

C A N A D A

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

No. : 500-11-036133-094

COUR SUPÉRIEURE
(Chambre commerciale)

siégeant en vertu de la *Loi sur les
arrangements avec les créanciers des
compagnies*, L.R.C. (1985), ch. C-36

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ABITIBI BOWATER INC.

-et-

ABITIBI-CONSOLIDATED INC.

-et-

BOWATER CANADIAN HOLDINGS INC.

-et-

les autres Requérantes mentionnées aux
Annexes "A", "B" et "C"

Requérantes

-et-

ERNST & YOUNG INC.

Contrôleur

c.

JAMES DOUGHAN, domicilié au 7685 Old
Paint, Scottsdale, Arizona, 85262, Etats-Unis

-et-

FIDUCIE DESJARDINS INC., en sa qualité de
fiduciaire du patrimoine de la fiducie
« *Abitibi-Consolidated Inc. Supplementary
Executive Retirement Compensation
Arrangement Trust* », ayant une place
d'affaires située au 1 Complexe Desjardins,
bureau 1422, Montréal, province de Québec,
H5B 1E4

Intimés

**REQUÊTE DE ABITIBI-CONSOLIDATED INC.
POUR L'OBTENTION DE DIRECTIVES CONCERNANT M. DOUGHAN
(Article 10 de la *Loi sur les arrangements
avec les créanciers des compagnies*
et paragraphe 103 de l'Ordonnance Initiale)**

À L'HONORABLE JUGE CLÉMENT GASCON, SIÉGEANT EN CHAMBRE COMMERCIALE, DANS ET POUR LE DISTRICT DE MONTRÉAL, LA REQUÉRANTE EXPOSE RESPECTUEUSEMENT CE QUI SUIT :

I. INTRODUCTION

1. Le 17 avril 2009, une « *Petition for the issuance of an initial order and Petition for the issuance of a recognition order* » a été déposée, notamment par la Requérante, Abitibi-Consolidated Inc. (ci-après « **ACI** »), aux termes de la *Loi sur les arrangements avec les créanciers des compagnies* (ci-après la « **LACC** »), tel qu'il appert du dossier de la Cour;
2. Le même jour, l'honorable juge Clément Gascon émettait une ordonnance initiale qui a par la suite été amendée à quelques reprises (ci-après l'« **Ordonnance Initiale** »), tel qu'il appert du dossier de la Cour;
3. Le 14 mai 2009, l'honorable juge Gascon reconduisait l'Ordonnance Initiale jusqu'au 4 septembre 2009, tel qu'il appert du dossier de la Cour;
4. Le 4 septembre 2009, l'honorable juge Gascon reconduisait de nouveau l'Ordonnance Initiale cette fois jusqu'au 15 décembre 2009, tel qu'il appert du dossier de la Cour;
5. Le paragraphe 103 de l'Ordonnance Initiale permet à ACI de demander à cette Cour des directives;
6. Par la présente Requête, ACI demande à cette Cour des directives concernant une portion du produit, déjà encaissé et à être prochainement distribué, de lettres de crédit émises afin de garantir les obligations de ACI aux termes du « *Canadian Supplemental Executive Retirement Plan (SERP) for Executive Employees of Abitibi-Consolidated Inc.* » daté du 1^{er} janvier 1999 et des « *Secured Management Supplementary Benefit Agreements* » datés d'avant 1988 (ci-après collectivement le « **SERP** ») et ce, pour les motifs exposés ci-après;

II. L'INTIMÉ JAMES DOUGHAN

7. L'intimé, James Doughan (ci-après « **Doughan** »), est un citoyen américain qui est domicilié à Scottsdale, en Arizona (États-Unis);
8. Doughan était président et chef de la direction de Stone-Consolidated Corporation (ci-après « **Stone** ») aux États-Unis;
9. En 1995, Doughan a accepté de déménager au Canada et a continué à occuper les mêmes fonctions au Canada;
10. En 1997, Stone a fusionné avec Abitibi-Price Inc. et la compagnie qui a résulté de cette fusion est ACI (ci-après la « **Fusion** »);
11. À la suite de la Fusion, Doughan a continué à occuper les mêmes fonctions pour ACI et ce, jusqu'au 26 avril 1999. Par la suite, il a occupé d'autres fonctions jusqu'au 31 décembre 1999, date à laquelle il a pris sa retraite;

III. L'ENTENTE DE PÉRÉQUATION FISCALE

12. Depuis son arrivée au Canada, Doughan jouissait d'une entente de péréquation fiscale aux termes de laquelle, Stone, et par la suite ACI, s'engageaient à maintenir Doughan dans la même position après impôts que celle dans laquelle il aurait été si son revenu gagné au Canada avait été gagné aux États-Unis (ci-après l' « **Entente de péréquation** »);

IV. L'INDEMNITÉ DE FIN D'EMPLOI ET LES RÉGIMES DE RETRAITE

13. En 1997, Doughan et Stone ont conclu une entente par laquelle cette dernière s'est notamment engagée à verser à Doughan une indemnité équivalant à trois ans de salaire lors de la fin de son emploi (ci-après l' « **Indemnité de fin d'emploi** »);
14. Cette entente a par la suite été modifiée afin de prévoir que le paiement de l'Indemnité de fin d'emploi serait effectué par le biais d'un « *Retirement Compensation Arrangement* »;
15. Doughan participait aussi au Régime de retraite des employés exécutifs de ACI (ci-après le « **Régime de base** ») de même qu'au SERP;

V. LA FIN D'EMPLOI DE DOUGHAN

16. Tel que mentionné précédemment, Doughan a pris sa retraite le 31 décembre 1999 et a cessé d'être résident canadien à la fin de l'année 1998;

17. En janvier 2000, Doughan a reçu l'Indemnité de fin d'emploi qui s'élevait à la somme de quatre millions trois cent milles dollars (4 300 000 \$);
18. À compter de janvier 2000, Doughan a également commencé à recevoir la prestation de retraite d'un montant à l'époque de 570 \$ CA par mois en vertu du Régime de base et la prestation de retraite d'un montant à l'époque de 27 600 \$ US par mois en vertu du SERP;
19. Le paiement de l'Indemnité de fin d'emploi de même que le fait que Doughan ne soit plus un résident canadien depuis la fin de l'année 1998 ont fait en sorte que les impôts canadiens (1 583 014 \$ CA) étaient moins élevés que les impôts américains (2 545 137 \$ CA) pour l'année d'imposition 1999;
20. En raison de cet état de fait, ACI a conclu que Doughan était endetté envers elle, aux termes de l'Entente de péréquation fiscale, pour l'année 1999 pour une somme de 590 621 \$ US, représentant la différence entre les impôts américains hypothétiques et les impôts canadiens réels, et une somme de 379 342 \$ US, représentant des avances déjà reçues par Doughan pour payer ses impôts, soit une somme totale de 969 963 \$ US;

VI. LES PROCÉDURES PENDANTES ENTRE ACI ET DOUGHAN

21. En mai 2002, ACI a intenté, dans le dossier portant le numéro de Cour 500-05-071231-029, une action contre Doughan dans le cadre de laquelle elle lui a réclamé la somme mentionnée ci-haut de 969 963 \$ US, soit 1 527 012,70 \$ CA, de même que la somme de 100 000 \$ CA pour des crédits sur l'impôt étranger utilisés sans droit par Doughan en 2000 (ci-après l' « **Action de ACI** »);
22. ACI a par la suite amendé son action afin de principalement réclamer en plus de la réclamation initiale des sommes liées aux années d'imposition 1997 et 1998. La somme totale réclamée par ACI s'élevait à la somme de 2 519 347,17 \$ CA en plus des intérêts et de l'indemnité additionnelle;
23. À compter du 1^{er} juillet 2002, ACI a cessé d'effectuer les versements de prestations de retraite en faveur de Doughan aux termes du Régime de base et du SERP puisqu'elle était d'avis qu'elle était en droit d'opérer compensation entre ces sommes et la somme réclamée à Doughan dans le cadre de l'Action de ACI;
24. En juin 2003, Doughan a déposé, dans le dossier portant le numéro de Cour 500-17-015973-038, une Requête en jugement déclaratoire demandant à la Cour de déclarer qu'il ne pouvait pas y avoir compensation légale entre ses prestations de retraite et la créance réclamée par ACI dans le cadre de l'Action de ACI (ci-après la « **Requête en jugement déclaratoire** »);

25. Le 15 juillet 2004, l'honorable juge Danièle Mayrand a accueilli en partie la Requête en jugement déclaratoire, a déclaré que les prestations de retraite versées aux termes du Régime de base sont insaisissables, que les prestations de retraite versées aux termes du SERP sont saisissables et que ACI ne peut pas opérer compensation parce que sa créance n'est ni liquide ni exigible (ci-après le « **Jugement Mayrand** »), tel qu'il appert d'une copie du Jugement Mayrand communiquée au soutien des présentes comme pièce **R-1**;
26. ACI a par la suite logé un appel à l'encontre du Jugement Mayrand et Doughan a logé un appel incident;
27. À compter du 1^{er} septembre 2004, ACI a recommencé à verser à Doughan les prestations de retraite en vertu du Régime de base de même que celles en vertu du SERP. Doughan n'a donc pas reçu les prestations de retraite du 1^{er} juillet 2002 au 31 août 2004, soit une somme totale de 1 041 277,86 \$ CA;
28. Les 5, 6, 7, 8, 9, 12 et 13 novembre 2007, l'honorable juge Roger E. Baker a entendu l'affaire au mérite dans le cadre de l'Action de ACI, et a pris le tout en délibéré;
29. Le 17 janvier 2008, la Cour d'appel a infirmé en partie le Jugement Mayrand et a substitué dans la troisième déclaration le mot « insaisissable » au mot « saisissable », déclarant ainsi que les prestations de retraite versées aux termes du SERP sont aussi insaisissables (ci-après le « **Jugement de la Cour d'appel** »), tel qu'il appert d'une copie du Jugement de la Cour d'appel communiquée au soutien des présentes comme pièce **R-2**;
30. ACI a par la suite présenté devant la Cour suprême une Requête pour permission d'en appeler à l'encontre du Jugement de la Cour d'appel, laquelle permission a été accordée le 8 août 2008 (ci-après l'« **Inscription en appel devant la Cour suprême** »), tel qu'il appert d'une copie de l'Inscription en appel devant la Cour suprême communiquée au soutien des présentes comme pièce **R-3**;
31. En avril 2008, Doughan a intenté, dans le dossier portant le numéro de Cour 500-17-042162-084, une Requête introductive d'instance contre ACI dans le cadre de laquelle il lui a réclamé le paiement des prestations de retraite aux termes du Régime de base et aux termes du SERP qui n'avaient pas été versées entre le 1^{er} juillet 2002 et le 31 août 2004 (ci-après la « **Requête de Doughan** »);
32. Le 25 juin 2008, l'honorable juge Chantal Corriveau a accueilli la Requête de Doughan et a condamné ACI à verser à Doughan la somme totale de 1 041 277,86 \$ CA en plus des intérêts et de l'indemnité additionnelle

(ci-après le « **Jugement Corriveau** »), tel qu'il appert d'une copie du Jugement Corriveau communiquée au soutien des présentes comme pièce **R-4**;

33. Le ou vers le 22 juillet 2008, ACI a déposé une inscription en appel à l'encontre du Jugement Corriveau, tel qu'il appert d'une copie de cette inscription en appel communiquée au soutien des présentes comme pièce **R-5**;
34. Le 7 juillet 2008, l'honorable juge Baker a accueilli l'Action de ACI et a condamné Doughan à verser à ACI la somme de 2 519 347,17 \$ CA en plus des intérêts et de l'indemnité additionnelle (ci-après le « **Jugement Baker** »), tel qu'il appert d'une copie du Jugement Baker communiquée au soutien des présentes comme pièce **R-6**;
35. Le ou vers le 4 août 2008, Doughan a déposé une inscription en appel à l'encontre du Jugement Baker, tel qu'il appert d'une copie de cette Inscription communiquée au soutien des présentes comme pièce **R-7**;
36. En novembre 2008, une entente est intervenue entre ACI et Doughan quant aux différentes procédures pendantes entre les parties prévoyant que :
 - a) ACI se désiste de l'Inscription en appel devant la Cour suprême;
 - b) Les procédures en appel à l'encontre du Jugement Corriveau sont suspendues jusqu'à ce qu'un jugement final soit rendu dans le dossier où le Jugement Baker a été rendu. À ce moment, ACI pourrait se désister de l'appel à l'encontre du Jugement Corriveau. La compensation pourrait alors s'effectuer le cas échéant;
 - c) Doughan renonce au Jugement de la Cour d'appel dans le cadre du dossier de la Requête en jugement déclaratoire;
 - d) ACI reconnaît la validité des versements des prestations de retraite effectués à ce jour, réitère son engagement du 31 août 2004 et accepte de continuer à verser mensuellement les prestations de retraite en vertu du Régime de base et du SERP, nonobstant la compensation alléguée;
 - e) Lorsqu'un jugement final sera rendu sur l'appel logé à l'encontre du Jugement Baker, la compensation s'opérera entre le montant dû à Doughan par ACI aux termes du Jugement Corriveau et tout montant payable à ACI, jusqu'à concurrence du montant de la dette la moins élevée;

(ci-après l' « **Entente de règlement** »), tel qu'il appert d'une copie de l'Entente de règlement communiquée au soutien des présentes comme pièce **R-8**;

VII. LA SUSPENSION DU VERSEMENT DES PRESTATIONS DE RETRAITE AUX TERMES DU SERP

37. Tel que mentionné précédemment, le 17 avril 2009, l'Ordonnance Initiale a été émise, notamment en faveur de ACI;
38. À compter de cette date, ACI a suspendu le versement des prestations de retraite aux termes du SERP pour tous les bénéficiaires, dont Doughan, et ce, tel que l'autorisait l'Ordonnance Initiale;
39. Les prestations de retraite aux termes du Régime de base ont, quant à elles, continué à être versées aux bénéficiaires, dont Doughan;

VIII. LES LETTRES DE CRÉDIT

40. Aux termes du « *Supplementary Executive Retirement Compensation Arrangement Trust Agreement* » intervenu entre ACI et l'Intimée, Fiducie Desjardins Inc. (ci-après « **Desjardins** »), le 23 avril 2004, une fiducie a été constituée afin de garantir les obligations créées en vertu du SERP et Desjardins a été nommée fiduciaire (ci-après la « **Convention de fiducie** »), tel qu'il appert d'une copie de la Convention de fiducie communiquée au soutien des présentes comme pièce **R-9**;
41. Afin de garantir les obligations de ACI aux termes du SERP, trois lettres de crédit, totalisant la somme de 57 198 000 \$ CA, ont été émises par la Banque Canadienne Impériale de Commerce dont le bénéficiaire est Desjardins en sa qualité de fiduciaire (ci-après les « **Lettres de crédit** »), tel qu'il appert d'une copie des Lettres de crédit communiquées au soutien des présentes comme pièce **R-10**;
42. Puisque ACI avait suspendu le versement des prestations de retraite en vertu du SERP et était par conséquent en défaut de respecter ses obligations aux termes du SERP, Desjardins a encaissé, le 11 juin 2009, les Lettres de crédit;
43. Conformément aux dispositions de la Convention de fiducie, Desjardins doit liquider le SERP et utiliser le produit des Lettres de crédit afin de verser aux bénéficiaires garantis les sommes auxquelles ils ont droit;
44. Le cabinet d'actuaire Mercer a été retenu afin de procéder au calcul des sommes dues à chacun des bénéficiaires garantis et en date des présentes, ce mandat n'est pas entièrement complété;

IX. LES DIRECTIVES RECHERCHÉES

45. Dans le cadre de l'exécution du mandat mentionné ci-haut, Mercer procédera au calcul de la somme forfaitaire qui devrait être versée à Doughan aux termes du SERP (ci-après la « **Somme forfaitaire** »);

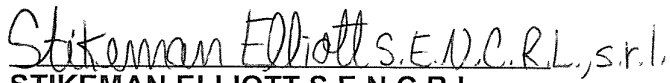
46. ACI demande à cette Cour d'émettre des directives afin que Desjardins ne procède pas au versement de la Somme forfaitaire en faveur de Doughan, mais conserve celle-ci et verse mensuellement à Doughan, à même la Somme forfaitaire, la somme qui lui était versée mensuellement à titre de prestation de retraite en vertu du SERP avant l'émission de l'Ordonnance Initiale et ce, jusqu'à ce qu'un jugement final et passé en force de chose jugée soit rendu dans le cadre du dossier où le Jugement Baker a été rendu;
47. ACI soumet qu'il est impératif que cette mesure soit mise en place, afin de permettre à ACI de conserver le droit d'opérer compensation, le cas échéant, entre les sommes dues à Doughan par ACI aux termes du Jugement Corriveau et les sommes dues à ACI par Doughan aux termes d'un jugement final à être rendu dans le cadre du dossier où le Jugement Baker a été rendu;
48. Le droit d'opérer compensation a d'ailleurs été expressément reconnu par Doughan et ACI aux termes de l'Entente de règlement et ACI soumet que cette volonté des parties doit être respectée;
49. ACI ne peut être préjudiciée d'avoir intenté des procédures aux termes de la LACC et son droit d'opérer compensation doit être préservé;
50. Étant donné sa situation financière précaire, ACI ne peut pas se permettre de ne pas être en mesure de récupérer auprès de Doughan, citoyen et résident américain, la somme de 2 519 347,17 \$ CA en plus des intérêts et de l'indemnité additionnelle aux termes d'un jugement final à être rendu dans le cadre du dossier où le Jugement Baker a été rendu;
51. Si la mesure qu'elle recherche n'est pas mise en place par cette Cour, ACI devra vraisemblablement tenter de nouvelles procédures afin de faire reconnaître aux États-Unis le jugement final à être rendu dans le cadre du dossier où le Jugement Baker a été rendu et de recouvrer la somme qui lui sera alors due;
52. Les coûts liés aux procédures pendantes entre Doughan et ACI depuis 2002 ont été suffisamment élevés et ACI ne peut pas se permettre d'assumer les coûts liés à de nouvelles procédures instituées à l'étranger;
53. Il est dans le meilleur intérêt de ACI et de ses créanciers que la présente Requête pour directives soit accueillie;
54. Si la présente Requête pour l'obtention de directives était accueillie, Doughan ne subirait aucun préjudice puisque le *statu quo* auquel il a consenti serait maintenu;
55. D'ailleurs, dans le cadre de la mise en demeure datée du 11 mai 2009 et transmise à ACI et Desjardins par les procureurs de Doughan, ce dernier

ne demande que le versement mensuel du SERP, tel qu'il appert d'une copie de cette lettre communiquée au soutien des présentes comme pièce R-11.

