the active employees.

[28] Abitibi replies that it does not have the capacity to respect its commitments and that the *CCAA* authorizes it to act as it did with respect to these benefits since the costs related to such benefits relate, for the most part, to the value of services rendered before the initial order was delivered.

DISCUSSION AND ANALYSIS

[29] With respect for the contrary opinion, the Court's view is that the CEP is right. Abitibi's decision is illegal and therefore null and without effect.

[30] Following the Court of Appeal's teachings on the subject, the Court considers that Abitibi cannot unilaterally modify the terms of a collective agreement applicable to its active employees in order to deprive them of certain rights, like the ones under the clauses discussed hereinabove.

[31] Neither the *CCAA*, nor the initial order authorize it to act in such a way.

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9 Exhibit I-1.

10 Paragraph 222 of AbitibiBowater's initial claim dated April 17, 2009.

[32] The reasons alleged by Abitibi to act as it did do not hold up. They result from an erroneous confusion on its part between the rights these collective agreements confer and the execution or enforceability of the potential claims in which they could result.

[33] Certain explanations to the benefit of all are appropriate.

a) The Court of Appeal's Teachings

[34] The Court's answer to the question in dispute resides in the reasons of three decisions of the Court of Appeal of Quebec of the last years, each in the context of restructuring under the *CCAA*. Abitibi should have taken these into account. It didn't.

[35] Firstly, in *Mine Jeffrey*[11] pronounced in 2003, the Court of Appeal states the following:

> [50] […], nothing in the *CCAA* authorizes the monitor or the court to unilaterally suspend the consideration payable to the party supplying a good or service to the debtor. Furthermore, this consideration must be agreed upon with the supplier before the delivery or before the initial order, as for example in a contract involving sequential performance, or the consideration could also be provided in the law, in a by-law, a tariff or in other market rules. […]
>
> [51] In this case, given that the accreditations are not concerned by the orders rendered, that the lay-off of all the salaried unionized workers does not terminate the accreditations and that individuals are called back the following day or later to exercise positions concerned by accreditations, the consideration to be paid to these individuals must be the consideration provided by the collective agreements or any amendment thereto negotiated with the concerned union. This consideration includes the salary and any other benefit related to the services rendered following the initial order. In addition, like any other supplier, they may not require the supplemental payment of any other amount due when the initial order is delivered (s. 11.3, paragraph a) *in fine*); as regards these amounts, they will be creditors under the *CCAA*, to whom the debtor will possibly present an arrangement.
>
> [52] The defendant underlines that the impugned order only suspends temporarily the collective agreements and that this is possible under the staying powers of the court. I believe such a suspension to be illegal when its effect is to unilaterally set aside the clauses of the collective agreements relating to the consideration payable to the employees called back and concerned by the accreditations. […] It is not a suspension but a modification of the working conditions imposed unilaterally by the monitor and therefore does not respect the rights of the appellants resulting from the accreditations.
>
> (emphasis added)

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

[36] The Court of Appeal concludes by saying:

> [60] The collective agreements continue to be in force like any contract involving sequential performance not modified by mutual agreement after the initial order or not terminated (assuming this is possible for collective agreements). The monitor or the court cannot unilaterally amend them. This being said, a distinction is to be made regarding the payment of claims resulting from collective agreements.
>
> [61] Hence, the unionized employees who continued to provide services, or were called back to do so, have the right to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3) according to the terms of the applicable collective agreement in its original version or as amended with the consent of the concerned union. However for the services provided earlier, the obligations not performed by Mine Jeffrey inc. result in claims against Mine Jeffrey inc. for which the monitor cannot be held liable (s. 11.8 *CCAA*) and for which the employees may not require immediate payment (s. 11.3 *CCAA*).

(emphasis added)

[37] Secondly, in *Uniforêt*,[12] delivered the same year, the Court of Appeal adopts the same perspective in the following terms:

> [22] […], even though it is not part of the collective agreement, the Participation Plan sets in a large part the working conditions of the employees […]. Under section 11.3 of the *CCAA* as interpreted in *Mine Jeffrey*, these working conditions could not be unilaterally modified or terminated by the appellants. Admitting they could do so would mean that, notwithstanding what our Court has decided in this judgment, an employer could "terminate" unilaterally any part of the existing working conditions, whether or not they are covered by a collective agreement. He would actually be able to modify them at will in the future. On the contrary, on a going-forward basis, he must accept the existing conditions, end the supply of merchandise or services or negotiate with the supplier of goods and services. In this case with regards to Uniforêt's workers […], it should have first negotiated and reached an agreement with the defendant union if it chose to suspend the Participation Plan while maintaining the workers in their position.

(emphasis added)

[38] Thirdly, in a judgment from August 1st, 2008, Judge Rayle of the Court of Appeal discusses the status of the claims of unionized workers under the plan of arrangement filed in the context of the restructuring of TQS[13]. In this file, the union wanted the claims under the collective agreement to have a distinct status so that they would not be affected by the proposed transaction and thereby be wholly payable.

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[12] *Uniforêt inc. v. 9027-1875 Québec inc.,* [2003] R.J.Q. 2073 (C.A.).

