

**ONTARIO
COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Smurfit-Stone Container Canada Inc. and the other Applicants listed on Schedule "A"

Applicants

**FACTUM OF
COMMUNICATIONS, ENERGY AND
PAPERWORKERS UNION OF CANADA**

October 6, 2009

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PART I: OVERVIEW

1. On January 26th, 2009, the Applicants' obtained an order under the *Companies' Creditors Arrangement Act* ("CCAA") staying all proceedings and claims against them ("Initial Order").
2. The Initial Order, as subsequently amended and restated, has been extended to December 24, 2009.

Reference: Stay Extension Order of the Honourable Justice Pepall dated September 25, 2009.

3. This factum is filed by the Communications, Energy and Paperworkers Union of Canada and its Local Unions 530 and 27Q (the "CEP") in support of its motion for an order or declaration that the Applicant, Smurfit-Stone Container Canada ("SSCC"), comply with the terms of its applicable collective agreements with the CEP at the La Tuque Mill in the Province of Quebec. Specifically, the CEP seeks an order or declaration that SSCC is required to file an amendment to the pension plan with the *Regie des Rentes du Quebec* (the "*Regie*") to make provision for indexed pension benefits ("Indexation Benefit"). Under the terms of the collective agreements, the Indexation Benefits were to be filed with the *Regie* and take effect on January 1, 2009.
4. Despite its collective agreement obligations, SSCC failed to file an amendment to the pension plan with the *Regie*.
5. Notwithstanding SSCC's failure to file an amended pension plan text with the *Regie*, the pension committee provided the Indexation Benefits to the plan's beneficiaries from January 1, 2009 to May 31, 2009.
6. However, on May 21, 2009, the pension committee announced its intention to claw back the Indexation Benefit in order to comply with an order issued by the *Regie* dated March 3, 2009 which limited the payment of pension benefits to those which were registered on or before March 3, 2009.

7. The CEP filed two grievances in respect of SSCC's failure to file the amendment regarding the Indexation Benefits and now seeks the assistance of this Honourable Court to enforce its rights thereunder.
8. The within motion is brought in respect of the Indexation Benefits that were to have taken effect January 1, 2009. It is not disputed that the Indexation Benefits effective in 2011 and 2013 are benefits in respect of current service employees and are therefore amendments to the pension plan that must be registered with the *Regie* pursuant to section 11.3 of the CCAA.
9. The CEP respectfully submits that it is just, equitable and not inconsistent with SSCC's restructuring endeavours for this Honourable Court to exercise its discretion and issue the orders sought.

PART II: FACTS

10. The CEP and its Local Unions represent approximately 1,014 employees employed by the Applicants, including approximately 422 employees employed by SSCC at the La Tuque mill in Quebec.

Reference: Application Record, Affidavit of Dean Jones sworn
January 25th, 2009, page 36

11. At the La Tuque mill, the CEP and its Local Unions are party to three (3) collective agreements with SSCC ("La Tuque Agreements"). The employees employed thereunder participate in a defined benefit pension plan registered in

Quebec as "Regime de retraite des employes syndiques d'Emballages Smurfit-Stone Canada Inc. Division La Tuque, Matane, Pointe-aux-Trembles et Burlington" ("Mill Plan").

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 14.

12. The La Tuque Agreements have a nominal expiry date of August 31, 2009 and cover the "security officer" bargaining unit (Local 530), the "all employee" bargaining unit (Local 530) and the "office employee" bargaining unit (Local 27Q).

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 14

13. The Mill Plan is expressly incorporated into the La Tuque Agreements. The La Tuque Agreements prohibit any change, alteration, suspension or discontinuance of the Mill Plan, or any other term of the La Tuque Agreements, without the mutual consent of the parties.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 14

14. The La Tuque Agreements further provide that improvements to the benefits payable under the Mill Plan are to be registered with the *Regie* and take effect at specific junctures.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 15

15. The La Tuque Agreements provide that benefits payable under the Mill Plan are to be indexed effective, *inter alia*, January 1, 2009. The La Tuque Agreements provide as follows:

Rajustements posterieurs a la retraite

Les dispositions relatives au reajustement posterieur a la retraite qui sont prevues au regime supplementaire B1 (50% de l'augmentation des prix a la concommation jusqu'a concurrence d'un reajustment de 5%) sont renouvelees a tous les deux (2) ans et ce, jusqu'au 31 aout 2014. Ainsi, de tels reajustements seront payables les 1er janvier 2005, 2007, 2009, 2011 et 2013 a ceux qui ont pris ou prendront leur retraite entre le 2 mai 1987 et le 31 decembre 2013.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 15

16. In order to implement the Indexation Benefits effective January 1, 2009, SSCC was required to register an amendment to the Mill Plan with the *Regie*.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 15