POUR CES MOTIFS, PLAISE À LA COUR :

1. **ORDONNER** à l'Intimée, Fiducie Desjardins Inc. (ci-après « **Desjardins** »), de ne pas remettre à l'Intimé, James Doughan (ci-après « **Doughan** »), et de conserver la somme qui sera calculée par Mercer comme étant la somme due à Doughan aux termes du « *Supplementary Executive Retirement Compensation Arrangement Trust Agreement* » daté du 23 avril 2004 (**R-9**) suite à l'encaissement des Lettres de crédits (**R-10**) (ci-après la « **Somme forfaitaire** »);
2. **ORDONNER** à Desjardins de verser à Doughan le premier jour de chaque mois, à même la Somme forfaitaire, la somme qui lui était versée mensuellement à titre de prestation de retraite en vertu du « *Canadian Supplemental Executive Retirement Plan (SERP) for Executive Employees of Abitibi-Consolidated Inc.* » avant l'émission de l'ordonnance initiale émise le 17 avril 2009 dans le cadre du présent dossier et ce, jusqu'à ce qu'un jugement final passé en force de chose jugée soit rendu dans le dossier où le Jugement Baker a été rendu portant les numéros C.S. 500-05-071231-029 et C.A. 500-09-018931-089;
3. **ORDONNER** à Doughan et à la Requérante, Abitibi-Consolidated Inc., de transmettre à Desjardins des instructions conjointes quant au solde de la Somme forfaitaire, le cas échéant, dans les 15 jours du jugement final passé en force de chose jugée à être rendu dans le dossier où le Jugement Baker a été rendu portant les numéros C.S. 500-05-071231-029 et C.A. 500-09-018931-089;
4. **ORDONNER** l'exécution provisoire nonobstant appel du jugement à être rendu sur la présente Requête;
5. **LE TOUT** sans frais, sauf en cas de contestation.

MONTREAL, le 25 novembre 2009

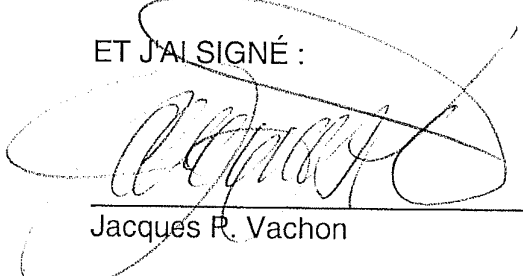

STIKEMAN ELLIOTT S.E.N.C.R.L.,
s.r.l.
Procureurs de la Requérante,
Abitibi-Consolidated Inc.

AFFIDAVIT

Je, soussigné, Jacques P. Vachon, premier vice-président, Affaires administratives et chef du contentieux, résidant aux fins des présentes au 1155 rue Metcalfe, bureau 800, à Montréal (Québec), H3B 5H2, affirme solennellement ce qui suit :

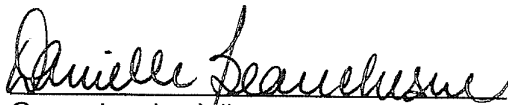
1. Je suis premier vice-président, Affaires administratives et chef du contentieux de AbitibiBowater Inc. et, à ce titre, je suis au courant des faits entourant la présente instance.
2. Tous les faits allégués dans la Requête de Abitibi-Consolidated Inc. pour l'obtention de directives concernant M. Doughan et dans le présent affidavit sont vrais et à ma connaissance personnelle.

ET J'AI SIGNÉ :



Jacques R. Vachon

Affirmé solennellement devant moi
à Montréal, ce 25^e jour de novembre 2009



Commissaire à l'assermentation

Commissaire à l'assermentation
Districts de Longueuil et Montréal
142 518

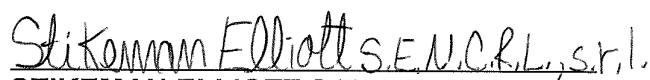
AVIS DE PRÉSENTATION

À : Avocats de la liste de signification

PRENEZ AVIS que la présente Requête de Abitibi-Consolidated Inc. pour l'obtention de directives concernant M. Doughan sera présentée devant l'honorable Juge Clément Gascon de la Cour supérieure, chambre commerciale, à une date, heure et salle à être déterminées.

VEUILLEZ AGIR EN CONSÉQUENCE.

MONTREAL, le 25 novembre 2009


STIKEMAN ELLIOTT S.E.N.C.R.L., s.r.l.

Procureurs de la Requérante,
Abitibi-Consolidated Inc.

ANNEXE "A"

ABITIBI PETITIONERS

1. Abitibi-Consolidated Company of Canada
2. Abitibi-Consolidated Inc.
3. 3224112 Nova Scotia Limited
4. Marketing Donohue Inc.
5. Abitibi-Consolidated Canadian Office Products Holding 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.
20. Abitibi-Consolidated (U.K.) Inc.

ANNEXE "B"

BOWATER PETITIONERS

1. Bowater Canada Finance Corporation
2. Bowater Canadian Limited
3. Bowater Canadian Holdings. Inc.
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. Canixel Hardboard Inc.
13. 9068-9050 Québec Inc.
14. Alliance Forest Products Inc. (2001)
15. Bowater Belledune Sawmill Inc.
16. Bowater Maritimes Inc.
17. Bowater Mitis Inc.
18. Bowater Guérette Inc.
19. Bowater Couturier Inc.

ANNEXE "C"

18.6 PETITIONERS

1. AbitibiBowater US Holding 1 Corp.
2. AbitibiBowater Inc.
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

COUR SUPÉRIEURE
(Chambre commerciale)

N°. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ABITIBOWATER INC. ET AL.

Requérantes

-et-

ERNST & YOUNG INC.

Contrôleur

c.

JAMES DOUGHAN ET AL.

Intimés

BS0350

n/dos.: 041053-1170

REQUÊTE DE ARBITRI-CONSOLIDATED INC.
POUR L'OBTENTION DE DIRECTIVES
CONCERNANT M. DOUGHAN (Article 10 de la
*Loi sur les arrangements avec les créanciers des
compagnies* et paragraphe 103 de l'Ordonnance
Initiale)

ORIGINAL

Me Mélanie Béland

(514) 397-3197

Fax : (514) 397-3591

STIKEMAN ELLIOTT

Stikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS

40^e Étage

1155, boul. René-Lévesque Ouest

Montréal, Canada H3B 3V2

C A N A D A

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

No. : 500-11-036133-094

COUR SUPÉRIEURE
(Chambre commerciale)

siégeant en vertu de la *Loi sur les
arrangements avec les créanciers des
compagnies*, L.R.C. (1985), ch. C-36

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ABITIBI BOWATER INC.

-et-

ABITIBI-CONSOLIDATED INC.

-et-

BOWATER CANADIAN HOLDINGS INC.

-et-

les autres Requérantes mentionnées aux
Annexes "A", "B" et "C"

Requérantes

-et-

ERNST & YOUNG INC.

Contrôleur

c.

JAMES DOUGHAN, domicilié au 7685 Old
Paint, Scottsdale, Arizona, 85262, Etats-Unis

-et-

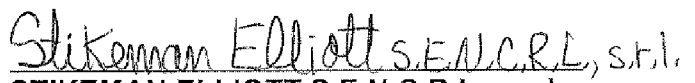
FIDUCIE DESJARDINS INC., en sa qualité de
fiduciaire du patrimoine de la fiducie
« *Abitibi-Consolidated Inc. Supplementary
Executive Retirement Compensation
Arrangement Trust* », ayant une place
d'affaires située au 1 Complexe Desjardins,
bureau 1422, Montréal, province de Québec,
H5B 1E4

Intimés

**LISTE DE PIÈCES AU SOUTIEN DE LA
REQUÊTE DE ABITIBI-CONSOLIDATED INC.
POUR L'OBTENTION DE DIRECTIVES
(Article 10 de la *Loi sur les arrangements
avec les créanciers des compagnies*
et paragraphe 103 de l'Ordonnance Initiale)**

- Pièce R-1 :** Jugement rendu par l'honorable juge Mayrand le 15 juillet 2004;
- Pièce R-2 :** Jugement rendu par la Cour d'appel le 17 janvier 2008;
- Pièce R-3 :** Inscription en appel déposée par ACI devant la Cour suprême le 8 août 2008;
- Pièce R-4 :** Jugement rendu par l'honorable juge Corriveau le 25 juin 2008;
- Pièce R-5 :** Inscription en appel déposée par ACI à l'encontre du Jugement Corriveau le 22 juillet 2008;
- Pièce R-6 :** Jugement rendu par l'honorable juge Baker le 7 juillet 2008;
- Pièce R-7 :** Inscription en appel déposée par Doughan à l'encontre du Jugement Baker le 4 août 2008;
- Pièce R-8 :** Entente de règlement intervenue entre ACI et Doughan en novembre 2008;
- Pièce R-9 :** Convention de fiducie intervenue entre ACI et Fiducie Desjardins Inc. le 23 avril 2004;
- Pièce R-10 :** Trois lettres de crédit émises par la Banque Canadienne Impériale de Commerce totalisant 57 198 000 \$ CA;
- Pièce R-11 :** Lettre de mise en demeure des procureurs de Doughan datée du 11 mai 2009.

MONTRÉAL, le 25 novembre 2009


STIKEMAN ELLIOTT S.E.N.C.R.L., s.r.l.
Procureurs de la Requérante,
Abitibi-Consolidated Inc.

PIÈCE R-1

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-17-015973-038

DATE : 15 JUILLET 2004

SOUS LA PRÉSIDENTE DE : L'HONORABLE DANIELLE MAYRAND, J.C.S.

JAMES DOUGHAN

Demandeur

c.

ABITIBI-CONSOLIDATED INC.

Défenderesse

JUGEMENT

[1] Dans un dossier connexe de la Cour supérieure (500-05-071231-029), la défenderesse (Abitibi) a intenté une poursuite contre le demandeur (Doughan), son ancien président et chef des opérations, dans laquelle elle lui réclame 1 627 000 \$ (la créance de Abitibi). La créance de Abitibi origine d'ententes convenues avec Doughan dans le cours de son emploi.

[2] Depuis le 1^{er} juillet 2002, Abitibi opère compensation légale, en paiement de sa créance, à même les prestations de retraite payable à Doughan depuis qu'il a quitté son d'emploi auprès de Abitibi.

[3] Par la présente requête, Doughan demande au tribunal de déclarer qu'il ne peut y avoir compensation légale entre la créance de Abitibi et les prestations de retraite qu'il

reçoit parce que celles-ci sont insaisissables et parce que la créance de Abitibi est sérieusement contestée par Doughan dans le dossier connexe.

[4] Abitibi reconnaît que la créance de Doughan, soit les prestations de retraite, est certaine, liquide et exigible.

LES PROCÉDURES PRÉLIMINAIRES

[5] En août 2003, Abitibi a présenté une requête en irrecevabilité, invoquant une certaine litispendance avec le dossier connexe. La soussignée a rejeté cette requête par jugement rendu le 25 août 2003.

[6] Plus récemment, Abitibi a tenté de réunir le présente dossier avec le dossier connexe. Sa demande a été rejetée le 25 mai 2004 parce que la déclaration de mise au rôle, en vertu de l'article 15 R.P.C.S. n'avait pas été produite dans le dossier connexe.

LES QUESTIONS EN LITIGE

1. La requête en jugement déclaratoire a-t-elle été déposée tardivement ; et si non,
2. Le *Severance Agreement* empêche-t-il Abitibi d'opérer compensation ?
3. Les prestations de retraite payables à Doughan constituent-elles des biens insaisissables ?
4. La créance de Abitibi, à l'encontre de Doughan, est-elle certaine, liquide et exigible ;
5. Le tribunal devrait-il appliquer l'article 462 C.p.c.

LES FAITS

Les avantages pécuniaires et bénéfices conférés à Doughan

[7] Doughan, citoyen américain, était président et chef de la direction de Abitibi jusqu'à sa retraite le 31 décembre 1999. Il avait occupé la même fonction pour Stone Consolidated (Stone) antérieurement à sa fusion avec Abitibi.

[8] Il participait au *Régime de retraite des employés exécutifs de Abitibi* (le Régime de base) de même qu'à un régime complémentaire qu'offre Abitibi à certains de ses hauts salariés, le *Supplemental Executive Retirement Plan* (SERP).

[9] En 1997, avant la fusion, Stone et Doughan exécutent une entente pour prévoir une compensation lors de sa cessation d'emploi (le *Severance Agreement*) qui comprend une indemnité équivalant à trois ans de salaire pour Doughan. Cette entente sera modifiée par le *Severance Compensation Transaction Agreement* (SCTA) pour

prévoir que le paiement de la compensation prévue au *Severance Agreement* se fera par la voie d'un *Retirement Compensation Arrangement* (RCA).

[10] Les bénéfices et indemnités prévus au *Severance Agreement* s'ajoutent aux prestations de retraite découlant du Régime de base et du SERP dont bénéficie Doughan.

L'entente de péréquation fiscale

[11] Depuis 1995, la rémunération de Doughan est ajustée en vertu d'une entente de péréquation fiscale dont le but est de maintenir ses revenus, après impôt, de la même manière que si ceux-ci avaient été gagnés aux États-Unis. Toute taxation additionnelle, découlant de l'emploi de Doughan au Canada, est assumée par Abitibi.

[12] À cette fin, Price Waterhouse Coopers (PWC), vérificatrice de Abitibi, prépare, après chaque fin d'année, les calculs de péréquation. Un premier calcul détermine les impôts réels payés par Doughan, et un second calcul théorique, le *Stay at Home Tax*, est effectué pour refléter les impôts qui auraient été payables par Doughan s'il était demeuré résident américain.

[13] Les calculs de péréquation ne sont connus que plusieurs mois après la fin de chaque année fiscale puisque les avis de cotisation de chaque autorité fiscale impliquée sont nécessaires pour les effectuer.

[14] Lorsque les calculs de péréquation sont finalisés, Abitibi ajuste la rémunération de Doughan pour tenir compte de toute taxation additionnelle canadienne et combler l'écart, le cas échéant. De son côté, Doughan doit rembourser Abitibi si celle-ci lui a, en cours d'exercice, consenti des avances trop élevées pour le paiement de ses impôts.

[15] Doughan quitte son poste le 31 décembre 1999. Dès janvier 2000, il reçoit la compensation prévue au RCA. De même, ses prestations de retraite commencent à lui être versées : Il reçoit une rente mensuelle de 27 600 \$ en vertu du SERP, et de 570 \$ en vertu du Régime de base. En janvier 2001, PWC finalise les calculs définitifs pour l'année 1999 qui tiennent compte de l'ensemble des revenus gagnés par Doughan, soit 5 873 000 \$, dont 4,3 M\$ à titre de compensation de départ en vertu du RCA.

[16] C'est le 19 janvier 2001 que PWC envoie les calculs de péréquation¹ pour l'année d'imposition 1999 à Doughan.

Le litige

[17] Suite à la mise en place du RCA et au fait que Doughan ne soit plus résident canadien depuis 1998, il en résulte que les impôts canadiens (1 583 014 \$) sont moins élevés que les impôts américains (2 545 137 \$) et ce, pour la première fois depuis

¹ D-5, D-5a

1995. Abitibi considère que l'entente de péréquation fiscale oblige Doughan à lui rembourser l'écart, soit 1 527 012,70\$.

Les procédures

[18] En mai 2002, Abitibi intente l'action dans le dossier connexe contre Doughan où elle réclame : 590 622 \$ US à titre de remboursement en application de l'entente de péréquation fiscale, 379 341 \$ US pour des avances sur les redevances fiscales que Abitibi a payées pour le bénéfice de Doughan. Elle réclame aussi 100 000 \$ pour des crédits sur l'impôt étranger utilisés par celui-ci en 2000 et dont Abitibi se prétend propriétaire.

[19] Le 28 mai 2002, Abitibi avise Doughan qu'elle compensera sa créance à compter du 1^{er} juillet 2002, à même les prestations de retraite qu'elle lui paie en vertu du Régime de base et du SERP. Elle compense à compter du 1^{er} juillet 2002 ; à ce jour, Abitibi a retenu 661 797 \$ US à même les prestations de retraite payables à Doughan.

ANALYSE ET DISCUSSION

1. La requête en jugement déclaratoire a-t-elle été déposée tardivement ?

[20] La présente requête a été introduite au mois de juin 2003, soit presque un an après que Abitibi ait commencé à compenser sa créance. Abitibi soulève que le recours est tardif en raison du délai écoulé.

[21] La requête pour jugement déclaratoire n'est pas assujettie à un délai pour sa présentation. Dans la mesure où le requérant satisfait aux conditions prescrites par l'article 452 C.p.c., le recours est valablement introduit. Le jugement rendu dans l'affaire *Cyrenne c. P.g.Q.*², cité par Abitibi, visait la décision d'un tribunal administratif dont on demandait l'annulation. Dans un tel cas, il est naturel que les délais prévus pour une requête en révision judiciaire s'appliquent lorsque c'est l'objectif recherché par une requête en jugement déclaratoire. Ce n'est pas le cas ici.

2. Le Severance Agreement empêche-t-il Abitibi d'opérer compensation ?

[22] Selon Doughan, l'article 8 du *Severance Agreement* empêche Abitibi d'opérer compensation à même les prestations de retraite qui lui sont dues :

Further, except as specifically provided in Section 6.1(B) and (E) hereof, the amount of any payment or benefit provided for in the Agreement shall not be reduced by any compensation earned by the Executive as the result of employment by another employer, by retirement benefits, by offset against any amount claimed to be owed by the Executive to the Company, or otherwise.

² J.E. 89-1627 (C.S.)

[23] Cette clause de non-compensation vise les bénéfices qui découlent du *Severance Agreement*. C'est l'article 6 du *Severance Agreement* qui les prévoit et celui-ci ne comprend pas les rentes de retraite émanant du SERP et du Régime de base.

[24] Les références dans le *Severance Agreement* aux autres avantages conférés à Doughan par Abitibi, dont le SERP et le Régime de base ne sont là que pour expliquer le contexte dans lequel la compensation de départ est octroyée et surtout pour préciser que les prestations de retraite sont payables « *in addition*³ » de cette compensation. D'ailleurs, comme le précise le *Severance Agreement*, ces avantages sont régis par leur propre contrat⁴.

[25] Enfin, l'article 7 (e) du SCTA prescrit que Abitibi se sera acquittée de toutes ses obligations au terme du *Severance Agreement* par le transfert au fonds constitué par le RCA, des montants dus au titre de la compensation de départ, ce qui a été fait par Abitibi, avant la cessation d'emploi de Doughan. Les prestations provenant des régimes de retraite ne peuvent donc être visées par le *Severance Agreement*, puisque celles-ci continuent d'être payables à Doughan en vertu du SERP et du Régime de base.

[26] Le tribunal conclut que le *Severance Agreement* n'empêche pas Abitibi d'opérer compensation à l'égard des prestations de retraite payables au terme du Régime de base et du SERP.

3. Les prestations de retraite constituent-elles des biens insaisissables ?

ARTICLE 1676 : La compensation s'opère quelle que soit la cause de l'obligation d'où résulte la dette.

Elle n'a pas lieu, cependant, si la créance résulte d'un acte fait dans l'intention de nuire ou si la dette a pour objet un bien insaisissable.

[27] L'article 1676 C.c.Q. empêche la compensation lorsque la dette a pour objet un bien insaisissable. Abitibi prétend que les prestations de retraite versées à Doughan sont des biens saisissables.

RÉGIME DE BASE

[28] Ce régime est régi par la Loi sur les régimes complémentaires de retraite⁵ (LRCR), une loi d'ordre public dont l'objectif est de promouvoir, favoriser et protéger les droits à une rente de retraite pour des employés. Le financement de ces prestations est à la charge de l'employeur seul ou avec ses employés.