[13] *Syndicat des 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.

[39] Judge Rayle replied that claims under a collective agreement do not benefit from any priority over the other unsecured claims (paragraph 23). She adds that while a debtor cannot exclude under the *CCAA* the conditions imposed by the negotiated collective agreement binding it, this does not mean that the employees' claims previous to the initial order must be wholly paid (paragraph 25).

[40] She is of the opinion that unionized workers do not have a priority or guaranteed status. She states that:

> [27] The representations of the appellant's lawyer are based on the erroneous premise that the workers have the right to a preferential status. […]

[41] The Court believes these teachings to be clear.

[42] On one part, Abitibi, as debtor, cannot, with regards to its active employees, terminate or suspend unilaterally the clauses of the collective agreements binding it, including the clauses of the Memorandum of Agreement which are an integral part of the collective agreements. By doing so, Abitibi would act illegally, breaching the rights of the CEP and its members.

[43] To set aside these clauses, it must negotiate and reach an agreement with the CEP. In fact, in a *CCAA* context, negotiation and discussion are often the parties greatest ally.

[44] However, on the other hand, with respect to Abitibi's liability for the services rendered before the initial order, the resulting claims, even if they are based on the collective agreements, do not benefit from a particular status, priority, privilege or guarantee.

[45] As a result, theses claims remain subject to the conditions of section 11.3 of the *CCAA* with regards their immediate payment right. According to this section, payment shall be due for the supply of services or valuable consideration provided after the initial order.

[46] Using Judge Journet's comments in TQS which were cited by Judge Rayle in her judgement from August 1st, 2008, the recognition of a right included in a collective agreement is different from the right to receive payment resulting from the former right. The recognition of a right differs from its execution.

[47] In the context of the *CCAA* and section 11.3, this distinction may have important consequences.

b) The Application to this Case

[48] Applied to the circumstances if this case, these teachings lead us to the following findings.

[49] The clauses at stake benefit Abitibi's active employees, i.e. those who have supplied services after the initial order. Commencing on May 1st, 2009, if they have at least 20 year of continuous service, the clauses give them the right to early retirement at 57 years of age, without any actuarial reduction. For some, this right may be exercised immediately. For others, this will occur in one, two, three or even many years.

[50] These clauses also modify the pension formula benefiting the active employees as of May 1st, 2009. The multiplier used to calculate the pension is increased from 1,70% to 1,75%. Again, the active employees who wish to benefit immediately from this increase may do so if they are eligible, others may do so at a later date.

[51] To the Court's understanding, the financial impact of these measures for Abitibi is twofold.

[52] Firstly, the improvements that these clauses bring would increase the actuarial deficit of the plans by about 68 million dollars[14]. However, the impact this will have on the amortization payments ("special payments" or "past service contributions") is unknown, as no evidence was presented, but such impact seems highly probable.

[53] At this time, according to Abitibi's allegation in its initial claim, the existing actuarial deficit of the benefit plans is of about 960 million dollar[15]. This deficit results in monthly amortization payments of about 8,5 million dollars according to paragraph 57 of the third report of the monitor. In all given proportions, the anticipated impact of the improvement clauses on the amortization payments in the present circumstances should be quite relative.

[54] Secondly, the modifications to the pension plans these clauses result in will also probably cause an increase in the employer's current service contributions, be it only because of the number of active employees who become eligible for these additional benefits.

[55] This being said, the pension plans, and not Abitibi, are the ones who pay the pensions or the bridge benefits to the eligible employees. Therefore the impact of the improvement clauses is on the plans themselves. Of course, Abitibi's contributions are directly affected, either because of the amortizations payments or because of the employer's current service contributions.

[56] To justify its decision to suspend the rights conferred by the clauses, Abitibi alleges its incapacity to finance the consequences of the application of the clauses. In doing so Abitibi confuses the costs relating to the performance of the rights the clauses confer and the rights themselves.

[57] On one hand, Abitibi cannot terminate unilaterally these rights conferred to the active employees, particularly given the fact that whatever the situation, these rights

[14] Exhibit I-1.

[15] Paragraph 222 of AbitibiBowater's initial claim dated April 17, 2009.

have a value, whether payable or not, which cannot be discarded without the consent of the CEP.

[58] On the other hand, it is not correct to allege that the costs related to the execution of the rights conferred by the clauses are necessarily what Abitibi calls amortization payments, special payments or payments relative to obligations or services previous to the initial order. It all depends on the situation.

[59] Two examples can illustrate this.

[60] Firstly, take an active employee of 54 years of age as of May 1st, 2009 who has 17 years of continuous service. The unilateral suspension of the clauses imposed by Abitibi deprives him of a right which gives rise to costs pertaining in part to services to be provided after the initial order and covered at minimum by the increase in the employer's current service contributions. Abitibi's argument based on related costs simply does not hold in such a case.