17. SSCC failed or refused to register an amendment in respect of the Indexation Benefits with the *Regie* as it was required to do on January 1, 2009 pursuant to the terms of the La Tuque Agreements.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 15

18. Despite SSCC's above-noted failure, the pension committee provided indexed benefits to the Mill Plan's beneficiaries from January 1 to May 31, 2009.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 16

19. On March 3, 2009 the *Regie* issued a decision in respect of the Mill Plan limiting cash outflows to those which were registered on or before March 3, 2009. The *Regie's* decision reads in part as follows:

Now therefore it is decided:

To provisionally order the pension committee of the Regime de retraite des employes syndiques d'Emballages Smurfit-Stone Canada Inc. – La Tuque, Matane, Pointe-aux-Trembles and Burlington divisions to limit cash outflows from the pension fund to the following situations

- Payment of the pensions in payment on the date on which the order is received and pensions the first instalment of which becomes payable after that date, in accordance with the plan text as registered on 3 March 2009;
- Payment of benefits for the defined contribution components, if necessary; and
- Payment of administration costs and investment management fees.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 16

20. Accordingly, as SSCC failed to register an amendment in respect of the Mill Plan with the *Regie* concerning the Indexation Benefits, the pension committee was obligated to comply with the *Regie's* decision and reduced benefits payable

under the Mill Plan by the amount of the Indexation Benefit commencing June 1, 2009. The pension committee did not seek to recoup any amounts paid to Mill Plan beneficiaries in respect of Indexation Benefits paid during the period of January 1 to May 31, 2009.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 16

21. On June 4, 2009, counsel to the CEP wrote to Mr. Jean-Marc Thibodeau, Senior Manager of Human Resources of SSCC, reminding SSCC of its collective agreement obligation to register an amendment with the *Regie* in respect of the Indexation Benefits payable by the Mill Plan.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 16

22. A follow up letter was sent by counsel to the CEP to Mr. Thibodeau on June 12, 2009.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 16

23. On June 25, 2009, counsel to SSCC responded to the CEP's letters of June 4 and June 12, 2009 by stating that SSCC was not required to register an amendment to the Mill Plan in respect of the Indexation Benefits.

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 17

24. The CEP filed two grievances with respect to SSCC's failure to register an amendment with the *Regie* in respect of the Indexation Benefits in accordance with the terms of the La Tuque Agreements (the "Grievances").

Reference: Motion Record, Affidavit of Renaud Gagne sworn July 21, 2009, Tab 2, page 15

25. The claw back of the Indexation Benefits by the Mill Plan pension committee has effected approximately 500-600 beneficiaries. The vast majority of the aforesaid beneficiaries rely exclusively on the fixed pension benefits provided under the Mill Plan. The claw back of the Indexation Benefit resulted in a loss of approximately \$250-500 per year per beneficiary. This reduction has caused a significant adverse effect on the financial wellbeing of beneficiaries under the Mill Plan.

Reference: Supplementary Motion Record, Affidavit of Germain Auclair sworn September 14, 2009, page 5

26. The Indexation Benefits at issue are payable by the Mill Plan fund rather than SSCC. The order and direction sought will not produce a cost payable by SSCC and will therefore not impede its restructuring process.

Reference: Supplementary Motion Record, Affidavit of Germain Auclair sworn September 14, 2009, page 5

PART III: ISSUES AND THE LAW

27. The CEP respectfully submits that the following issues are relevant to the disposition of its motion:

- (i) Is it appropriate for this Honourable Court to issue an order directing SSCC to register an amendment making provision for the Indexation Benefits at issue?
- (ii) Is it appropriate, or necessary, for this Honourable Court to issue an order directing the pension committee to pay the Indexation Benefits from the Mill Plan fund?

REGISTERING INDEXATION BENEFIT AMENDMENT

28. The CEP submits that it is appropriate for this Honourable Court to exercise its discretion and issue an order directing SSCC to register an amendment with the *Regie* making provision for the Indexation Benefits payable by the Mill Plan. Sound reasons dictate that the motion sought by the CEP ought to be granted.

Jurisdiction to Issue Order

29. This Honourable Court is clothed with the jurisdiction to issue an order directing SSCC to file an amendment in respect of the Indexation Benefits with the *Regie*.

The relevant provisions of Section 11 of the CCAA provide as follows:

11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings take or that might be take in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceedings against the company.

30. The statutory discretion found in Section 11 of the CCAA has been described as follows:

What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction...In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff*, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors."

Stelco Inc., [2005] O.J. No. 1171 at paragraph 44 (C.A.)