³ Article 6.1 (d), p. 4

⁴ Article 5.3, p. 4

⁵ L.R.Q., chapitre R-15.1

[29] La compensation ne peut s'opérer. Doughan ne détient pas de créance pour le paiement de ses prestations de retraite à l'encontre de Abitibi. En vertu de l'article 6 de la LRCR, c'est la caisse de retraite qui constitue un patrimoine fiduciaire, qui assume cette responsabilité. Pour cette seule raison, Abitibi ne peut opérer compensation, mais il y a plus.

[30] La LRCR comporte à l'article 264, une déclaration d'insaisissabilité pour les droits qui découlent des régimes qu'elle régit.

ARTICLE 264 : *Sauf dispositions contraires de la loi, est incessible et insaisissable :*

1° toute cotisation versée ou qui doit être versée à la caisse de retraite ou à l'assureur, ainsi que les intérêts accumulés ;

2° toute somme remboursée ou toute prestation versée en vertu d'un régime de retraite ou de la présente loi ;

3° toute somme attribuée au conjoint du participant à la suite d'un partage ou d'une autre cession de droits visés au chapitre VIII, avec les intérêts accumulés.

[31] L'argument de Abitibi voulant que, dès le paiement des prestations, celles-ci ne soient plus protégées et deviennent saisissables, doit être rejeté.

[32] Les deux arrêts de la Cour suprême du Canada⁶ sur lesquels Abitibi prend appui ne lui sont d'aucun secours. Dans l'arrêt Poulin, l'employé avait cessé sa participation à un régime, qui comportait une protection d'insaisissabilité, et obtenu une remise de capital qui a été transférée dans un REER. Le véhicule choisi n'étant plus un régime de retraite que la loi déclare insaisissable, la protection ne peut plus être invoquée. Lorsqu'un participant reçoit la valeur des droits accumulés par la remise du capital correspondant, il perd son droit de créance à l'égard de ce régime.

[33] Dans l'arrêt Thibault, la Cour suprême confirme que la protection d'insaisissabilité, décrétée pour les droits découlant d'un régime de retraite, cesse lorsque le capital est intégré au patrimoine de l'employé, notamment parce que les fonds ne sont plus immobilisés.

[34] Le capital, auquel il est fait référence dans ces deux arrêts, correspond à la valeur des droits que l'employé avait accumulés lors de la cessation de sa participation dans le Régime, et non pas de prestations qui lui sont versées alors qu'il demeure un participant à un régime protégé.

[35] Ces situations sont différentes de celle de Doughan qui continue sa participation au Régime de base dont il reçoit les prestations prévues par ce contrat.

⁶ Poulin c. Serge Morency et Associés Inc., (1999) 3 R.C.S. 351 et Banque de Nouvelle-Écosse c. Thibault, C.S.C., 14 mai 2004.

[36] À l'article 264 de la LRCR, le législateur a clairement spécifié son intention d'accorder une protection d'insaisissabilité aux prestations versées au terme d'un régime visé par la LRCR.

[37] Le tribunal conclut que les prestations du Régime de base versées à Doughan sont insaisissables et ne sont pas sujettes à compensation.

Le SERP

[38] Doughan reconnaît que le SERP n'est pas visé par la LRCR et qu'il ne bénéficie pas de la protection de l'article 264.

[39] Il invoque par contre l'article 553.7 C.p.c. pour empêcher la compensation. Cet article prévoit :

553. Sont insaisissables...

7. Les prestations accordées au titre d'un régime complémentaire de retraite auquel cotise un employeur pour le compte de ses employés, les autres sommes déclarées insaisissables par une loi régissant ces régimes ainsi que les cotisations qui sont ou doivent être versées à ces régimes.

[40] Le SERP n'est pas un régime auquel cotise Abitibi pour le compte de ses employés et n'est pas non plus un régime régi par une loi.

[41] Il s'agit d'un régime complémentaire au Régime de base afin que le haut-salarié reçoive des prestations en fonction de sa rémunération. Par contre, contrairement au Régime de base, les prestations du SERP ne sont pas « provisionnées » i.e. « financées » à l'avance par l'employeur.

[42] Plutôt que de verser des cotisations à une caisse fiduciaire pour assurer le paiement des prestations promises au terme du SERP, Abitibi a requis l'émission d'une lettre de crédit bancaire pour garantir le paiement de ses obligations au terme du SERP⁷.

[43] Cette lettre de crédit est émise en faveur de Fiducie Desjardins qui agit comme agent-payeur pour le compte de Abitibi.

[44] À chaque mois, Fiducie Desjardins transmet à Abitibi la liste des prestations payables aux bénéficiaires du SERP, dont Doughan. Sur réception, Abitibi transfère, à même ses fonds généraux, les montants correspondants, dans un compte ouvert à cette fin auprès de Fiducie Desjardins. Celle-ci dirige le paiement des prestations aux différents bénéficiaires y compris Doughan.

⁷ Article 4.03, P-8

[45] Doughan confond cotisations et prestations. La prestation est le bénéfice versé à l'employé suivant les termes et conditions du régime. La cotisation à un régime de retraite correspond au montant que l'employeur et/ou les employés versent pour assurer le paiement de la prestation. Abitibi a payé les prestations à Doughan sans cotiser à une caisse ou à un fonds constitué pour assurer le paiement des prestations.

[46] La lettre de crédit ne constitue pas une cotisation au SERP comme le prétend Doughan mais une garantie du respect des obligations de Abitibi de payer les prestations.

[47] Je conclus que les prestations de retraite versées au terme du SERP ne sont pas visées par l'article 553.7 C.p.c. et qu'elles sont saisissables.

4. La créance de Abitibi est-elle certaine, liquide et exigible, à l'encontre de Doughan ?

ARTICLE 1673 C.p.c. : *La compensation s'opère de plein droit dès que coexistent des dettes qui sont l'une et l'autre certaines, liquides et exigibles et qui ont pour objet une somme d'argent ou une certaine quantité de biens fongibles de même espèces.*

Une partie peut demander la liquidation judiciaire d'une dette afin de l'opposer en compensation.

Commentaires du Ministre de la Justice

Cet article complète le précédent quant à la notion de compensation. Le premier alinéa énonce le principe que la compensation résulte du seul effet de la loi, lorsque certaines conditions existent, relativement aux dettes visées. Il précise, contrairement au premier alinéa de l'article 1188 C.C.B.C., que la dette doit être, certes liquide et exigible, mais aussi certaine, c'est-à-dire non contestée ou contestable.

[48] Doughan n'a fait entendre aucun témoin, estimant que la preuve documentaire, dont la contestation et demande reconventionnelle dans le dossier connexe, démontre le caractère sérieux de sa contestation à l'encontre de la créance de Abitibi.

[49] À la demande de Doughan, et malgré l'objection de Abitibi, le tribunal a autorisé le dépôt des pièces D-18 à D-31, produites au soutien de la contestation dans le dossier connexe, parce que Abitibi en a reconnu l'existence dans sa déclaration pour mise au rôle du présent dossier. De même, la production de ces pièces a été permise par le tribunal uniquement aux fins de « mesurer » l'étendue de la contestation de Doughan et non pour en établir le contenu.

[50] La créance de Abitibi découle de l'application de l'entente de péréquation fiscale après le paiement de la compensation de départ à même le RCA.

[51] L'objectif recherché par l'établissement du RCA était de sécuriser Doughan en transférant à l'avance les fonds qui lui seraient dévolus lors de sa cessation d'emploi et

de permettre à Abitibi de limiter les impôts payables en raison du paiement de cette indemnité.

[52] Afin que Abitibi puisse diminuer l'impôt dont elle aurait été redevable en vertu de l'entente de péréquation, Doughan a accepté de retourner résider aux États-Unis en 1998, un an avant sa cessation d'emploi, afin qu'il soit considéré, aux fins fiscales, comme non-résident canadien. En effet, comme résident canadien, la compensation de départ de 4.3 M\$ était taxée à environ 52%. Comme non-résident canadien, le niveau de taxation était réduit à 25%.

[53] Doughan refuse d'être assujéti à un impôt canadien de l'ordre de 52%, pour les motifs qui sont énoncés dans sa contestation à l'encontre de l'action de Abitibi dans le dossier connexe.

[54] Il prétend que l'entente de péréquation allait dans un sens unique, i.e., Abitibi devait compenser Doughan lorsque l'impôt canadien est supérieur aux impôts américains, mais il n'a jamais convenu de l'inverse.

[55] Par ailleurs, il invoque que la mise en place du RCA mettait de côté l'entente de péréquation fiscale dans le contexte du paiement de son indemnité de départ et alors qu'il a cessé d'être résident canadien.

[56] Enfin, même si Doughan a accepté l'établissement du RCA pour réduire le fardeau fiscal de Abitibi, cela ne pouvait équivaloir à augmenter son propre fardeau fiscal pour l'année 1999, qu'il estimait être de l'ordre de 25% de ses revenus d'imposition⁸, et non de 50% comme le prévoient les calculs du *Stay at Home Tax* pour cette année d'imposition.

[57] Abitibi réclame aussi les crédits d'impôt étrangers dont a bénéficié Doughan suite à l'application des ententes de péréquation fiscales. Elle s'appuie sur l'article 7 (j) de SCTA. Doughan, pour sa part, estime en être l'unique propriétaire puisque le prêt prévu à l'article 7 n'a jamais été fait.

LE DROIT

[58] Selon la jurisprudence et les autorités, il faut que les réclamations que l'on veut compenser soient certaines, liquides et exigibles, non dans un sens absolu mais, il suffit qu'elles puissent être aisément prouvées et liquidées⁹.

[59] En effet, la liquidité des dettes comporte deux conditions : tout d'abord, l'existence juridique des deux dettes, i.e. : que leur existence ne soit pas contestée ou contestable ; ensuite, il faut que le montant de la dette soit fixée avec précision ou puisse l'être aisément.

⁸ D-19, D-20

⁹ *Canadian Snow Fence Ltd. c. Banque canadienne impériale de commerce*, (1974) C.A. 476.

[60] Lorsqu'une dette est contestée, elle ne perdra son caractère certain et liquide que si la contestation est raisonnable et sérieuse¹⁰.

[61] Les procédures dans le dossier connexe, de même que la preuve présentée lors de l'audience, démontrent que la créance de Abitibi est contestable, et que la contestation de Doughan est raisonnablement sérieuse. Il ne s'agit pas d'une contestation frivole.

[62] Le témoignage de M. Milot, de PWC, et l'ensemble de la preuve¹¹, soulèvent plusieurs questionnements sur la créance de Abitibi, dont le montant global d'économie d'impôt qu'elle voulait récupérer par la mise en place du RCA et l'application subséquente de l'entente de péréquation fiscale. Ces éléments ne peuvent être justifiés promptement et sommairement, comme le prétend Abitibi.

[63] Il serait injuste que Doughan, dont la créance est incontestable, attende son paiement jusqu'à ce que Abitibi ait établi la certitude de sa réclamation. Décider autrement équivaut à apposer un terme à une créance qui est exigible.

5. Le tribunal devrait-il appliquer l'article 462 C.p.c. ?

ARTICLE 462 C.p.c. : *Aucune demande ne peut être rejetée par le seul motif qu'elle ne vise à obtenir qu'un jugement déclaratoire ; mais si le tribunal est d'avis que l'intérêt du demandeur est insuffisant ou que son jugement ne mettrait pas fin à l'incertitude ou à la controverse qui a donné lieu à la demande, il peut refuser de prononcer.*

[64] La demande subsidiaire de Abitibi, de ne pas prononcer de jugement sur la quatrième question, doit être rejetée. Contrairement à ses prétentions, le présent jugement met fin à la controverse prévalant entre Abitibi et Doughan. L'objet du présent jugement n'est pas de décider du bien-fondé de la créance de Abitibi qui connaîtra son aboutissement dans le dossier connexe mais uniquement de déterminer le sérieux de la contestation de Doughan.

¹⁰ Pineau c. Serge Gaudet, *Théorie des obligations*, 4^e éd., Montréal, Les éditions Thémis 2001 ; KARIM, Vincent, *Commentaires sur les obligations*, vol. 2, Cowansville, Les éditions Yvon Blais, 1997 ; BAUDOUIN, Jean-Louis et Pierre-Gabriel JOBIN, *Les obligations*, 5^e éd., Cowansville, Les éditions Yvon Blais, 1998 ; Arcand c. Savard, (1973) C.A. 187 ; Bailey c. Chagnon, J.E. 1996-2231 (C.S.) ; *Structal (1982) inc. c. Fernand Gilbert Itée*, 1998 R.J.Q. 2686 (C.A.).

¹¹ D-5, D-5a, D-19 et D-20

PAR CES MOTIFS, LE TRIBUNAL :

ACCUEILLE en partie la requête en jugement déclaratoire ;

DÉCLARE que les prestations de retraite versées au demandeur, au terme du « *Régime des employés exécutifs de Abitibi-Consolidated Inc.* », sont insaisissables ;

DÉCLARE que les prestations de retraite versées au demandeur au terme du *Supplemental Executive Retirement Pension Plan*, sont saisissables.

DÉCLARE que la défenderesse ne peut opérer compensation entre la créance invoquée dans le dossier de la Cour supérieure, portant le numéro 500-05-071231-029, et les prestations de retraite payables au demandeur en vertu du *Régime de retraite des employés de Abitibi-Consolidated Inc.* et du *Supplemental Executive Retirement Plan* et ce, depuis le 1^{er} juillet 2002.

AVEC DÉPENS contre la défenderesse.

DANIÈLE MAYRAND, J.C.S.

Me Sandor J. Klein
DE GRANDPRÉ CHAIT
Procureur du demandeur

Me Suzanne Côté et Geneviève Magnan
STIKEMAN ELLIOTT
Procureures de la défenderesse

Dates d'audience : Les 18, 21, 22 et 23 juin 2004

COUR SUPÉRIEURE
(Chambre commerciale)

Nº. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ARITIBBOWATER INC. ET AL.

Requérantes

ERNST & YOUNG INC.

Contrôleurs

9

JAMES DOUGHAN ET AL.

Intimés

BS0350 n/dos.: 041053-1170

PIÈCE R-1

ORIGINAL

Me Mélanie Bélard (514) 397-3197

Fax: (514) 397-3591

STIKEMAN ELLIOTT

Sikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS

40^e Étage

1155, boul. René-Lévesque Ouest

Montréal, Canada H3B 3V2

PIÈCE R-2

JUGEMENTS.QC.CA

Décisions des tribunaux et organismes du Québec



Société québécoise
d'information juridique

Abitibi-Consolidated inc. c. Doughan

2008 QCCA 79

COUR D'APPEL

CANADA

PROVINCE DE QUÉBEC

GREFFE DE MONTRÉAL

N° : 500-09-014622-043
(500-17-015973-038)

DATE : Le 17 janvier 2008

CORAM : LES HONORABLES MARC BEAUREGARD J.C.A.
 YVES-MARIE MORISSETTE J.C.A.
 JACQUES DUFRESNE J.C.A.

ABITIBI- CONSOLIDATED INC.
APPELANTE – INTIMÉE INCIDENTE - Défenderesse
c.

JAMES DOUGHAN
INTIMÉ – APPELANT INCIDENT - Demandeur

ARRÊT

[1] **LA COUR** : - Statuant sur le pourvoi de l'appelante et sur le pourvoi incident de l'intimé contre un jugement de la Cour supérieure (Montréal, 15 juillet 2004, la juge Danièle Mayrand) qui a accueilli en partie une requête de l'intimé pour jugement déclaratoire;

[2] Après avoir étudié le dossier, entendu les parties et délibéré;

[3] Pour les motifs du juge Morissette, auxquels souscrivent les juges Beauregard et Dufresne;

[4] **REJETTE** le pourvoi et **CONDAMNE** l'appelante à payer à l'intimé les débours judiciaires ainsi qu'une somme de 5 000 \$ pour tous les honoraires judiciaires prévus au Tarif des avocats;

[5] **ACCUEILLE** le pourvoi incident, sans frais, **INFIRME** en partie le jugement entrepris et **SUBSTITUE** dans la troisième déclaration de ce jugement le mot « insaisissables » au mot « saisissables ».

MARC BEAUREGARD J.C.A.

YVES-MARIE MORISSETTE J.C.A.

JACQUES DUFRESNE J.C.A.

Me Suzanne Côté
Me Louise Touchette
STIKEMAN, ELLIOT
Pour l'appelante

Me Sandor J. Klein
Me Arthur I. Bronstein
De GRANDPRÉ, CHAIT
Pour l'intimé

Date d'audience : 25 octobre 2006

MOTIFS DU JUGE MORISSETTE

[6] L'appelante se pourvoit contre un jugement de la Cour supérieure qui a fait droit en partie à la requête pour jugement déclaratoire de l'intimé. L'intimé dépose un appel incident et attaque le jugement parce que la Cour supérieure ne lui a pas donné entière satisfaction selon les conclusions de sa requête. Pour les raisons qui suivent, j'estime que l'appel doit être rejeté et l'appel incident accueilli.

I. Origine du dossier

[7] L'intimé est l'ancien président de l'appelante. Il a résigné ses fonctions en 1999 et a commencé à toucher les prestations de retraite auxquelles il avait droit en vertu de deux régimes de retraite distincts qui étaient prévus, l'un pour les cadres de l'appelante et l'autre pour ses cadres supérieurs.

[8] Tout en considérant que l'intimé avait droit à recevoir les prestations mensuelles de retraite qu'elle versait à un tiers « fiduciaire », l'appelante a néanmoins cessé ces versements au motif que, selon elle, l'intimé avait envers elle une dette certaine, liquide et exigible.

[9] Devant cela, l'intimé a présenté à la Cour supérieure une requête pour jugement déclaratoire qui priait le tribunal de déclarer :

... that whatever debt may exist in favour of Defendant as Plaintiff in record No. 500-05-071231-029 of the Superior Court, District of Montreal, cannot be the object of legal or judicial compensation against the pensions payable to Plaintiff by Defendant, the whole with costs[.]

Le jugement entrepris donne raison à l'intimé sur ce premier point mais ne fait que partiellement droit à sa requête puisqu'il comprend aussi dans son dispositif les déclarations suivantes :

... que les prestations de retraite versées au demandeur, au terme du « *Régime des employés exécutifs de Abitibi-Consolidated Inc.* », sont insaisissables;

... que les prestations de retraite versées au demandeur au terme du *Supplemental Executive Retirement Pension Plan*, sont saisissables [.]

... que la défenderesse ne peut opérer compensation entre la créance invoquée dans le dossier de la Cour supérieure, portant le numéro 500-05-071231-029, et les prestations de retraite payables au demandeur en vertu du *Régime de retraite des employés de Abitibi-Consolidated Inc.* et du *Supplemental Executive Retirement Plan* et ce, depuis le 1^{er} juillet 2002.

Le deuxième de ces trois alinéas inflige un démenti au paragraphe 11 de la requête introductive d'instance de l'intimé, qui énonçait :

11. Plaintiff's pension is, moreover unseizable in virtue of article 553 (7) of the Code of Civil Procedure as well as in virtue of article 264 (2) of the *Loi sur les régimes complémentaires de retraite* [.]

Insatisfaite, l'appelante se pourvoit et réitère ici qu'il y avait lieu à compensation légale entre les deux dettes. L'intimé quant à lui se porte appelant incident et attaque la déclaration selon laquelle les prestations versées en vertu du *Supplemental Executive Retirement Pension Plan* seraient saisissables.