[61] Secondly, take an active employee of 57 years of age as of May 1st, 2009 who has 20 years of continuous service. The exercise of his right to an immediate early retirement without any actuarial reduction confers him a right to a pension increased by a certain amount and therefore a claim. Even in the case where Abitibi would be able to justify that in such a situation the better part of the costs related to the additional value of this pension were for services provided before the order, Abitibi's decision still deprives the employee at a minimum of his right to a pension increased by this amount. If such a right is valid and recognized but for whatever reason the additional value of the pension is not paid to the employee, this additional value can nonetheless be part of the possible global arrangement proposed to the creditors like any other claim.

[62] Again, Abitibi's decision penalizes without justification such an employee with regards to this right even in the case where the execution of this right would not be possible because, for example, of an impossibility to pay by the debtors or because of the non-application of section 11.3 of the *CCAA*.

[63] The Court considers that this is the unfair impact of Abitibi's illegal decision resulting from Abitibi's confusion between the respect of the right and the potential enforceability of the resulting claims.

[64] Abitibi's decision is even more unjustified given that the pensions are paid by the pension plans and not by itself. For the moment, it is unknown when, how and by whom will be felt the consequences of Abitibi's difficulty to pay amortization contributions or other special payments of the sort.

[65] It may also be added that Abitibi's decision is rather unfair in its application and quite clumsy. Although it alleges not to have the means to respect its commitments, Abitibi still maintains the counterpart payable by its active employees, namely the increase of their payments from 7 to 7,5 %.

[66] In other words, Abitibi is of the view that its unionized workers have the means to honor negotiated commitments which it considers valid and effective, but that Abitibi does not. It seems as if Abitibi is applying a double standard here.

[67] In this regard, the submission of Abitibi's lawyer on postfiling claims and prefiling claims is not relevant to the impugned decision.

[68] At issue here is a completely unilateral suspension of the exercise of a right of the active employees. The impact of this right on the resulting claims is another distinct issue. It arises, according to Abitibi, in particular with respect to amortization payments or special payments. This is another debate.

[69] Similarly the other submission presented by Abitibi's lawyer on the distinction between a "benefit at large" and a "specific work-related benefit" is not relevant at this stage.

[70] The ability to potentially limit the payment of claims that are said to be related to services rendered before the initial order cannot justify the termination, even on a temporary basis, of the right from which the claims arise.

[71] In this perspective, Abitibi's reading of paragraphs 57 and 58 of *Mine Jeffrey* is erroneous. It is not important that its obligations with respect to the benefits paid under the collective agreements do not create a priority status. This does not in any way authorize Abitibi to temporarily and unilaterally suspend the clauses from which the right to these benefits arise.

[72] Finally, Abitibi's last submission that the *Régie des rentes* would likely refuse the modifications the clauses set out because of their impact on the accumulated actuarial deficit of the plans is far from convincing.

[73] This unrealized contingency is not a reason for Abitibi to duck its obligations. This submission sounds more like a false pretence. Abitibi has on the contrary the duty to act diligently and in good faith in the realization of the commitments it has taken up and agreed upon.

[74] In a nutshell, none of Abitibi's arguments can justify the legality of its actions.

c) Summary

[75] It is pertinent to summarize at this point.

[76] The suspension of the right of active employees of 57 years of age and who have 20 years of continuous service to an early retirement without any actuarial reduction as of May 1st, 2009 is illegal.

[77] The same applies to the suspension of the increase in the pension formula applicable to the active employees from 1,70% to 1,75% as of the same date.

[78] However, it must be understood that the illegality of this action and the recognition of the validity of the rights arising from the clauses are not necessarily synonymous of the corollary recognition of the right to the immediate total or partial enforceability of the claims arising from such clauses.

[79] Such a question is not presently at issue before this Court. It may be, at least in part, included in the upcoming debate on the suspension of the amortization payments. This other debate is on different matters and requires an analysis of different questions. Therefore, the Court does not presently take position on these matters.

[80] The second conclusion sought by the CEP is therefore well founded.

[81] The Court deems the first conclusion useless. The debate is not about the fact that the collective agreements are in force or that the debtors must respect them for services provided since the order. This seems granted on each part. The question at stake is rather about a decision alleged to be illegal.

[82] Finally, since the clauses come into force on May 1st, 2009, the exceptional urgency justifies the award of provisional execution. In fact, since provisional execution notwithstanding appeal was ordered by the initial order, subsequent judgments that correct its illegal applications should logically benefit from this as well.

FOR THESE REASONS GIVEN ORALLY AND RECORDED, THE COURT:

[83] **DECLARES** null and illegal the debtor's decision to suspend the right of the active employees who have at least 20 years of continuous service to early retirement at 57 years of age without actuarial reduction as of May 1st, 2009 as well as the increase in the pension formula from 1,70% to 1,75% as of May 1st, 2009, the whole as set out in the collective agreements and in the Memorandum of Agreement (exhibit S-1), and applying to the workers represented by the Communications, Energy and Paperworkers Union of Canada (CEP) and its local sections 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;

[84] **ORDERS** the provisional execution of this judgment, notwithstanding appeal and without the need to provide security;

[85] **WITH COSTS.**

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CLEMENT GASCON, J.C.S.

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Date of hearing April 30, May 1st, and May 4th 2009
Revision and transcript of the reasons May 5th, 2009