31. The court's broad supervisory role in a CCAA proceeding includes the power to issue orders and directions to a debtor company concerning its obligations to its

creditors. The court may exercise its statutory discretion and direct a debtor company to meet its contractual obligations where doing so would not otherwise interfere in the restructuring process. As discussed further below, the orders sought by the CEP will not interfere with SSCC's restructuring. In the circumstances, it is appropriate for this Honourable Court to exercise its discretion and issue the orders sought.

32. In the alternative, the jurisdiction to issue the orders sought by the CEP is found in section 20 of the CCAA which permits the court to apply the provisions of the CCAA together with "the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders."
33. Section 20 of the CCAA has been found to be broad in scope and enables a supervising judge to interpret and apply external statutes where appropriate in a CCAA proceeding.

Stelco, supra, paragraph 53.

Sound Reasons to Grant the Order Sought

34. Where "sound reasons" exist, this Honourable Court should exercise its statutory discretion and permit a party to pursue its rights against a debtor company subject to a CCAA proceeding. In determining what constitutes "sound reasons," the following factors must be considered:

- (a) The balance of convenience;
- (b) The relative prejudice to the parties; and
- (c) The merits of the proposed action.

ICR Commercial Real Estate (Regine) Ltd. v. Bricore Land Group Ltd., [2007] S.J. No. 313 at paragraph 68.

35. The balance of convenience in the within matter weighs heavily in favour of permitting the CEP to pursue its rights vis-à-vis the Indexation Benefits. The CEP is seeking to compel SSCC to comply with its administrative obligations that flow from the La Tuque Agreements. The orders sought by the CEP would not result in a monetary outlay by SSCC. The Indexation Benefits at issue are payable by the Mill Plan.
36. This point was recently addressed in the *Abitibi* decision where the Honourable Justice Clement Gascon, discussing the registration of certain pension benefit improvement with the *Regie*, stated as follows:

That 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 amortization payments or because of the employer's current service contributions.

Book of Authorities, *Abitibi* (No: 500-11-036133-094) May 4, 2009, Tab 2, paragraph 55 (unofficial translation)

37. Any projected increase in the actuarial deficit of the Mill Plan that might flow from registering the Indexation Benefits is speculative at this time. Moreover, even if an increase in special payments is triggered, there would be no

immediate effect on SSCC as all special payments have been suspended during the CCAA proceeding. The balance of convenience therefore lies heavily in favour of granting the order sought by the CEP.

38. The order sought by the CEP would not prejudice SSCC or its restructuring process. As stated above, the orders sought would not require a monetary outlay.
39. On the other hand, the beneficiaries entitled to the Indexation Benefit live on fixed incomes provided under the Mill Plan, have experienced an immediate reduction in benefits received, and have endured hardships as a result of SSCC's failure to register the Indexation Benefit amendment.
40. There is no dispute that SSCC's failure to register an amendment in respect of the Indexation Benefits is in violation of the La Tuque Agreements. This is expressly admitted at paragraph 22 of the affidavit of Mr. Yves Rouves sworn October 2, 2009. In the circumstances, since it is admitted that SSCC has failed to register an amendment in respect of the Indexation Benefits, and since its failure to do so is directly related to the instant CCAA proceedings, jurisdiction to address this matter is properly before this Honourable Court and is not to be deferred to an arbitrator or any other administrative body not responsible for these insolvency proceedings.
41. Based on the foregoing, there exist sound reasons to permit the CEP to assert its rights under the La Tuque Agreements notwithstanding the Initial Order of this

Honourable Court. Further, there exist sound reasons for this Honourable Court to exercise its statutory discretion and issue an order requiring SSCC to register an amendment with the *Regie* in respect of the Indexation Benefits.

JURISDICTION TO ORDER PAYMENT FROM MILL PLAN

42. An order directing SSCC to file an amendment in respect of the Indexation Benefits payable January 1, 2009 would not conflict with the March 3, 2009 decision of the *Regie*. The *Regie's* decision is clear and unambiguous. Only benefits registered as at March 3, 2009 are authorized to be paid out of the Mill Plan. The order sought by the CEP involves the registration of an amendment to make provision for the Indexation Benefits retroactive to January 1, 2009. The amendment is effective prior to March 3, 2009 and would therefore not offend the order of the *Regie*. Retroactive amendments are directly contemplated by the *Supplementary Pension Plans Act*:

19. No amendment to a pension plan may become effective before the date it is registered with the *Regie*, except in the following cases:

...

2) where the amendment is to become effective on a given date prior to its registration, in which case the amendment may, provided it is registered, become effective on that date.