[10] Pour comprendre l'enjeu du débat, il importe de revenir brièvement sur le litige qui s'instruira éventuellement en Cour supérieure dans le dossier portant le numéro 500-05-071231-029 (« le dossier connexe »).

Voici dans les grandes lignes en quoi consiste ce litige.

[11] Avant 1997, l'intimé, citoyen américain, a occupé pendant plusieurs années les fonctions de président et de chef de la direction de Stone Consolidated (Stone), une entreprise qui fusionna par la suite avec l'appelante. À compter de 1997 et jusqu'au 31 décembre 1999, l'intimé occupa les mêmes fonctions au sein de l'appelante.

[12] Entre autres avantages auxquels il avait droit de par ses fonctions, l'intimé jouissait depuis son arrivée au Canada en 1995 d'une entente dite « de péréquation fiscale ». Aux termes de cette entente, Stone, et par la suite l'appelante, s'engageaient à verser annuellement à l'intimé un supplément de rémunération basé sur la différence entre l'impôt que l'intimé était tenu de payer en tant que résident du Canada, et l'impôt qu'hypothétiquement il aurait eu à payer s'il avait résidé aux États-Unis. Ce supplément était payable au moyen d'avances, avec possibilité de rajustements postérieurs à l'année d'imposition.

[13] À la fin de 1998, l'intimé cessa d'être résident du Canada, tout en continuant d'exercer les mêmes fonctions.

[14] Le 31 décembre 1999, l'intimé quittait son poste et prenait sa retraite. Le mois suivant, il se voyait verser une somme de 4 300 000 \$ à titre d'indemnité contractuelle de fin d'emploi. Il commençait en outre à percevoir une rente mensuelle de retraite de 28 170 \$ versée dans le cadre des régimes de retraite auxquels il était admissible : le *Régime des employés exécutifs de Abitibi-Consolidated Inc.* [le REEAC] pour 570 \$ et le *Supplemental Executive Retirement Plan* [le SERP] pour 27 600 \$.

[15] Parce qu'il est devenu résident américain en 1998 et par le jeu de dispositions des lois fiscales pertinentes, l'intimé, pour l'année financière 1999, aurait globalement payé moins d'impôt que si son revenu avait été gagné aux États-Unis.

[16] En raison de cet état de fait, l'appelante a conclu que l'intimé était endetté envers elle d'une somme de 590 621 \$ US, représentant « the difference between [his] theoretical tax liability and his actual tax liability », et d'une somme de 379 342 \$ US, représentant des avances déjà reçues par lui aux fins de payer ses impôts. Ces deux montants totalisent 969 963 \$ US, soit 1 527 012,70 \$ CA au taux d'échange de 1,5743 dollar canadien par dollar américain.

[17] L'appelante a réclamé cette somme de l'intimé qui a nié être endetté envers elle. Elle a donc entrepris contre lui en Cour supérieure au mois de mars 2002 une action pour le même montant. C'est le dossier connexe, mentionné dans le dispositif du jugement entrepris et au paragraphe [10] ci-dessus.

[18] Sur ces entrefaites, cependant, l'appelante avait commencé à verser ou faire verser à l'intimé depuis janvier 2000 la rente de retraite à laquelle il avait droit en vertu des deux régimes de retraite auxquels il est admissible.

[19] Malgré leurs tentatives de trouver une solution négociée au litige, les parties devaient demeurer sur leur position respective.

[20] Invoquant alors compensation légale, l'appelante décidait de retenir le paiement des rentes de retraite de l'intimé à compter du 1^{er} juillet 2002. D'où la requête pour jugement déclaratoire de l'intimé, dont la conclusion principale a déjà été reproduite au paragraphe [9] de ces motifs. C'est le dossier 500-17-015973-038 de la Cour supérieure, où fut versé le jugement entrepris.

[21] En Cour supérieure, plusieurs arguments de droit ont été soulevés de part et d'autre sur la recevabilité de la requête comme sur le fond des questions en litige : insaisissabilité des prestations de retraite de l'intimé, empêchement contractuel à la compensation, caractère incertain et non exigible de la créance de l'appelante, tardiveté du recours de l'intimé et effet de l'article 462 C.p.c. La juge de première instance a considéré tous ces arguments et, comme on l'a vu, elle a donné partiellement raison à l'intimé.

II. Jugement dont appel

[22] La juge a conclu :

- 1) que la créance de l'appelante n'était pas certaine;
- 2) que l'intimé avait tort de prétendre que l'appelante s'était engagée par contrat à ne pas invoquer la compensation;
- 3) qu'en tout état de cause, l'intimé n'était pas créancier de l'appelante mais du « fiduciaire » des régimes de retraite;
- 4) qu'une partie des prestations (le régime de base) était insaisissable en application de la *Loi sur les régimes complémentaires de retraite*, mais qu'une autre partie des prestations (le régime supplémentaire) n'était pas insaisissable en application de cette loi ou de l'article 553.7.

[23] L'irrecevabilité de la requête pour jugement déclaratoire, l'empêchement contractuel à la compensation, la tardiveté du recours et la saisissabilité du montant versé dans le cadre du REEAC ne sont plus plaidés en appel par l'appelante.

[24] Deux points, à vrai dire, méritent d'être abordés de plus près pour décider du sort de l'appel et de l'appel incident. Premièrement, le caractère certain, liquide et exigible de la créance de l'appelante et, partant, la faculté pour elle d'opérer compensation entre d'une part, la dette alléguée par l'appelante (son droit, contesté par l'intimé, à un remboursement en vertu de l'entente de péréquation), et d'autre part, la dette alléguée par l'intimé (son droit, qui n'est pas contesté par l'appelante, à des prestations de retraite). Deuxièmement, la saisissabilité des prestations versées aux termes du SERP.

III. Analyse

A. La possibilité d'une compensation entre les deux créances

[25] Après avoir cité l'article 1673 C.c.Q. et le commentaire ministériel sur cette disposition, la juge s'est exprimée comme suit sur la question de la compensation légale :

[58] Selon la jurisprudence et les autorités, il faut que les réclamations que l'on veut compenser soient certaines, liquides et exigibles, non dans un sens absolu mais, il suffit qu'elles puissent être aisément prouvées et liquidées[1].

[59] En effet, la liquidité des dettes comporte deux conditions : tout d'abord, l'existence juridique des deux dettes, i.e. : que leur existence ne soit pas contestée ou contestable; ensuite, il faut que le montant de la dette soit fixée avec précision ou puisse l'être aisément.

[60] Lorsqu'une dette est contestée, elle ne perdra son caractère certain et liquide que si la contestation est raisonnable et sérieuse[2].

[61] Les procédures dans le dossier connexe, de même que la preuve présentée lors de l'audience, démontrent que la créance de Abitibi est contestable, et que la contestation de Doughan est raisonnablement sérieuse. Il ne s'agit pas d'une contestation frivole.

[62] Le témoignage de M. Milot, de PWC, et l'ensemble de la preuve[3], soulèvent plusieurs questionnements sur la créance de Abitibi, dont le montant global d'économie d'impôt qu'elle voulait récupérer par la mise en place du RCA et l'application subséquente de l'entente de péréquation fiscale. Ces éléments ne peuvent être justifiés promptement et sommairement, comme le prétend Abitibi.

[63] Il serait injuste que Doughan, dont la créance est incontestable, attende son paiement jusqu'à ce que Abitibi ait établi la certitude de sa réclamation. Décider autrement équivaut à apposer un terme à une créance qui est exigible.

[26] À une légère nuance près, je ne trouve rien à redire dans l'énoncé du droit qu'exprime la juge aux paragraphes [58], [59] et [60] de ses motifs. La nuance qui me paraît indiquée découle du libellé de l'article 1673 C.c.Q., qui a remplacé en 1994 l'article 1188 C.c.B.-C. Le premier alinéa de la plus récente de ces dispositions prévoit aujourd'hui ceci :

1673. La compensation s'opère de plein droit dès que coexistent des dettes qui sont l'une et l'autre certaines, liquides et exigibles et qui ont pour objet une somme d'argent ou une certaine quantité de biens fongibles de même espèce.

L'article 1188 C.c.B.-C. disposait, quant à lui, comme suit :

1188. La compensation s'opère de plein droit entre deux dettes également liquides et exigibles et ayant pour objet une somme de deniers ou une quantité de choses indéterminées de même nature et qualité.

On voit qu'aux exigences de liquidité et d'exigibilité s'est ajoutée en 1994 celle de la certitude de la dette, un élément jusque-là accepté en jurisprudence mais qui n'avait pas été codifié en 1866. Il est donc à mon sens inexact de dire que la certitude de la dette est une sous-composante de l'exigence de la liquidité de la dette.

[27] On trouve dans la doctrine une explication de la transition entre les deux dispositions. Ainsi, dans un ouvrage récent des professeurs Didier Lluellas et Benoît Moore, on peut lire ceci à ce sujet[4] :

2680. Certitude des deux dettes. La compensation légale équivalant à un paiement, elle suppose que ce dernier puisse être effectué efficacement et volontairement. Il est donc normal que le Code exige que l'une et l'autre dettes soient certaines (art. 1673 al. 1^{er}). La certitude des dettes n'était pas explicitement prévue par l'article 1188 C.c.B.-C., lequel n'imposait que la liquidité et l'exigibilité. Le Code actuel a raison de ne pas confondre ces deux notions. En effet, la liquidité concerne le « montant d'une dette », alors que la certitude concerne « sa validité juridique ». Une dette, bien qu'apparemment chiffrée – donc « liquide » – ne sera pas compensable si elle est contestée – le débiteur résiste à une demande du créancier, pourvu que la contestation ne soit pas un artifice dilatoire –, voire « sérieusement contestable » – comme la dette affectée d'une condition de type résolutoire. Inversement, une dette sera compensable même si elle n'est pas chiffrée, si elle n'est ni contestable ni contestée : songeons à B qui doit rembourser un prêt de 100 000 \$ consenti par A et qui a été blessé par la négligence de ce dernier qui a reconnu sa responsabilité dans un acte signé plus d'un mois après l'accident; la dette de A n'est pas encore liquide, mais elle est certaine. Lorsqu'elle deviendra liquide, la compensation pourra jouer.

Ce passage me semble décrire avec justesse la situation à laquelle font actuellement face l'appelante et l'intimé.

[28] Le quantum de la créance à l'égard de laquelle l'appelante prétend qu'il y a compensation légale ne semble pas être matière à débat entre les parties : il s'agit d'une somme de 1 527 012,70 \$ CA.

[29] En revanche, le fondement même de cette créance est vivement contesté par l'intimé dans le dossier connexe. Il me paraît utile, malgré la longueur de l'extrait qui suit, de citer les paragraphes les plus pertinents de la défense déposée par l'intimé dans ce dossier :

Proposal to reduce tax reimbursement costs

24. These advisors suggested that the Plaintiff Abitibi-Consolidated Inc. could achieve significant savings on tax equalization if Defendant were to become a non-resident of Canada prior to the payment of severance compensation into an RCA [Retirement Compensation Arrangement] for his benefit;

25. At the suggestion of Plaintiff's tax advisors, Defendant returned to the United States when he did, at the end of 1998, in order to save Plaintiff from having to compensate Defendant for the higher Canadian than American taxes on his severance compensation;
26. It was understood at the time by Plaintiff and these tax advisors that, as a result of Defendant's new status as a non-resident of Canada, Plaintiff would save the money it would have been obliged to pay to equalize the taxes on the severance compensation had Defendant continued to reside in Canada, while Defendant would benefit from the lower non-resident tax on the severance compensation itself;
27. This is evident from the letter from PriceWaterhouse to Defendant dated March 18, 1998 in which PriceWaterhouse proposed changes to Defendant's retirement arrangements in order to achieve "a significant tax reimbursement saving to the Company" and from PriceWaterhouse's Proposal to Reduce Tax Reimbursement Costs which accompanied that letter; the letter and the proposal are communicated by Defendant as Exhibit D-19;
28. It is clear from Schedule III to the Proposal to Reduce Tax Reimbursement Costs, Exhibit D-19, that Defendant would be keeping three million dollars on an assumed Severance payment of four million dollars;
29. This was confirmed by Mr. Gerry Wood of PriceWaterhouseCoopers in a letter to Defendant dated May 11, 1999 communicated herewith by Defendant as Defendant's Exhibit D-20;

Claim in relation to 1999

30. Plaintiff's claim in relation to the year 1999 is composed of the sum of US \$ 590,621.00 claimed on the basis of an equalization calculation, and the sum of US \$ 379,342.00 which Plaintiff paid to the various tax authorities towards the beginning of the year 2000 and which Plaintiff is seeking to recover from Defendant;
31. Plaintiff purports to make these claims on the basis of the tax equalization agreement entered into by its predecessor Stone prior to the amalgamation;

a) Claim for US \$ 590,621.00
32. Plaintiff claims an amount of US \$ 590,621.00 being the difference between a theoretical amount which Plaintiff has described as a "stay at home tax" and a lower amount being the sum of the taxes actually paid by Defendant not as a Canadian resident but as a non-resident of Canada in relation to the taxation year 1999;
33. Plaintiff makes this claim despite the fact that Plaintiff received a great benefit from the implementation of the Proposal to Reduce Tax Reimbursement Costs which implementation was conditional on Defendant's returning to the United States prior to the payment of moneys pursuant to the RCA;

34. Defendant returned to the United States earlier than he would otherwise have done, and this at considerable inconvenience to himself;
35. As a result of Defendant's acceptance of the PriceWaterhouse Proposal and the Severance Compensation Transition Agreement which was its implementation, Plaintiff has avoided tax equalization payments which it would otherwise have been obliged to make, and which are estimated at an amount in excess of US \$ 1,600,000 in the PriceWaterhouse Proposal to Reduce Tax Reimbursement Costs which forms part of Defendant's Exhibit D-19;
36. The part of Plaintiff's claim in relation to the year 1999 in the amount of US \$ 590,621 has no foundation in the agreement between the parties and is unfounded;
37. In its claim for US \$ 590,621 Plaintiff claims tax equalization for the excess of United States taxes over Canadian taxes, in the absence of any agreement that Defendant would make equalization payments to Plaintiff in the event Canadian taxes were lower than United States taxes;

b) Claim for US \$ 379,342.00
38. Plaintiff is claiming from Defendant a further amount of US \$ 379,342.00 which Plaintiff paid to the various tax authorities towards the beginning of the year 2000 for the accounts of Defendant;
39. Defendant's income for the year 1999 included an amount of US \$ 352,993 which was paid to him by the Plaintiff as tax equalization in relation to the year 1998 when he was resident in Canada and employed in Canada by the Plaintiff;
40. This amount was paid to Defendant in 1999 rather than in 1998 as a result of a change in Plaintiff's procedure with regard to the timing of the payment of equalization which came about following the letter from PriceWaterhouse to Plaintiff dated January 2, 1998 which we communicate herewith as Defendant's Exhibit D-21;
41. Under the Tax Equalization Agreement Plaintiff is obliged to pay to Defendant, in addition to any amount paid to him as equalization, all other amounts required to cover the additional taxes incurred by Defendant as a result of a tax equalization payment;
42. As a result of the inclusion of the amount of US \$ 352,993 in Defendant's income for the year 1999 (resulting from the equalization of his 1998 income), Defendant in the year 1999 incurred additional taxes in the amount of US \$ 177,000;
43. These taxes would have been absorbed by Plaintiff pursuant to the 1998 equalization calculation, had Plaintiff not changed its procedure with regard to the timing of the payment of equalization;
44. Plaintiff is required to pay Defendant an amount of approximately US

\$ 397,750 which is the estimated amount required to cover all taxes incurred by Defendant as a result of the payment to him in 1999 of the amount of US \$ 352,993 as a tax equalization in relation to the year 1998 when he was resident in Canada and employed in Canada by the Plaintiff;

45. This amount is calculated using the "gross-up" method used by Mr. Gerry Wood of PriceWaterhouse in the Proposal to Reduce Tax Reimbursement Costs, Exhibit D-19, and which we refer to herein below in paragraph 47;
46. In the Proposal to Reduce Tax Reimbursement Costs, Exhibit D-19, the calculation of the amount of additional income which is sufficient after taxes to cover the requisite equalization payment is referred to by Mr. Gerry Wood of PriceWaterhouse as a "gross-up";
47. Using the same method of calculation for the "gross-up" as was used by Mr. Gerry Wood of PriceWaterhouse to calculate the amount of US \$ 850,000 appearing in the PriceWaterhouse Proposal to Reduce Tax Reimbursement Costs, as explained by Mr. Gerry Wood in his reply to his undertaking # 8, which reply is communicated herewith as Defendant's Exhibit D-22, the amount of income necessary to cover all taxes on the amount of US \$ 352,993 is the amount of US \$ 177,000 referred to in paragraph 42 herein above, "grossed-up" as follows:

$$\text{US \$ } 177,000 / (100\% - 55.5\%) = \text{US \$ } 397,752$$

The rate of 55.5% is the sum of the following:

Maximum combined Canadian/Quebec rate 1998 51.2%
Approximate additional US Federal tax payable, since Defendant would not get a full foreign tax credit under US rules. (State income taxes are ignored as immaterial) 4.3%

48. The amount of US \$ 397,752 exceeds the amount of US \$ 379,342 which Plaintiff paid to his various tax authorities towards the beginning of the year 2000 for the account of Defendant by US \$ 18,410 which Defendant is entitled to claim from Plaintiff;

Claim of Can \$ 100,000 in relation to the year 2000

49. Plaintiff is claiming from Defendant an amount of Can \$ 100,000 in relation to the year 2000 being Defendant's estimated tax saving in the year 2000 resulting from the use by Defendant of Foreign Tax Credits accumulated during the course of his employment in Canada;
50. There was never any agreement between Defendant and Plaintiff or its predecessor Stone that the employer would be entitled to compensation resulting from the benefit which Defendant might derive from Foreign Tax Credits accumulated by him during his residence and employment in Canada;
51. Plaintiff's claim in relation to the year 2000 is completely unfounded;

[30] La contestation dans le dossier connexe suit son cours. L'appelante ne s'est pas prévalu de l'article 75.1

C.p.c. pour tenter de faire rejeter, parce qu'elle serait frivole ou manifestement mal fondée, la défense et demande reconventionnelle que l'intimé a produite au dossier connexe en juin 2003.

[31] Il incombait à l'appelante (au besoin, preuve à l'appui) de démontrer que la créance qu'elle fait valoir en vertu de l'entente de péréquation présente les caractères requis. Le fait que la question soit actuellement en litige devant la même cour tend à démontrer le contraire. On peut concevoir que, pour faire obstacle à la compensation légale qu'on lui oppose, un débiteur prenne l'initiative de contester devant une instance compétente la créance invoquée contre lui. On peut concevoir aussi que cette contestation soit manifestement sans mérite – soit un « artifice dilatoire », selon l'expression des auteurs précités; dans ce cas, des moyens existent pour mettre fin liminairement à la contestation. Mais, en l'occurrence, la situation est tout autre.

[32] La créance de l'intimé contre l'appelante est admise par cette dernière, elle est certaine, liquide et exigible.

[33] Par contre, la créance de l'appelante contre l'intimé est incertaine. Un litige en apparence sérieux est engagé entre les parties sur sa validité. Dans ces conditions, c'est l'appelante qui devait faire les frais de cette incertitude aussi longtemps qu'un jugement final validant et liquidant cette créance n'aura pas été prononcé dans le dossier connexe. Si l'appelante est déboutée dans ce dossier, elle n'aura subi aucun préjudice. Si elle a gain de cause, l'intimé devra lui verser les intérêts prévus par la loi à titre de dommages moratoires pour le retard qu'il aura mis à s'exécuter.