43. Since the order sought by the CEP would not conflict with the March 3, 2009 order of the *Regie*, payment of the Indexation Benefits under the Mill Plan would not contravene the decision of the *Regie*.
44. In the alternative, if the order sought by the CEP does conflict with the March 3, 2009 decision of the *Regie*, the doctrine of paramountcy operates so as to make paramount the exercise of this Honourable Court's statutory discretion pursuant to the CCAA in the face of conflicting provincial legislation:

Matters normally constituting part of a bankruptcy scheme, but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

Reference re: Constitutional Creditor Arrangement Act (Canada), [1934] S.C.J. No. 46 at page 2

45. The Supreme Court of Canada's above-noted teachings have been regularly and consistently followed in CCAA proceedings. It is now well settled that if a conflict arises between the CCAA and either federal or provincial statutes, the CCAA prevails (see, for example, *Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 at paragraphs 102-104; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*, [1995] B.C.J. No. 1535 at paragraphs 26-28; and *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558 at paragraph 74).
46. The authority of the *Regie* and the pension committee to issue and enforce the *Regie*'s March 3, 2009 decision is found at section 248 of the *Supplemental Pension Plans Act*, R.S. Q. c. R-15.

47. This Honourable Court's jurisdiction to issue an order in conflict with the *Regie* was recently addressed in *Abitibiwater Inc. (Arrangement relatif a)*, [2009] J.Q. No. 4473 (English Translation). In *Abitibiwater*, the employer took the position that it need not register and implement certain pension benefit improvements set out in the collective agreements on the basis that the *Regie* would likely refuse to accept such improvements as a result of their impact on the actuarial deficit of the pension plans. In rejecting the employer's position, the Honourable Justice Gascon noted that the concern related to the *Regie* was speculative and, in any event, not grounds upon which the employer may "duck its obligations":

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.

Book of Authorities, *Abitibi* (No: 500-11-036133-094) May 4, 2009, Tab 2, paragraphs 72-73.

OBLIGATIONS NOT SUBJECT TO COMPROMISE

48. The failure of SSCC to satisfy its obligation to file an amendment to the Mill Plan in respect of the Indexation Benefits does not give rise to a "claim" subject to compromise in a proposed plan of arrangement and, therefore, SSCC's failure may be pursued upon the conclusion of these proceedings if not dealt with in the within motion. Further, the Indexation Benefits at issue are benefits payable by the Mill Plan not SSCC and, therefore, are not subject to compromise in a

proposed plan of arrangement. Since neither the act of registering an amendment in respect of the Indexation Benefits nor the payment of the Indexation Benefits itself are subject to compromise, these obligations will survive the CCAA restructuring process and must be complied with. There is no valid reason to delay compliance.

49. The only debt that might arise as a result of the orders sought by the CEP is in respect of a projected increase in the actuarial liability of the Mill Plan. As addressed above, an increase in the actuarial liability of the Mill Plan is speculative at this juncture. In any event, and although not necessary to the disposition of the within motion, such actuarial liabilities must be paid pursuant to the applicable pension legislation and are not subject to compromise through the restructuring efforts of SSCC.

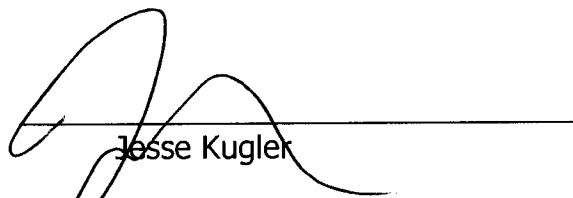
PART IV: ORDER SOUGHT

50. The CEP respectfully requests that this Honourable Court issue the following orders:
- (a) An Order directing the Applicants to register with the *Regie* an amendment to the Mill Plan to make provision for the Indexation Benefits effective January 1, 2009;
 - (b) An Order directing the pension committee to commence the immediate payment of the Indexation Benefits to all beneficiaries

in accordance with the amended Mill Plan, less those Indexation Benefits previously paid; and

- (c) An Order granting the CEP its costs on this motion against any party opposing the relief requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of October, 2009.



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SCHEDULE A**LIST OF AUTHORITIES**

1. *Stelco Inc.*, [2005] O.J. No. 1171
2. *ICR Commercial Real Estate (Regine) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313
3. *Constitutional Creditor Arrangement Act (Canada)*, [1934] S.C.J. No. 46
4. *Metcalfe & Mansfield Alternative Investments II Corp.*, (2008), 92 O.R. (3d) 513
5. *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*, [1995] B.C.J. No. 1535
6. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558
7. *Abitibowater Inc. (Arrangement relative a)*, [2009] J.Q. No. 4473

SCHEDULE B**TEXT OF STATUTES, REGULATIONS & BY-LAWS**

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended:

11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceedings against the company.

20 The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Supplemental Pension Plans Act, R.S. Q. c. R-15:

19. No amendment to a pension plan may become effective before the date it is registered with the Regie, except in the following cases:

...

2) where the amendment is to become effective on a given date prior to its registration, in which case the amendment may, provided it is registered, become effective on that date.

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