[34] Cela étant, la juge a eu raison de conclure qu'à ce stade, il était prématuré pour l'appelante d'opérer compensation, et que l'intimé avait droit d'obtenir un jugement déclaratoire en sa faveur, dans les termes qu'énonce le chef du dispositif relatif à la compensation.

[35] L'appelante ne fait pas voir non plus que la juge aurait mal exercé le pouvoir discrétionnaire que lui conférait l'article 462 C.p.c. J'adopterais tels quels les motifs de la juge à cet égard.

B) La saisissabilité des prestations versées en vertu du SERP

[36] Les prestations de retraite que la juge a déclarées insaisissables sont versées à l'intimé en vertu du REEAC, un régime assujéti à l'article 234 de la *Loi sur les régimes complémentaires de retraite*[5]. Cette loi ne s'applique pas au SERP, ce que concède l'intimé.

[37] Ce dernier invoque plutôt le paragraphe 7 de l'article 553 C.p.c. qui, selon lui, rendrait insaisissables les prestations versées en vertu de ce second régime. Cette disposition énonce ce qui suit :

553. Sont insaisissables :

7. Les prestations accordées au titre d'un régime complémentaire de retraite auquel cotise un employeur pour le compte de ses employés, les autres sommes déclarées insaisissables par une loi régissant ces régimes ainsi que les cotisations qui sont ou doivent être versées à ces régimes.

Analysant cette question, la juge a estimé que les prestations payables à l'intimé en vertu du SERP n'étaient pas visées par le paragraphe en question.

[38] Pour justifier cette interprétation de la disposition en cause, la juge a d'abord tiré de la preuve documentaire quelques constatations de fait :

- le SERP est un régime complémentaire prévu pour les hauts-salariés de l'appelante;
- il n'est pas « régi par une loi » au sens du paragraphe 7 de l'article 553 précité;
- les prestations payables en vertu du SERP ne sont pas « provisionnées », c'est-à-dire « financées » à l'avance par l'appelante;
- au fur et à mesure qu'elles deviennent dues, ces prestations sont payées par l'appelante à une

compagnie de fiducie qui agit pour l'appelante en qualité d'agent-payeur;

- une lettre de crédit bancaire émise en faveur de la compagnie de fiducie garantit le paiement des prestations dues par l'appelante en vertu du SERP.

[39] Selon la juge, vu ces faits, c'est à tort que l'intimé invoque la règle d'insaisissabilité de l'article 553 C.p.c. Elle exprime sa conclusion en ces termes :

[45] Doughan confond cotisations et prestations. La prestation est le bénéfice versé à l'employé suivant les termes et conditions du régime. La cotisation à un régime de retraite correspond au montant que l'employeur et/ou les employés versent pour assurer le paiement de la prestation. Abitibi a payé les prestations à Doughan sans cotiser à une caisse ou à un fonds constitué pour assurer le paiement des prestations.

[46] La lettre de crédit ne constitue pas une cotisation au SERP comme le prétend Doughan mais une garantie du respect des obligations de Abitibi de payer les prestations.

[47] Je conclus que les prestations de retraite versées au terme du SERP ne sont pas visées par l'article 553.7 C.p.c. et qu'elles sont saisissables.

[40] Je note en premier lieu que la preuve documentaire au dossier d'appel n'inclut pas la lettre de crédit mentionnée aux paragraphes [45] et [46] des motifs livrés en première instance.

[41] Quoi qu'il en soit, il me semble que la question débattue ici peut être résolue par une simple application des termes utilisés par le législateur dans le libellé du paragraphe 7 de l'article 553 C.p.c. Tout comme la juge, je suis d'avis que l'expression « régime complémentaire de retraite » doit être comprise comme applicable au SERP : cette expression n'est pas définie par la loi en des termes qui excluraient le type de régime en cause ici et, conformément au sens ordinaire des mots, elle peut s'entendre d'un contrat en vertu duquel l'ex-employeur s'engage à verser périodiquement un montant d'argent à titre de prestation à un ex-employé retraité. C'est ce dont il s'agit ici.

[42] Or, comme le souligne l'intimé dans son mémoire, un fait surtout expliquerait pourquoi la juge a considéré que les modalités du SERP font échec à l'exception d'insaisissabilité prévue par le Code : les prestations auxquelles l'intimé a droit ne sont pas « provisionnées » ou « financées » à l'avance par l'appelante, il n'y a pas de capitalisation en jeu.

[43] Cette caractéristique du SERP ressort clairement de l'expertise du témoin André Dionne, produite en défense par l'appelante. Ce témoin, juriste de formation et qui fut entendu en qualité de « conseiller en matière de régimes de retraite », fournit les précisions suivantes :

... Because the SERP is not subject to [the Québec Supplemental Pension Plans Act (QSPPA)], there is no legal requirement that the SERP benefits be prefunded by employer contributions, i.e. SERP benefits can be paid out from [Abitibi-Consolidated Inc. (ACI)]'s funds on a "pay-as-you-go" basis.

Some supplemental pension arrangements are funded (i.e. money is set aside in a separate fund) because an employer has elected to do so, but the SERP is unfunded, i.e. no funds are contributed in advance to a third party to pay future SERP benefits

Payment Facility Agreement

A somewhat common practice in the market place for supplemental retirement plans such as the SERP is that the employer will enter into an "agency" or "facility of payment arrangement" with a third party, which in many cases will be the person or entity who also acts as the trustee or custodian of the employer's registered pension plan. ACI has adopted such an approach, and each month, Fiducie Desjardins makes SERP retirement benefits payments on behalf of ACI.

Notwithstanding this facility of payment arrangement, it cannot be said that contributions are paid in advance by ACI to fund the SERP. In fact, if it was considered that the SERP is funded by contributions from ACI, the arrangement between ACI and Fiducie Desjardins would no longer be a simple "facility of payment arrangement", but would be a Retirement Compensation Arrangement (an "RCA") for the purposes of the [Income Tax Act (ITA)]. An RCA is defined as an arrangement under which contributions are made by an employer to another person (referred to as the "Custodian") in connection with supplemental (i.e. in excess of the retirement benefits that can be paid from a registered pension plan under the ITA) retirement benefits payable to its employees. One of the consequences of an arrangement being characterized as an RCA for tax purposes is that all contributions paid by ACI to the Custodian would be subject to a 50 % refundable tax to be remitted to the CCRA. It is because the arrangement between ACI and Fiducie Desjardins does not contemplate the payment of contributions by ACI to a Custodian that the SERP is not considered to be an RCA.

Letter of Credit

Through a separate arrangement, Fiducie Desjardins also holds a Letter of Credit in order to secure the payment of the SERP benefits by ACI. The use of a Letter of Credit to secure supplemental retirement benefits is quite prevalent in the market place and such arrangement, although providing security, is not funding of the payment of contributions by the employer to a Custodian. In fact, while the Letter of Credit arrangement is being maintained, the employer has to pay the retirement benefits from its operating funds on a pay-as-you-go basis, whether directly or through an agency or facility of payment arrangement with a third party. This is the situation with the SERP.

Bref, diverses considérations financières et fiscales ont pu motiver la mise sur pied du SERP sous la forme décrite ici. Mais je ne vois pas en quoi la forme qu'il revêt serait incompatible avec la règle d'insaisissabilité qu'énonce le paragraphe 7 de l'article 553 C.p.c.; cette disposition n'impose pas qu'un régime complémentaire de retraite soit « provisionné » à l'avance.

[44] Selon ce qui apparaît au dossier et que confirme le témoin Dionne, l'intimé a droit en vertu du SERP à des prestations mensuelles qu'il touche de l'agent-payeur Fiducie Desjardins; l'appelante, quant à elle, verse ces sommes à l'agent-payeur à même ses revenus courants. Si l'appelante omettait de verser comme prévu les sommes nécessaires pour couvrir les prestations payables aux termes du SERP, l'agent-payeur se prévaudrait de la lettre de crédit; le but de cette sûreté, toujours selon le témoin Dionne, est de protéger les bénéficiaires de prestations en vertu du SERP.

[45] Dans l'arrêt *Poulin c. Serge Morency et Associés inc.* [6], le juge Gonthier au nom de la Cour suprême du Canada rappelait une remarque de portée générale faite dans la même affaire par la juge Deschamps, alors de la Cour d'appel du Québec :

Comme l'a souligné le juge Deschamps dans ses motifs, si on examine les cas d'insaisissabilité prévus par la loi, le désir de protéger les créances alimentaires au sens large semble prédominer. L'objectif est souvent de prévenir les saisies en mains tierces, c'est-à-dire les saisies à la source. On n'a qu'à penser au par. 553(11) C.p.c. qui déclare insaisissable une partie des "traitements, salaires et gages bruts".

Gardant cette observation à l'esprit, j'en viens à la conclusion que le paiement que l'appelante destine à l'intimé en application du SERP ne devient saisissable que lorsqu'il pénètre dans le patrimoine de l'intimé. La somme en cause est donc insaisissable au stade où l'appelante prétend tirer parti de la compensation légale; c'est un motif de plus pour rejeter les prétentions qu'elle a fait valoir en première instance.

[46] Pour les motifs qui précèdent, je rejetterais l'appel principal et je ferais droit à l'appel incident afin de déclarer insaisissables les prestations de retraites versées à l'intimé en application du SERP.

YVES-MARIE MORISSETTE J.C.A.

- [1] *Canadian Snow Fence Ltd. c. Banque canadienne impériale de commerce*, [1974] C.A. 476 .
- [2] PINEAU, Jean et. Serge GAUDET, *Théorie des obligations*, 4^e éd., Montréal, Les éditions Thémis 2001 ; KARIM, Vincent, *Commentaires sur les obligations*, vol. 2, Cowansville, Les éditions Yvon Blais, 1997 ; BAUDOUIN, Jean-Louis et Pierre-Gabriel JOBIN, *Les obligations*, 5^e éd., Cowansville, Les éditions Yvon Blais, 1998 ; *Arcand c. Savard*, [1973] C.A. 187 ; *Bailey c. Chagnon*, J.E. 1996-2231 (C.S.) ; *Structal (1982) inc. c. Fernand Gilbert ltée*, [1998] R.J.Q. 2886 (C.A.).
- [3] D-5, D-5a, D-19 et D-20.
- [4] *Droit des obligations*, Montréal : Éd. Thémis, 2006, p. 1553. Voir aussi, sur le même sujet, BÉLANGER, André, « La compensation légale, son automatisme et ses conditions d'application : entre mythes et réalités » (2003), 44 *Cahiers de droit* 129, p. 152-6.
- [5] L.R.Q., c. R-15.1.
- [6] [1999] 3 R.C.S. 351 .

Ce site est une collaboration de SOQUIJ et du ministère de la Justice du Québec.

COUR SUPÉRIEURE
(Chambre commerciale)

Nº. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ARITIBIBOWATER INC. ET AL.

Requérantes

-et-

ERNST & YOUNG INC.

Contrôleur

⑤

JAMES DOUGHAN ET AL.

Intimés

BS0350
ny/dos.: 041053-1170

PIECE R-2

ORIGINAL

Me Mélanie Béliand (514) 397-3197

Fax: (514) 397-3591

STIKEMAN ELLIOTT

Stikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS

40^e Étape

1155, boul. René-Lévesque Ouest

Montréal, Canada H3B 3V2

PIÈCE R-3

Référence : Jugements sur demandes d'autorisation
Date : 7 août 2008

Autres formats : [PDF WPD](#)
[Page facile à imprimer](#)

SUPREME COURT OF CANADA -- JUDGMENTS IN LEAVE APPLICATIONS
OTTAWA, 2008-08-07. THE SUPREME COURT OF CANADA HAS TODAY RENDERED JUDGMENT IN THE FOLLOWING APPLICATIONS FOR LEAVE TO APPEAL.
FROM: SUPREME COURT OF CANADA (613) 995-4330

COUR SUPRÊME DU CANADA -- JUGEMENTS SUR DEMANDES D'AUTORISATION
OTTAWA, 2008-08-07. LA COUR SUPRÊME DU CANADA A RENDU JUGEMENT AUJOURD'HUI DANS LES DEMANDES D'AUTORISATION D'APPEL SUIVANTES.
SOURCE: COUR SUPRÊME DU CANADA (613) 995-4330

COMMENTS/COMMENTAIRES: comments@scc-csc.gc.ca

Note for subscribers:

The summaries of the cases are available at <http://www.scc-csc.gc.ca> :

Click on Cases and on SCC Case Information, type in the Case Number and press Search. Click on the Case Number on the Search Result screen, and when the docket screen appears, click on "Summary" which will appear in the left column.

Alternatively, click on

http://scc.lexum.umontreal.ca/en/news_release/2008/08-08-01.2a/08-08-01.2a.html

Note pour les abonnés :

Les sommaires des causes sont affichés à l'adresse <http://www.scc-csc.gc.ca> :

Cliquez sur « Dossiers », puis sur « Renseignements sur les dossiers ». Tapez le n° de dossier et appuyez sur « Recherche ». Cliquez sur le n° du dossier dans les Résultats de la recherche pour accéder au Registre. Cliquez enfin sur le lien menant au « Sommaire » qui figure dans la colonne de gauche.

Autre façon de procéder : Cliquez sur

http://scc.lexum.umontreal.ca/fr/news_release/2008/08-08-01.2a/08-08-01.2a.html

GRANTED WITH COSTS / ACCORDÉES AVEC DÉPENS

Gaétan Plourde c. Compagnie Wal-Mart du Canada Inc. - et - Commission des relations du travail (Qc) (Civile) (Autorisation) (32342)

(La demande d'autorisation d'appel est accordée avec dépens en faveur du demandeur quelle que soit l'issue de l'appel. / The application for leave to appeal is granted with costs to the applicant in any event of the cause.)

Coram: Binnie / LeBel / Deschamps

Abitibi-Consolidated Inc. c. James Doughan (Qc) (Civile) (Autorisation) (32523)

(La demande d'autorisation d'appel est accordée avec dépens en faveur de la demanderesse quelle que soit l'issue de l'appel. / The application for leave to appeal is granted with costs to the applicant in any event of the cause.)

Coram: Binnie / Fish / Abella

Johanne Desbiens, et autres c. Compagnie Wal-Mart du Canada Inc. - et - Commissions des relations du travail (Qc) (Civile)
(Autorisation) (32527)

(La demande d'autorisation d'appel est accordée avec dépens en faveur des demanderesse quelle que soit l'issue de l'appel. / The application for leave to appeal is granted with costs to the applicants in any event of the cause.)

Coram: Binnie / LeBel / Deschamps

DISMISSED WITH COSTS / REJETÉE AVEC DÉPENS

Serge Bell et autres (Les autres salariés demandeurs sont listés à l'Annexe A) c. Régime de retraite pour les employé(es) de Sobeys Inc. et autres (Qc) (Civile) (Autorisation) (32590)

Coram: LeBel / Deschamps / Charron

DISMISSED / REJETÉES

Cleveland Alexander-Scott c. Sa Majesté la Reine - et entre - Evens Belleville et autres c. Sa Majesté la Reine (Qc) (Criminelle)
(Autorisation) (32461)

(Les demandes d'autorisation d'appel sont rejetées. / The applications for leave to appeal are dismissed.)

Coram: LeBel / Deschamps / Charron

Andrew Paul Johnson v. Her Majesty the Queen (B.C.) (Criminal) (By Leave) (32653)

Coram: LeBel / Deschamps / Charron

[Accueil](#)

[Contactez-nous](#)

[Avis importants](#)

[Listes de distribution](#)

[Recherche avancée](#)

[English](#)

par **LexUM** en partenariat avec la Cour suprême du Canada

Numéro du dossier : 32523

COUR SUPRÊME DU CANADA
(EN APPEL D'UN JUGEMENT DE LA COUR D'APPEL DE LA PROVINCE DE QUÉBEC)

ENTRE :

ABITIBI-CONSOLIDATED INC.

COPIE
du dossier

APPELANTE
(Appelante - Intimée incidente
devant la Cour d'appel du Québec)

ET :

JAMES DOUGHAN

INTIMÉ
(Intimé – Appelant incident
devant la Cour d'appel du Québec)

AVIS D'APPEL

(En vertu des articles 58(1)b), 60(1)a) et 60(4) de la *Loi sur la Cour suprême*
et de l'article 33 des *Règles de la Cour suprême du Canada*)

SACHEZ que ABITIBI-CONSOLIDATED INC., donnant suite à l'autorisation d'appel accordée le 7 août 2008, interjette appel à la Cour suprême du Canada du jugement de la Cour d'appel du Québec prononcé le 17 janvier 2008.

FAIT À MONTRÉAL, le 3 septembre 2008

(s) *Patrick Girard*

M^e Suzanne Côté
M^e Patrick Girard
STIKEMAN ELLIOTT S.E.N.C.R.L., s.r.l.
1155, boul. René-Lévesque ouest
Bureau 4000
Montréal (Québec) H3B 3V2
Téléphone : (514) 397-3219
Télécopieur : (514) 397-3619
scote@stikeman.com

Procureurs de l'Appelante

CORRESPONDANT

Me Pierre Landry
Noël et Associés S.E.N.C.
111, rue Champlain
Gatineau (Québec) J8X 3R1
Téléphone : (819) 771-7393
Télécopieur : (819) 771-5397
p.landry@noelassocies.com

ORIGINAL
et COPIE : REGISTRAIRE DE LA COUR

COPIE : GREFFIER DE LA COUR D'APPEL DU QUÉBEC POUR LE DISTRICT DE
MONTREAL

COPIE À :

M^e Sandor J. Klein
Me Arthur I. Bronstein
De GRANDPRÉ CHAIT
1000, rue De La Gauchetière ouest
Bureau 2900
Montréal (Québec) H3B 2G2
Tél. : (514) 878-3265
Télec. : (514) 878-5765
sklein@degrandpre.com

Procureurs de l'Intimé

Numéro de dossier : 32523

COUR SUPRÊME DU CANADA

(EN APPEL D'UN JUGEMENT DE LA COUR D'APPEL
DE LA PROVINCE DE QUÉBEC)

ENTRE :

ABITIBI-CONSOLIDATED INC.

Appelante

- et -

JAMES DOUGHAN

Intimé

AVIS D'APPEL

COPIE POUR HUISSIERS

Me Suzanne Côté
Me Patrick Girard

(514) 397-3219
(514) 397-3657

STIKEMAN ELLIOTT
Avocats/Barristers & Solicitors
1155, boul. René-Lévesque ouest, bureau 4000
Montréal (Québec) H3B 3V2

BS0350

N/Dossier : 041053-1088

REÇU

9 SEP 2008

PAR:

RENE A. D. L.

(Chambre commerciale)

N°. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ABITIBI BOWATER INC. ET AL.

Requérantes

ERNST & YOUNG INC.

Contrôleur

9

JAMES DOUGHAN ET AL.

Intimés

BS0350

n/dos.: 041053-1170

PIÈCE R-3

ORIGINAL

Me Mélanie Béland

(514) 397-3197

Fax: (514) 397-3591

STIKEMAN ELLIOTT

Stikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS

40^e Étage

1155, boul. René-Lévesque Ouest

Montréal, Canada H3B 3V2

PIÈCE R-4

JUGEMENTS.QC.CA

Décisions des tribunaux et organismes du Québec



Société québécoise
d'information juridique

Doughan c. Abitibi-Consolidated inc.

2008 QCCS 2807

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-17-042162-084

DATE : 25 juin 2008

SOUS LA PRÉSIDENTE DE : L'HONORABLE CHANTAL CORRIVEAU, J.C.S.

JAMES DOUGHAN

Demandeur

c.

ABITIBI-CONSOLIDATED INC.

Défenderesse

JUGEMENT

[1] Le Tribunal est saisi d'une demande de condamnation à être prononcée en faveur du demandeur, James Doughan («**Doughan**») à l'encontre de son ancien employeur, Abitibi-Consolidated Inc. («**Abitibi**») en paiement de prestations issues de régimes de retraite, dont il bénéficie à titre d'ex-employé.

[2] Jusqu'en 1999, Doughan était président et CEO d'Abitibi. Aux termes de sa fin d'emploi, Doughan a bénéficié de montants payables en vertu de deux régimes de retraite.

[3] En date du 1^{er} juillet 2002, Abitibi décide de cesser les paiements dus en vertu des régimes de retraite invoquant qu'elle est en droit d'opérer compensation, eu égard à d'autres montants qu'elle réclame de Doughan dans un dossier connexe portant le numéro 500-05-071231-029 («**l'action d'Abitibi**»). Les paiements n'ont pas été versés durant la période du 1^{er} juillet 2002 au 31 août 2004.

[4] Parallèlement à l'action d'Abitibi, Doughan a saisi les tribunaux d'une requête jugement déclaratoire portant le numéro 500-17-015973-038 («**la requête en jugement déclaratoire**»). Il demande au Tribunal de clarifier, à son point de vue, l'illégalité de la position entreprise par Abitibi refusant de lui verser ses prestations de régimes de retraite en opérant compensation.

[5] Aux termes de la requête en jugement déclaratoire, l'honorable Danièle Mayrand rend jugement le 15 juillet 2004 se prononçant sur le caractère saisissable et non saisissable des prestations de retraites visées par la

requête.

[6] Aux termes d'un arrêt rendu le 17 janvier 2008, la Cour d'appel renverse en partie le jugement de la Cour supérieure déclarant insaisissable la portion du régime de retraite déclarée saisissable par la juge Mayrand.

[7] Par sa défense à la présente cause, Abitibi demande à cette Cour de déclarer prématurée la réclamation de Doughan aux motifs qu'il y a actuellement une demande d'autorisation de pourvoi à la Cour suprême dans le dossier de la requête pour jugement déclaratoire qui demeure pendante.

[8] Également, dans l'action d'Abitibi, une audition au fond a eu lieu en Cour supérieure et le jugement est actuellement en délibéré devant l'honorable Roger Baker.

LES QUESTIONS

[9] Le Tribunal doit donc disposer de la demande de Doughan de condamner Abitibi à lui verser la somme de 1 041 277.86 \$ et les intérêts y afférents.

[10] Le Tribunal doit également se prononcer sur la demande formulée par Abitibi de déclarer prématuré le présent dossier. Alternativement, Abitibi demande de suspendre le prononcé du jugement pour lui permettre de déposer des procédures, soit en Cour d'appel ou en Cour suprême pour obtenir la suspension de l'exécution des procédures dans le dossier concernant la requête pour jugement déclaratoire.

DISCUSSION

[11] Le Tribunal estime mal fondée la demande de déclaration de prématurité ou de suspension formulée par Abitibi.

[12] Le présent dossier soulève tout simplement la question du droit de Doughan de recevoir des rentes issues de deux programmes de régimes de retraite mis sur pied par Abitibi, alors que Doughan était à son emploi.

[13] Bien qu'un autre litige soit actuellement en délibéré devant l'honorable juge Roger Baker qui se prononcera sur la validité de l'action entreprise par Abitibi à l'encontre de Doughan réclamant de ce dernier remboursement de sommes reçues en trop durant son emploi ou à l'issue de la mise en exercice de son entente de séparation, le présent Tribunal n'est pas lié par cet autre litige qui est autonome et indépendant.

[14] Il en est de même, en ce qui concerne un jugement final à être rendu dans le dossier de requête pour jugement déclaratoire.

[15] Aux termes d'une audition en Cour suprême dans ce dossier, la Cour pourrait techniquement renverser la décision de la Cour d'appel et se prononcer sur la légalité de la compensation à effectuer par Abitibi à l'encontre de Doughan.

[16] Que la Cour suprême accepte ou non d'entendre le pourvoi, qu'elle renverse ou non l'arrêt rendu par la Cour d'appel, cela ne peut servir de justification au présent Tribunal de refuser de se prononcer sur des sommes par ailleurs reconnues comme étant dues à Doughan par Abitibi.

[17] La demande d'autorisation actuellement soumise à la Cour suprême pour considération concerne le caractère de saisissabilité ou non des prestations payables en vertu du régime de retraite.

[18] Le présent dossier soulève uniquement le droit du demandeur à ses prestations. Ce droit n'est pas contesté.

[19] Ce qui est litigieux entre les parties est le droit du demandeur de percevoir les paiements qui lui sont dus.

[20] En effet, durant la période du 1^{er} juillet 2002 au 31 août 2004, Abitibi a retenu des sommes payables en vertu des régimes de retraite à Doughan pour se compenser de montants qu'elle lui réclame par ailleurs.

[21] Considérant les admissions versées au présent dossier, Abitibi ne conteste pas le droit aux prestations, ni les montants réclamés.

[22] Le Tribunal doit rendre jugement en faveur de Doughan pour le montant réclamé dans les conclusions de l'action.

[23] Dans ce dossier, il n'y a pas de justification à prononcer une condamnation exécutoire, nonobstant appel, tel que le lui invite à le faire l'avocat de Doughan.

[24] Aussi, il n'y a pas de justification à suspendre la condamnation permettant à Abitibi de s'adresser à la Cour suprême pour faire des représentations d'ordonnance de sursis d'exécution en attendant que jugement final rendu par la Cour suprême.

[25] Finalement, les intérêts et l'indemnité additionnelle devront être accordés à Doughan selon les dates inscrites aux conclusions de la requête amendée dans le présent dossier, puisqu'elles reflètent le moment à partir duquel les montants devaient être versés, selon les différentes exigibilités des paiements des rentes.

[26] À la lumière du fait que les avocats de Doughan avaient, par mise en demeure, précisément exprimé leur contestation au refus d'Abitibi de verser à leur client les montants, l'intérêt et l'indemnité additionnelle doivent être consentis au fur et à mesure des différentes échéances.

[27] **POUR CES MOTIFS, LE TRIBUNAL:**

[28] **GRANTS** Mr. James Doughan action;

[29] **CONDEMNS** Defendant, Abitibi-Consolidated Inc., to pay Mr. James Doughan de following amounts:

\$42,673.83 CDN	With interest at the rate of 5% per annum from due July 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date July 1, 2002;
\$44,436.75 CDN	With interest at the rate of 5% per annum from due August 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date August 1, 2002;
\$43,695.20 CDN	With interest at the rate of 5% per annum from due September 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date September 1, 2002;
\$44,548.68 CDN	With interest at the rate of 5% per annum from due October 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date October 1, 2002;
\$43,905.08 CDN	With interest at the rate of 5% per annum from due November 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date November 1, 2002;
\$44,067.38 CDN	With interest at the rate of 5% per annum from due December 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date December 1, 2002;
\$43,454.55 CDN	With interest at the rate of 5% per annum from due January 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date January 1, 2003;
\$42,612.27 CDN	With interest at the rate of 5% per annum from due February 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date February 1, 2003;
\$42,091.79 CDN	With interest at the rate of 5% per annum from due March 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date March 1, 2003;
\$41,434.19 CDN	With interest at the rate of 5% per annum from due April 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date April 1, 2003;
\$40,687.05 CDN	With interest at the rate of 5% per annum from due May 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date May 1, 2003;
\$38,607.92 CDN	With interest at the rate of 5% per annum from due June 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date June 1, 2003;
\$38,084.65 CDN	With interest at the rate of 5% per annum from due July 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date July 1, 2003;
\$39,357.86 CDN	With interest at the rate of 5% per annum from due August 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date August 1, 2003;
\$39,553.74 CDN	With interest at the rate of 5% per annum from due September 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date September 1, 2003;
\$38,023.08 CDN	With interest at the rate of 5% per annum from due October 1, 2003, and the

additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date October 1, 2003;

\$36,623.94 CDN With interest at the rate of 5% per annum from due November 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date November 1, 2003;

\$36,987.72 CDN With interest at the rate of 5% per annum from due December 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date December 1, 2003;

\$37,334.71 CDN With interest at the rate of 5% per annum from due January 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date January 1, 2004;

\$36,859.00 CDN With interest at the rate of 5% per annum from due February 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date February 1, 2004;

\$37,273.14 CDN With interest at the rate of 5% per annum from due March 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date March 1, 2004;

\$37,331.91 CDN With interest at the rate of 5% per annum from due April 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date April 1, 2004;

\$38,112.63 CDN With interest at the rate of 5% per annum from due May 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date May 1, 2004;

\$38,392.46 CDN With interest at the rate of 5% per annum from due June 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date June 1, 2004;

\$38,093.04 CDN With interest at the rate of 5% per annum from due July 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date July 1, 2004;

\$37,035.29 CDN With interest at the rate of 5% per annum from due August 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date August 1, 2004;

[30] **THE WHOLE** with costs.

CHANTAL CORRIVEAU, j.c.s.

Me Sandor Jack Klein et
Me Arthur Bronstein
DE GRANDPRÉ, CHAIT
Avocats du demandeur

Me Suzanne Côté et
Me Pierre-Paul Daunais
STIKEMAN, ELLIOTT
Avocate de la défenderesse

Date d'audience : 23 juin 2008

Ce site est une collaboration de SOQUIJ et du ministère de la Justice du Québec.

(Chambre commerciale)

Nº. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ABTIBIBOWATER INC. ET AL.

Requérantes

ERNST & YOUNG INC.

Contrôleurs

9

JAMES DOUGHAN ET AL.

Intimés

BS0350 n/dos.: 041053-1170

PIÈCE R-4

ORIGINAL

Me Mélanie Bélard
(514) 397-3197

Fax: (514) 397-3591

STIKEMAN ELLIOTT
Stikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS
40^e Étage
1155, boul. René-Lévesque Ouest
Montréal, Canada H3B 3V2

PIÈCE R-5

CANADA

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

COUR SUPÉRIEURE

No : 500-17-042162-084

C.A.M. No :

ABITIBI-CONSOLIDATED INC.,
compagnie légalement constituée
ayant son siège social au 1155 rue
Metcalf, suite 990, district de
Montréal, Province de Québec, H3B
5H2

APPELANTE/Défenderesse en
première instance

- vs. -

JAMES DOUGHAN, domicilié au 7685
Old Paint, Scottsdale, Arizona, 85262,
Etats-Unis

INTIMÉ/Demandeur en première
instance

INSCRIPTION EN APPEL (Article 495, Code de procédure civile)
--

L'APPELANTE inscrit cette cause en appel devant la Cour d'appel siégeant à Montréal.

Le jugement de la Cour supérieure, dont appel est interjeté, a été rendu en date du 25 juin 2008, par l'Honorable juge Chantal Corriveau siégeant dans le district de Montréal (ci-après le « **Jugement** »).

Le Jugement a accueilli l'action de l'INTIMÉ dans les termes suivants :

« [27] **POUR CES MOTIFS, LE TRIBUNAL :**

[28] **GRANTS** Mr. James Doughan action;

[29] **CONDEMNS** Defendant, Abitibi-Consolidated Inc., to pay Mr. James Doughan de (sic) following amounts;

\$42,673.83 CDN	With interest at the rate of 5% per annum from due (sic) July 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date July 1, 2002;
\$44,436.75 CDN	With interest at the rate of 5% per annum from due (sic) August 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date August 1, 2002;
\$43,695.20 CDN	With interest at the rate of 5% per annum from due (sic) September 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date September 1, 2002;
\$44,548.68 CDN	With interest at the rate of 5% per annum from due (sic) October 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date October 1, 2002;

\$43,905.08 CDN

With interest at the rate of 5% per annum from due (sic) November 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date November 1, 2002;

\$44,067.38 CDN

With interest at the rate of 5% per annum from due (sic) December 1, 2002, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date December 1, 2002;

\$43,454.55 CDN

With interest at the rate of 5% per annum from due (sic) January 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date January 1, 2003;

\$42,612.27 CDN

With interest at the rate of 5% per annum from due (sic) February 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date February 1, 2003;

\$42,091.79 CDN

With interest at the rate of 5% per annum from due (sic) March 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date March 1, 2003;

\$41,434.19 CDN

With interest at the rate of 5% per annum from due (sic) April 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date April 1, 2003;

\$40,687.05 CDN

With interest at the rate of 5% per annum from due (sic) May 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date May 1, 2003;

\$38,607.92 CDN

With interest at the rate of 5% per annum from due (sic) June 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date June 1, 2003;

\$38,084.65 CDN

With interest at the rate of 5% per annum from due (sic) July 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date July 1, 2003;

\$39,357.86 CDN

With interest at the rate of 5% per annum from due (sic) August 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date August 1, 2003;

\$39,553.74 CDN

With interest at the rate of 5% per annum from due (sic) September 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date September 1, 2003;

\$38,023.08 CDN

With interest at the rate of 5% per annum from due (sic) October 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date October 1, 2003;

\$36,623.94 CDN

With interest at the rate of 5% per annum from due (sic) November 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date November 1, 2003;

\$36,987.72 CDN

With interest at the rate of 5% per annum from due (sic) December 1, 2003, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date December 1, 2003;

\$37,334.71 CDN

With interest at the rate of 5% per annum from due (sic) January 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date January 1, 2004;

\$36,859.00 CDN

With interest at the rate of 5% per annum from due (sic) February 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date February 1, 2004;

\$37,273.14 CDN

With interest at the rate of 5% per annum from due (sic) March 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date March 1, 2004;

\$37,331.91 CDN

With interest at the rate of 5% per annum from due (sic) April 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date April 1, 2004;

\$38,112.63 CDN

With interest at the rate of 5% per annum from due (sic) May 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date May 1, 2004;

\$38,392.46 CDN

With interest at the rate of 5% per annum from due (sic) June 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date June 1, 2004;

\$38,093.04 CDN

With interest at the rate of 5% per annum from due (sic) July 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date July 1, 2004;

\$37,035.29 CDN

With interest at the rate of 5% per annum from due (sic) August 1, 2004, and the additional indemnity pursuant to the provisions of article C.C.Q. 1619 from due date August 1, 2004;

[30] THE WHOLE WITH COSTS».

La durée de l'enquête et de l'audition en première instance a été de deux (2) heures trente minutes.

Le juge de première instance a erré dans le Jugement, pour les motifs suivants :

I.- LE JUGE DE PREMIÈRE INSTANCE A COMMIS UNE ERREUR DE DROIT EN CONSIDÉRANT QUE LE JUGEMENT DÉCLARATOIRE RENDU PAR LA COUR D'APPEL EN JANVIER 2008, DANS LE DOSSIER 500-09-014822-043 (CI-APRÈS « LE JUGEMENT DÉCLARATOIRE ») AVAIT L'AUTORITÉ DE LA CHOSE JUGÉE

- 1.- Le juge de première instance a erré en droit en concluant aux paragraphes 14 et suivants du Jugement qu'il n'était « pas lié » par les autres litiges pendants entre les parties ou, autrement formulé, qu'il n'avait pas à prendre en considération le sort de ces autres litiges dans le cadre du dossier qui lui était soumis. Plus particulièrement, le juge de première instance mentionne :

« [13]...le présent Tribunal n'est pas lié par cet autre litige qui est autonome et indépendant.

[14] Il en est de même, en ce qui concerne un jugement final à être rendu dans le dossier de requête pour jugement déclaratoire.

[15] Aux termes d'une audition en Cour Suprême dans ce dossier, la Cour pourrait techniquement renverser la décision de la Cour d'appel et se prononcer sur la légalité de la compensation à effectuer par Abitibi à l'encontre de Doughan.

[16] Que la Cour Suprême accepte ou non d'entendre le pourvoi, qu'elle renverse ou non l'arrêt rendu par la Cour d'appel, cela ne peut servir de justification au présent Tribunal de refuser de se prononcer sur des sommes par ailleurs reconnues comme étant dues à Doughan par Abitibi. »

- 2.- En concluant comme il l'a fait, le juge de première instance conclut implicitement, sans toutefois avoir fait l'analyse de la jurisprudence et des arguments de droit soumis par l'APPELANTE, que le Jugement déclaratoire a acquis l'autorité de la chose jugée, en dépit de la demande pour permission d'en appeler présentée par l'APPELANTE à la Cour Suprême du Canada dans ledit dossier, laquelle demande est par ailleurs toujours pendante;
- 3.- En effet, bien que le juge de première instance n'y fasse aucunement référence dans le Jugement, l'action instituée par l'INTIMÉ est strictement fondée sur le caractère « exécutoire » du Jugement déclaratoire ainsi que sur le fait qu'un tel jugement aurait acquis l'autorité de la chose jugée et ce, nonobstant la demande pour permission d'en appeler présentée par l'APPELANTE à la Cour Suprême du Canada. À cet effet, l'INTIMÉ allègue dans sa Requête introductive d'instance que :

«10. That although the Court of Appeal confirmed that Defendant did not have the right to effect compensation between the amount of its alleged claim and the pension payable to Plaintiff (...) Defendant refuses to pay to Plaintiff...»;

- 4.- Aussi, le juge de première instance ne pouvait tout simplement pas accueillir la Requête introductive d'instance de l'INTIMÉ sans d'abord conclure que le Jugement déclaratoire avait acquis l'autorité de la chose jugée ou qu'il était exécutoire, ce qui n'est manifestement pas le cas tel que plus amplement exposé ci-après;
- 5.- En l'espèce, le Jugement déclaratoire n'avait pas de caractère « exécutoire » mais était plutôt « déclaratif », le rendant ainsi non susceptible d'exécution forcée :

- ◇ Classic Fabrics Corp. c. B. Rawe GMBH & Co. J.E. 2001-573 (C.A.);
 - ◇ Ferme Brien & Fils inc. c. Fédération des producteurs acéricoles du Québec, 2007 Q.C.C.A. 1337 au par. 16;
 - ◇ Comité de déontologie policière c. Dechenault, J.E. 2005-1823 (C.A.)
- 6.- Dans ces circonstances et compte tenu du fait que le Jugement déclaratoire ne portait pas condamnation à l'encontre de l'APPELLANTE, celle-ci n'avait donc pas à demander de sursis d'exécution de cette décision;
- 7.- Aussi, le Jugement déclaratoire n'avait pas encore acquis l'autorité de la chose jugée et ne pouvait donc pas servir de fondement à un recours en justice distinct de la part de l'INTIMÉ;
- 8.- En effet, le principe juridique veut qu'un jugement ne puisse acquérir l'autorité de la chose jugée si une partie en a appelé dudit jugement; le jugement déclaratoire ne fait par ailleurs pas exception à ce principe bien établi :
- ◇ Jean-Claude ROYER, « *La preuve civile* », 3e édition, 2003, par. 816;
 - ◇ Société St-Jean-Baptiste de Montréal c. La Communauté urbaine de Montréal (1981) C.A. 168;
- 9.- Reprenant la décision de son collègue, l'honorable juge Victor Melançon dans l'affaire Continental Air Freight Ltd. c. Jean Nicolas Importations Inc. et als J.E. 80-349 (C.S.), l'honorable juge Gratton de la Cour Supérieure mentionnait dans l'affaire Greenbaum c. Blondin J.E. 88-245 (C.S.) aux pp. 6-12. :
- « La lecture des différents articles concernant l'appel et l'exécution du jugement me porte à conclure que le principe appliqué et émis par les commissaires devrait aussi s'appliquer pour le jugement qui est prononcé par la Cour d'Appel parce qu'il est toujours de la juridiction du Code de procédure civile tant qu'il n'y a pas eu d'inscription en appel selon la loi et les règles de la Cour Suprême du Canada et qu'ainsi, le jugement n'est pas exécutoire tant et aussi longtemps que le délai pour appeler en Cour Suprême n'est pas expiré. Ce qui veut dire que le jugement n'a pas obtenu l'autorité de la chose jugée qu'on retrouve à l'art. 1241 C.c.B.c.*

(...)

Le principe est que celui qui succombe, à moins que la loi dise qu'il n'y a pas d'appel, a droit d'en appeler et au Canada pour celui qui intente son recours en Cour supérieure a, en principe, droit à deux appels celui à la Cour d'Appel dans la province et ensuite la cour Suprême du Canada.

*(...) d'appliquer ce principe dans les circonstances de ce présent dossier, ce qui me porte à conclure que le jugement actuellement ne serait pas exécutoire et qu'ainsi **il n'a pas l'autorité de la chose jugée tant que la Cour Suprême ne se sera pas prononcée sur la permission d'en appeler.***

(...)

J'opte pour la position de mon collègue M. le juge Melançon car contrairement à ce que dit mon collègue M. le juge Landry je crois qu'interpréter autrement placerait celui qui veut en appeler à la Cour Suprême dans une position intenable si on interprétait comme M. le juge Landry l'a fait.

En effet, quelqu'un pourrait appeler à la Cour Suprême, éventuellement avoir gain de cause et casser le jugement de la Cour d'appel mais être obligé d'exécuter le jugement prononcé par la Cour d'appel, très lourd d'exécution soit par, comme dans le cas ici, transmission d'un titre ou encore par un montant très élevé auquel le débiteur-appelant aurait pu être condamné.

Je ne crois pas que ce soit l'esprit général du Code que d'empêcher l'appel et voilà pourquoi dans les circonstances de ce présent dossier, je suis d'opinion à décider que le jugement n'est pas exécutoire et n'est pas sujet à l'émission d'un bref d'exécution. »

(Nos caractères gras)

- 10.- Abondant dans le même sens, l'honorable juge Parent mentionnait dans l'affaire Droit de la Famille-2547 J.E. 96-2262 (C.S.) aux pp. 10-11:

« Cette opinion de Me Décary résume succinctement celle que M. le juge Bernard Gratton émettait, de façon plus élaborée, en rendant jugement à l'audience dans Greenbaum c. Blondin (...) Elle est également conforme à celle exprimée par M. le juge Victor Melançon dans Continental Air Freight Ltd. c. Jean Nicolas Importations Inc. [1980] C.S. 531.

Avec respect pour l'opinion contraire exprimée, entre autres, par M. le juge Louis-Philippe Landry dans Antoine Adam c. André Tessier [1979] C.S. 898, et par M. le juge Bernard Flynn dans Greenbaum c. Blondin (...) et pour les motifs exprimés par Me Décary et par MM. les juges Gratton et Melançon, dans l'article et les jugements précités, le Tribunal est d'avis que l'article 568 C.p.c. s'applique à un arrêt de la Cour d'Appel qui condamne à payer une somme d'argent, et qu'en règle générale un tel jugement n'est pas exécutoire avant l'expiration du délai d'appel à la Cour Suprême. »:

- 11.- Par analogie, l'APPELANTE renvoie aux propos suivants de la Cour d'appel dans l'affaire Paquet-syndicat inc. c. Anciens employés-cadres de Paquet-syndicat inc., 1997 CanLII 10260 (QC C.A.):

« Le juge a répondu par l'affirmative à la question qui lui était posée. L'essence de son jugement se trouve dans ceci:

- Le régime des intimes, en vertu de ses lettres (sic.) patentes, de ses règlements généraux et d'un jugement passé en force de chose jugée, prévoit que les biens accumulés appartiennent à ses membres.

- Or, en vertu du premier alinéa de l'article 9.1, Loi 60, ce régime ne peut être modifié.

- Le droit de l'employeur de mettre la main sur quelques biens du régime continue donc à être écarté.

Avec égards, je suis d'avis que ces motifs sont erronés et que la conclusion du jugement de première instance est mal fondée.

D'abord il me paraît manifeste que, quelle que soit sa valeur, le jugement de 1986 n'a pas la force de la chose jugée. Un appel fut interjeté de ce jugement et, si les appelants se sont éventuellement désistés de leur pourvoi, c'était sous réserve de la transaction qui réglait le litige. Il faut donc traiter ce jugement comme s'il n'avait jamais été prononcé et conclure que l'opinion de son auteur concernant la façon dont le Régime pouvait être modifié n'a plus de pertinence au regard de la transaction, encore moins au regard des nouvelles dispositions législatives. Enfin, vu la transaction, il n'est pas utile de déterminer si, en vertu des termes du Régime et de la loi, c'étaient les ayants droit de l'employeur ou les participants qui, avant la transaction, avaient droit au surplus d'actif du Régime. ».

(Nos caractères gras)

- 12.- En l'espèce, le raisonnement exposé par l'honorable juge Gratton dans l'affaire Greenbaum c. Blondin s'applique intégralement à la présente situation: l'APPELANTE est actuellement dans une position où elle doit exécuter le Jugement, fondé sur le Jugement déclaratoire, lequel a été rendu dans un dossier distinct et est toujours susceptible d'être renversé par la Cour Suprême du Canada;
- 13.- Si tel était le cas, la décision de la Cour Suprême du Canada ne pourrait annuler le Jugement. Les parties se retrouveraient alors avec deux jugements contradictoires rendus dans deux instances distinctes : a) un Jugement portant condamnation et fondée sur la prémisse que l'APPELANTE ne pouvait opérer compensation et b) un jugement de la Cour Suprême du Canada, établissant que l'APPELANTE pouvait opérer compensation;
- 14.- Une telle situation peut et doit être évitée en appliquant le principe de l'autorité de la chose jugée. Or, un jugement dont il est fait appel ne peut acquérir l'autorité de la chose jugée et en conséquent ne peut servir de fondement à un recours distinct;

- 15.- Qui plus est, cette honorable Cour doit aussi prendre en considération le jugement rendu par l'honorable Juge Baker en date du 7 juillet 2008 (500-05-071231-029), lequel jugement condamnait l'INTIMÉ à verser à l'APPELANTE une somme de 2 519 348,65 \$ plus intérêts et indemnité additionnelle et de plus, confirmant par le fait même le caractère liquide et exigible de sa créance;
- 16.- Dans des circonstances similaires, le juge Benoît de la Cour supérieure dans l'affaire Bond Architects & Engineers Ltd. c. Compagnie de cautionnement Alta, J.E. 94-1025 (C.S.) appliquait le raisonnement voulant qu'un jugement dont il est fait appel ne peut acquérir l'autorité de la chose jugée et ne peut servir de fondement à un recours distinct:

« En dépit de ces décisions, il me semble que le tribunal du Québec doit apprécier le caractère final et définitif, l'autorité de la chose jugée et le caractère exécutoire du jugement à la fois en vertu de la loi étrangère et de la loi du Québec.

«Jugement final» se dit généralement d'un jugement par lequel un tribunal dispose du dossier dont il est saisi autrement que de manière interlocutoire. Un tel jugement n'est définitif que s'il émane du tribunal de dernier ressort, s'il n'est plus appelable, s'il ne peut être cassé ou modifié par une cour d'appel. L'autorité de la chose jugée ne s'attache en permanence à un jugement que s'il est définitif.

Dans la présente affaire, le jugement de première instance de Terre-Neuve ne peut être considéré définitif puisqu'un appel est pendant. En l'absence de preuve du droit de Terre-Neuve en matière de caractère final et définitif de ses jugements, la conception de la loi de Terre-Neuve est présumée être la même que la loi du Québec en la matière.

Le jugement du tribunal de Terre-Neuve étant frappé d'appel n'a jamais acquis l'autorité de la chose jugée. Si la Cour supérieure du Québec exemplifiait le jugement de première instance et si ce jugement était subséquemment cassé par le tribunal d'appel de Terre-Neuve, l'intimée Alta demeurerait tout de même assujettie au jugement d'exemplification.

En l'absence de mécanisme légal d'annulation automatique du jugement d'exemplification dans de telles circonstances, l'intimée se verrait dans l'obligation en pareil cas de prendre l'initiative de demander l'annulation.».

(Nos caractères gras)

- 17.- L'APPELANTE soutient donc qu'il est dans l'intérêt de la justice que le recours de l'INTIMÉ soit rejeté, puisqu'il est prématuré, étant fondé seulement sur un jugement qui n'a pas acquis l'autorité de la chose jugée de manière définitive;

◇ Léger c. S.G. [2007] Q.C.C.S. 3475;

II.- LE JUGE DE PREMIÈRE INSTANCE A COMMIS UNE ERREUR DE FAITS ET DE DROIT EN CONSIDÉRANT QUE LE « DROIT DU DEMANDEUR (INTIMÉ) À SES PRESTATIONS » AVAIT ÉTÉ ADMIS PAR L'APPELANTE

- 18.- Le juge de première instance ne pouvait conclure comme il l'a fait en considérant que le droit de l'INTIMÉ n'était pas contesté puisqu'il s'agissait du « *droit du demandeur à ses prestations* » (par. 18 du Jugement) et que ce droit faisait par ailleurs l'objet d'une admission de la part de l'APPELANTE;
- 19.- Dans les faits, l'admission faite par l'APPELANTE ne visait strictement que les montants représentant les sommes qui seraient dues par l'APPELANTE dans la mesure où un jugement final passé en force de chose jugée concluait que celle-ci n'était pas en droit d'opérer compensation entre les sommes dues par l'INTIMÉ et celles dues à l'INTIMÉ aux termes des différents régimes lui étant applicables;
- 20.- Or, en l'espèce, en date du Jugement, le Jugement déclaratoire faisait l'objet d'une demande pour permission d'en appeler à la Cour Suprême du Canada, laquelle demande est toujours pendante;
- 21.- Aussi, le Jugement déclaratoire n'a toujours pas acquis l'autorité de la chose jugée et est toujours susceptible d'être renversé, comme le note d'ailleurs le juge de première instance au paragraphe 15 du Jugement;
- 22.- En conséquence, le juge de première instance ne pouvait conclure que les admissions formulées par l'APPELANTE faisaient en sorte

que le droit de l'INTIMÉ aux sommes réclamées ne faisait l'objet d'aucune contestation;

- 23.- Ces admissions, telles que formulées et déposées au dossier de la Cour, ne représentent qu'une reconnaissance des montants retenus par l'APPELANTE, sans toutefois qu'une telle reconnaissance ne puisse être interprétée comme une renonciation à contester le droit de l'INTIMÉ de réclamer ces mêmes montants;

III.- LE JUGE DE PREMIÈRE INSTANCE A ERRÉ EN FAITS ET EN DROIT EN RETENANT LA DATE DE VERSEMENT DES PRESTATIONS DE RETRAITE COMME POINT DE DÉPART DU CALCUL DE L'INDEMNITÉ ADDITIONNELLE

- 24.- À cet égard, le juge de première instance conclut :

« [25] Finalement, les intérêts et l'indemnité additionnelle devront être accordés à Doughan selon les dates inscrites aux conclusions de la requête amendée dans le présent dossier, puisqu'elles reflètent le moment à partir duquel les montants devaient être versés, selon les différentes exigibilités des paiements des rentes. »

- 25.- En concluant de la sorte, le juge de première instance cautionne le comportement de l'INTIMÉ qui a laissé s'écouler un délai d'environ une année entre la date où l'APPELANTE a commencé à opérer compensation entre les sommes qui lui étaient dues et les prestations de retraite de l'INTIMÉ et le moment où celui-ci a décidé de prendre action et requérir un jugement déclaratoire;
- 26.- Qui plus est, une telle conclusion fait aussi abstraction du fait que c'est l'INTIMÉ qui a décidé de procéder *via* la procédure en jugement déclaratoire plutôt que par l'entremise d'une action en remboursement;
- 27.- Or, l'indemnité additionnelle peut être réduite lorsque les longs délais entre l'institution de l'action et l'audition de la cause ne sont pas entièrement imputables à la défenderesse, mais découlent également d'éléments impondérables ou imprévus ou même qui relèvent directement du comportement du demandeur;
- 28.- Finalement, et ceci plaidé de façon subsidiaire, le juge de première instance a erré en refusant d'exercer la discrétion que lui confèrent les articles 2, 20, 46, 166, 4.1 et 4.2 du C.p.c. pour octroyer à

l'APPELANTE un délai supplémentaire lui permettant de présenter une requête pour surseoir à l'exécution du Jugement déclaratoire;

L'APPELANTE demandera à la Cour d'appel de :

INFIRMER le jugement de première instance;

REJETER la Requête introductive d'instance de l'INTIMÉ;

SUBSIDIAIREMENT :

DÉCLARER que la Requête introductive d'instance de l'INTIMÉ est prématurée;

LE TOUT avec dépens, tant en première instance qu'en appel.

L'APPELANTE avise Mes De Grandpré Chait (Me Sandor Klein et Me Arthur Bronstein), avocats de l'INTIMÉ, de la présente inscription.

MONTREAL, ce 22^e jour de juillet 2008

(S) STIKEMAN ELLIOTT S.E.N.C.R.L., s.r.l.

STIKEMAN ELLIOTT S.E.N.C.R.L., s.r.l.
Procureurs de l'APPELANTE Abitibi-Consolidated Inc.

COPIE CONFORME

STIKEMAN ELLIOTT S.E.N.C.R.L., S.R.L.

(Chambre commerciale)

Nº. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ABTIBIBOWATER INC. ET AL.

Requérantes

-et-

ERNST & YOUNG INC.

Contrôleur

9

JAMES DOUGHAN ET AL.

Intimés

BS0350
ny/dos.: 041053-1170

PIECE R-5

ORIGINAL.

Me Mélanie Béliand (514) 397-3197

Fax: (514) 397-3591

STIKEMAN ELLIOTT

Stikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS

40^e Étage

1155, boul. René-Lévesque Ouest

Montréal, Canada H3B 3V2

PIÈCE R-6

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-05-071231-029

DATE: July 7, 2008

IN THE PRESENCE OF: THE HONOURABLE ROGER E. BAKER, J.S.C.

ABITIBI-CONSOLIDATED INC.
Plaintiff/Cross-Defendant

v.

JAMES DOUGHAN
Defendant/Cross-Plaintiff

JUDGMENT

[1] The Court has heard an action by Plaintiff/Cross-Defendant Abitibi-Consolidated Inc. (hereinafter "Abitibi") against Mr. James Doughan, Defendant/Cross-Plaintiff (hereinafter "Doughan"), wherein the amount claimed against Doughan is \$2,519,348.65 and the amount of his Cross-Demand is \$1,545,431.76.

THE PARTIES

[2] Plaintiff is the result of an amalgamation between Stone Consolidated Corporation (hereinafter "Stone"), an American corporation, and Abitibi Price Inc., a Canadian corporation, which became Abitibi-Consolidated Inc., the present Plaintiff, with it's head office in Montreal.

[3] Defendant, an American citizen, worked for Stone in the United States until 1994, as President and Chief Executive Officer, and continued in that capacity as and from

January 1, 1995 with Stone in Montreal Canada, until the amalgamation between Stone and Abitibi Price Inc., after which he served in the same capacity for the present Plaintiff until December 31, 1998.

[4] In 1994, Doughan suggested to Roger Stone, the principal owner and shareholder of Stone, that he run the Stone operation in Canada. However, his principal concern was the significantly higher Canadian tax rate, as he had no wish to be penalized for employment in a foreign country as a consequence of the tax laws then prevailing, as well as the then existing disparity in the Canadian and American currency rate of exchange, which was significant at that time.

[5] The genesis of the terms under which Doughan left Chicago for employment in Montreal were set out in a letter by Roger Stone of July 28, 1994, which letter, as it is understood by both parties to be the cornerstone of the agreement at the center of this dispute, is set down in its entirety:

"Stone Container Corporation

Roger W. Stone

Chairman, President and Chief Executive Officer

150 North Michigan Avenue

Chicago, Illinois 60601-7568

July 28, 1994

312 580-4601

Stone-Consolidated Compensation Committee

Mr. Pierre Cote, Chairman

Mr. Gordon Gray

As you know, I've been discussing with Jim Doughan his becoming a Montreal resident for the duration of his assignment as CEO of Stone-Consolidated. Because the weak Canadian dollar relative to the U.S. and other differences in compensation practices, I have the following recommendations:

1. **For tax purposes, he should be treated as if he continued to live in Chicago. Any additional tax liability would be borne by the company.**

2. He probably will buy a condominium in Montreal, and, if so, I believe he should be guaranteed against loss when he retires. I might add that I view the probability of loss as remote and certainly not material.
3. We shall continue to pay him in U.S. dollars and use a U.S. pay scale to determine his compensation package.
4. We will determine and bear the expense of the tax analysis to determine the amount of any disparity.

Frankly, I think this is pretty simple and fair. Thus far I'm delighted with Jim's performance and believe his relocation to Montreal will be of great benefit to the company and all of its shareholders.

.....

July 28, 1994

I'm, of course, open to any suggestions. I would appreciate it if you would give this matter some thought and get back to me with your conclusions at your convenience.

Warmest regards,

(Signature)

RWS:ns"¹

[6] This letter set out broad terms and guidelines for Defendant's employment in Canada with Stone, and after the amalgamation, the present Plaintiff. It is how they carried out these guidelines over the years which leads to an understanding of the nature of the agreement, as well as their respective intentions, and finally the legal consequences of these issues.

[7] Stone and Doughan had several conversations which dealt with the terms and conditions of the possible move of Doughan to Montreal, as well as the impact on his tax position.

¹ Exhibit D-18 (emphasis added).

[8] Doughan became a Canadian resident on January 1, 1995 and remained as such until December 31, 1998. Although he ceased being Canadian resident on that date, he continued to act as President and CEO of Abitibi until April 26, 1999. Doughan continued to be on the payroll of Abitibi until he retired on December 31, 1999.

[9] Stone and Doughan testified on the subject of Doughan moving to Canada from the United States. Both men shared a concern that Doughan not be penalized for the disparities in the tax structures in the two countries if he were to take up Canadian residence here and be subject to Canadian tax levels for his work; in other words, Doughan did not want to be penalized for the privilege of working in Canada with a significant tax obligation over and above his level in the United States.

[10] The testimony of Roger Stone:

"Q- Did you have any discussions with Mr. Doughan prior to the sending of this letter?

A- Oh, I'm sure I did.

Q- And do you recall in a general way the nature of the discussions?

A- Well, in a general (Inaudible), to the best of my recollection, we would have discussed this as terms for him coming to Canada to run the new company.

[...]

Q- So the question was, what was Mr. Doughan asking you in connection with this move, to the best of your recollection?

A- To the best of my recollection, **Jim wanted to be sure that he wasn't being penalized by taking this opportunity** and that he has always been properly compensated to take this opportunity."²

[11] The testimony of James Doughan:

"Q- And can you describe the discussions you had with Mr. Stone regarding that question?

A- Yes. I said, "Roger, the only problem in moving there is that I have... I'm paid in U.S. dollars here at U.S. pay scales. When I go up there, Canadian pay scales are different, as are the Canadian dollar, and **I just don't want to pay any penalty for going there.**

² Transcript of testimony of Mr. Stone, November 8, 2007, pages 9-11 (emphasis added).

Q- You've seen, Mister, Exhibit D-18, which is Mr. Stone's recommendation to the Compensation Committee. Did you know anything about the fate which that recommendation had?

A- Yes, sir.

[...]

Q- What happened to it?

A- No, I moved to Montreal to take over the corporation based on this recommendation."³

[12] Both parties to this litigation went to great lengths in an attempt to describe the nature of the arrangement under which Doughan worked for the Plaintiff in Canada. At issue is whether Doughan was only protected against the higher taxes in this country, or whether in fact he might achieve a profit from any sudden change in the tax rates between the two countries; which means, according to the defense theory, Doughan received additional funds when the Canadian rates were higher, and conversely when there was a brief reversal of the tax rates, he would benefit from the increased funds given to him by Plaintiff, thus "winning in both directions". This is the nub of the case; and the following questions are raised to determine what precisely was the arrangement between the parties:

- 1 - What was the intent of James Doughan, as well as his expectations when he agreed to move to Canada for the purpose only of his work?
- 2 - Did these two men have an understanding such that Plaintiff implemented their agreement over a period of several years?
- 3 - How did the Plaintiff company treat the arrangement both in practice, and in the books and records, including the material published which is a requirement of all public corporations in Canada?
- 4 - Beyond espousing their respective theories, were the expert witnesses helpful in explaining what it was these parties did, and under which principles of international practice dealing with similar circumstances?

[13] The precise allegations of both parties are useful to set out to focus on the distinction each makes in resolving the questions as raised above by the Court. These allegations encompass not only the facts as stated by each of them, but their allegations in respect of documentary evidence, the expert reports, and the corporate documentation which may clarify the nature of the agreement of the parties.

³ Transcript of testimony of Mr. Doughan, November 8, 2007, pages 20-21 (emphasis added).

THE PROCEEDINGS

[14] Plaintiff's position as alleged in the **Reparticularized and Re-Re-Amended Declaration**:

"THE AGREEMENTS BETWEEN THE PARTIES

5. At the beginning of his employment for Stone in Canada, an agreement was entered into between Defendant and Stone, called "Tax Equalization Agreement", by virtue of which Defendant was to be, in connection with the income earned from his work for Stone in Canada, in the same after-tax position as if he had worked and lived in the United States of America (U.S.A.); the same Tax Equalization Agreement continued to be in effect during the course of Defendant's employment with Plaintiff;
- 5a) When Defendant started working for Plaintiff, he represented that he had a Tax Equalization Agreement with Stone and thus wanted the same financial arrangement with Plaintiff. Plaintiff is not aware of the circumstances of the conclusion of the initial agreement between Stone and Defendant, including which representative of Stone might have concluded such agreement. To Plaintiff's knowledge, such agreement between Defendant and Stone was verbal;
- 5b) The discussions whereby Plaintiff agreed to continue to extend tax equalization adjustments to Defendant took place between the Defendant himself and the Human Resources and Compensation Committee of the Board of Directors as well as the senior management of Plaintiff, including Ron Y. Oberlander, Jean-Claude Casavant and Jacques Vachon;
- 5c) It was agreed by the same individuals who had discussed and agreed that a Tax Equalization Agreement would be in effect between the Parties;
6. Therefore, the result of such a Tax Equalization Agreement for Plaintiff was that it had to disburse more money upfront to maintain Defendant's cash flow as if he had worked and lived in the United States, since the tax rates on Defendant's income earned in Canada were generally higher than if the same income would have been earned in the U.S.A.; however, it was always verbally agreed and understood between and by the parties (as described in paragraphs 5 to 5c) that Defendant would repay any balance due resulting from the tax equalization calculation as well as any tax advances made by Plaintiff through the Tax Equalization Agreement;
7. The same Tax Equalization Agreement continued to be in effect with respect to the "**Severance Agreement**" (P-1) entered into on April 10th, 1997 by Stone and Defendant, by which the parties determine in advance their respective rights and obligations in case of a Change in Control in the company; [...]
8. The Severance Agreement Exhibit P-1 provided, *inter alia*, the payment of certain sums of money to Defendant:

« 5.3 If the Executive's employment shall be terminated for any reason following a Change in Control and during the term, the Company shall pay to the Executive the Executive's normal post-termination compensation and benefits as such payments become due. Such post-termination compensation and benefits shall be determined under, and paid in accordance with, the Company's retirement, insurance and other compensation or benefit plans, programs and arrangements as in effect immediately prior to the Change in Control or, to the extent more favourable to the Executive, as in effect immediately prior to the Date of Termination. »

9. As of May 30, 1997, an agreement entitled "**Severance Compensation Transition Agreement**" was entered into between Plaintiff and Defendant, by which the parties agreed on the manner the payments provided for in the Severance Agreement should be paid following the Amalgamation of Stone and Abitibi-Price Inc., and following the acceptance by Defendant to continue his employment, the whole as appears from a copy of the Severance Compensation Transition Agreement communicated to Defendant simultaneously with the present Declaration, to avail as if recited at length, as Exhibit P-2;

10. The Severance Compensation Transition Agreement provides, *inter alia*, in its preamble, the following:

« E. In order to provide a degree of security to the Executive, the Corporation has agreed to create a Retirement Compensation Arrangement within the meaning of the Income Tax Act (Canada) ("RCA") to fund the benefits payable pursuant to sections 6.1(A), (C) and (D) of the Severance Agreement (the "Severance Payment") and to deposit such Severance Payment in trust for the Executive's retirement. »;

11. As mentioned in Paragraph 9 of the present Declaration, the Severance Compensation Transition Agreement Exhibit P-2 amends the Severance Agreement Exhibit P-1 in connection with the payments provided for in Subsections (A), (C) and (D) of Section 6.1 of Exhibit P-1 in the following way:

« 6.4 (A) Notwithstanding the provisions of 6.2, the payments provided for in subsections (A), (C) and (D) of Section 6.1 hereof shall be paid into a trust fund established in respect of a Retirement Compensation Arrangement within the meaning of the Income Tax Act (Canada) ("RCA") that is established for the benefit of the Executive by the Corporation. The terms of the RCA shall be agreed upon by the Executive and the Corporation. The Corporation shall be responsible for: (i) all costs incurred in establishing, administering and maintaining the RCA, including the trust fund; and (ii) remitting all taxes and making all required income tax filings in respect of all contributions by the Corporation to the RCA trust fund. For greater certainty, the trustee of the RCA shall be responsible for filing income tax returns and information returns on behalf of the trust fund and remitting to the Receiver General out of the trust fund the amount of tax, if

any, payable by it for the year or claiming a refund of refundable tax owing to the trust fund, if applicable. »;

12. The Severance Compensation Transition Agreement provides also the following regarding the taxes resulting from the creation of the Retirement Compensation Arrangement (RCA):

« 7(h) The Corporation's obligations with respect to any income tax payable on the monies deposited to the RCA shall be limited to the withholdings and filings required in respect of the Corporation's contribution of the RCA trust fund pursuant to the terms of the Income Tax Act (Canada), applicable Quebec income tax legislation and the tax laws of the United States. The trustee of the RCA shall be responsible for all required remittances, withholdings and income tax filings in respect of the RCA trust fund after the Corporation has contributed the required amount to the trust fund. The Executive or his estate shall be solely responsible for all taxes levied when the monies deposited in the RCA are paid to the Executive or his estate. »

« 7.(i) The Establishment and funding of the RCA will, pursuant to applicable United States legislation, create a United States tax liability for the Executive of about \$650,000 (USD). The Corporation will lend the Executive the necessary funds to pay the additional tax liability under United States tax legislation which is associated with the establishment and funding of the RCA. The Executive agrees to repay the amounts that will be advanced to him by the Corporation in respect of the additional tax liability under United States tax legislation which was created by funding the RCA. »

*« 7.(j) The additional United States tax liability of about \$650,000 created as a result of establishing and funding the RCA in 1998 **will, as a result of the excess foreign tax credits which arose as a result of the Executive's employment in Canada, be refunded to the Executive.** As a result of filing his United States tax return, about \$100,000 will be refunded by United States tax authorities to the Executive in 2000 and about \$550,000 will be refunded to the Executive in 2001. **The Executive agrees to direct the United States tax authorities to pay all such amounts to the Corporation. The Executive agrees to make all required income tax filings and all other action required to obtain the excess foreign tax credit refund and, upon request, to provide the Corporation with all materials that pertain to claiming the excess foreign tax credit refund.** »⁴*

⁴ Reparticularized and Re-Re-Amended Declaration, para. 5-12. (emphasis added)

[15] Defendant's position as alleged in the Plea and Cross-Demand to Re-particularized and Re-Re-Amended Declaration of November 12, 2007:

- "3. Defendant denies the allegations of paragraph 5 as drafted averring that in fact what was agreed was that, as long as Defendant was resident in Canada and employed by Stone in Canada any additional tax liability resulting from his relocation to Canada would be borne by Stone; Defendant prays acte of the admission that the equalization agreement entered into by Defendant at the beginning of his employment for Stone in Canada continued in effect during the course of Defendant's employment with Plaintiff;"⁵

[16] Defendant asserts its critical and fundamental position as follows:

- "4. Defendant denies paragraph 5a as drafted, averring that:
- a) his tax equalization agreement with Stone was in place when Stone merged with Abitibi-Price to form Plaintiff;
 - b) **the tax equalization agreement which was in place did not entitle Plaintiff to claim tax equalization from Defendant in the event that Canadian taxes were in any given year less than American taxes;**
 - c) the tax equalization agreement in place was never described by Defendant in a way which would entitle Plaintiff to claim equalization from Defendant in the event that aggregate of American and Canadian taxes were in any given year less than the American taxes which would have been payable by Defendant had Defendant been employed in the U.S. rather than in Canada;
 - d) as a result of the merger the tax equalization agreement which was in place at the merger remained in force and binding upon Plaintiff;"⁶

[17] Defendant describes the Tax Equalization Agreement as follows:

"The Tax Equalization Agreement"

- 15. Defendant was President and Chief Executive Officer of Stone-Consolidated Corporation prior to the amalgamation of Stone-Consolidated Corporation with Abitibi Price Inc. effective May 30th, 1997;
- 16. Defendant had previously worked for Stone-Consolidated Corporation in the United States as President and CEO;

⁵ Plea and Cross-Demand to Re-particularized and Re-Re-Amended Declaration of November 12, 2007, para. 3.

⁶ Id., para. 4.

17. When Defendant relocated to Montreal as President and CEO of Stone-Consolidated Corporation it was agreed between Defendant and Stone-Consolidated Corporation that any additional tax liability resulting from his employment and relocation in Canada would be borne by Stone;
18. This agreement followed the recommendation made by Roger W. Stone to the Stone-Consolidated Compensation Committee in his letter of July 28, 1994, which is communicated herewith as Defendant's Exhibit D-18;
19. Accordingly, Defendant's compensation package while President and CEO of Stone-Consolidated Corporation and then of Plaintiff included tax equalization payments sufficient to ensure that he received the same net income after taxes in relation to each year's employment as he would have received had he remained in the United States (in the state of Illinois) and not been subject to Canadian taxation;
20. The amounts paid to Defendant for purposes of tax equalization were reported year by year and year after year by Plaintiff to the taxing authorities as part of Defendant's compensation and were comprised within the amounts declared year by year and year after year as Defendant's compensation in Plaintiff's annual proxy statements to its shareholders;"⁷

[18] The Defendant's position in respect of the Retirement Compensation Arrangement (RCA) is that the following scheme was devised by Plaintiff's tax advisors:

"24. These advisors suggested that the Plaintiff Abitibi-Consolidated Inc. could achieve significant savings on tax equalization if Defendant were to become a non-resident of Canada prior to the payment of severance compensation into an RCA for his benefit;

25. At the suggestion of Plaintiff's tax advisors, Defendant returned to the United States when he did, at the end of 1998, in order to save Plaintiff from having to compensate Defendant for the higher Canadian than American taxes on his severance compensation;

26. It was understood at the time by Plaintiff and these tax advisors that, as a result of Defendant's new status as a non-resident of Canada, Plaintiff would save the money it would have been obliged to pay to equalize the taxes on the severance compensation had Defendant continued to reside in Canada, while Defendant would benefit from the lower non-resident tax on the severance compensation itself;"⁸

⁷ Id., para. 15-20 (emphasis added).

⁸ Id., para. 24-26.

[19] The parties have entirely different views as to the meaning of the concepts of tax equalization and the right of use foreign tax credits. Much of the evidence on these subjects was adduced through the use of documentary evidence and expert testimony; here too however the experts differed dramatically as to the nature of the agreement between the parties, and indeed even the meaning of the term tax equalization and the applicability as well as ownership of the foreign tax credits in this dispute.

THE EXPERTS: THEIR REPORTS AND TESTIMONY

[20] Plaintiff called as an expert witness **Sandro Bartolini**, senior manager, international executive services of KPMG LLP Chartered Accountants; he produced a report (hereinafter "Bartolini Report")⁹ dated February 16, 2006.

[21] Bartolini, at the outset, in the context of an international assignment of an employee, described generally a company's income tax reimbursement policies as having three major objectives:

- "1. To ensure, within certain parameters, that the employee's tax liability will neither exceed nor be less than his stay-at-home tax liability, that is, what the employee's tax liability would have been in the absence of the foreign assignment;
2. To ensure good corporate citizenship regarding employee's tax compliance in every location in which the company operates and to eliminate the risk of nonconformance with local law, tax regulations, and exchange rate controls;
3. To limit the company cost as far as law and practicality permits."¹⁰

[22] Bartolini stated that there are four commonly used methods of tax reimbursement:

- 1- tax equalization;
- 2- tax protection;
- 3- laissez faire;
- 4- *ad hoc*.

It is the first two which both Bartolini and the Defense expert Cruikshank considered, both in their respective reports and testimony. The analysis by both experts was not an abstract exercise in the transborder movement of employees; the distinction between tax equalization and tax protection is, as we shall see below, considerable, and shall have a critical impact on the rights of the parties in this case.

⁹ Exhibit P-53, Report by KPMG LLP Chartered Accountants, written by Mr. Sandro Bartolini, and dated February 16, 2006.

¹⁰ *Id.*, p. 3.

BARTOLINI'S DEFINITION OF TAX EQUALIZATION

[23] Mr. Bartolini describes tax equalization as follows:

"Tax equalization is a tax reimbursement method utilized by companies which ensures that the tax liability for an employee on foreign assignment neither exceeds nor is less than his stay-at-home tax liability.

Where the combined home and host country's actual taxes are higher as a result of the foreign assignment, the employer reimburses the employee for the additional costs incurred. However, where the combined actual taxes are lower as a result of the foreign assignment, then the employee is required to reimburse the employer for the difference. Consequently, regardless of the tax jurisdiction where the employee works, the employee will be subject to the same level of taxation as if he would have remained home. For example, tax equalized employees from the U.S. on assignment in Canada should be in the same tax position during the assignment as they would have been had they remained in the U.S."¹¹

[24] According to Bartolini, there are four basic elements of tax equalization:

- "1 Hypothetical Tax. The estimated tax liability that a comparably-situated employee would have in the absence of a foreign assignment. This hypothetical tax amount replaces the employee's regular tax withholdings. Income not related to an individual employment is generally treated separately for equalization and hypothetical tax calculation.
- 2 Domestic Tax. The actual tax liability the employee's home country tax authorities levy on the employee's income.
- 3 Foreign Tax. The actual tax liability levied on the employee's income by foreign tax authorities. Note: for U.S. citizen filing joint tax return spousal income is normally not tax equalized by an assignee's employer.
- 4 Stay-at-Home Tax. Year-end calculation of the employee's "stay-at-home" tax liability based on actual deductions and income (excluding allowances and reimbursements associated with the foreign assignment).

A company's objective with regard to an employee's tax responsibility is to minimize the impact of the international assignment on his tax obligation. Because tax rates vary greatly throughout the world and that assignment related allowances are generally subject to U.S. and foreign tax, companies will assume responsibility for the employee's federal U.S., state (if any) and foreign income taxes. In exchange, the employee will pay a hypothetical tax that approximates the amount that would have been paid in federal, state and social security taxes had he remained in the U.S. This amount will be retained by the company and not paid to any government authority. Because the hypothetical tax withheld is based

¹¹ Id., pp. 3-4.

on estimates of income and eligible deductions not related to the foreign employment, reconciliation is required each year."¹²

[25] The Bartolini Report explains how tax equalization functions in practice:

"Where the employee's hypothetical tax is greater than the calculated stay-at-home tax, the company refunds the difference to the individual. Where the opposite is true, the individual has to remit the balance due to the company. This procedure is generally referred to as the final tax equalization settlement for the year and should be performed soon after completion of the actual returns to avoid unnecessary delays in making final settlement.

Finally, in the year of repatriation, amounts to cover moving costs, miscellaneous relocation allowances and final foreign tax returns are generally required. These items are frequently not settled until the year after the employee's return to the home country and may generate additional home and host country tax consequences as these amounts generally constitute taxable income. In order to avoid a perpetual tax on tax, a final "gross-up" is calculated to provide the individual with sufficient settlement in the final year to provide reimbursement for any excess taxes that may become due."¹³

[26] Bartolini's analysis of how tax equalization functioned within Abitibi on an annual basis for the Defendant is as follows:

"Finally, in the year of repatriation, amounts to cover moving costs, miscellaneous relocation allowances and final foreign tax returns are generally required. These items are frequently not settled until the year after the employee's return to the home country and may generate additional home and host country tax consequences as these amounts generally constitute taxable income. In order to avoid a perpetual tax on tax, a final "gross-up" is calculated to provide the individual with sufficient settlement in the final year to provide reimbursement for any excess taxes that may become due.

Because Defendant is a U.S. citizen who has been living and working in Canada, he was subject to higher tax rates than if he had remained in the United States. Consequently, Plaintiff funded the Canadian taxes on Defendant's behalf. On an annual basis, PriceWaterhouse Coopers prepared tax equalization statements to determine his stay-at-home tax. Defendant was responsible for any hypothetical taxes that were under withheld in comparison to his stay-at-home taxes. Accordingly, Defendant, in October 1998, refunded Plaintiff the amount he owed for his 1995 (US\$54,147) and 1996 (\$144,020) tax equalization (exhibits P-17 and P-18). For the 1997 tax equalization, documents indicate that a partial repayment of the US\$601,275 amount due to Plaintiff was made by Defendant. The repayment of these amounts clearly indicates that Defendant was following the principles of tax equalization. It should be noted that for tax years 1995 to 1998

¹² *Id.*, p. 4 (emphasis added).

¹³ *Id.*, p. 5.

Defendant's hypothetical tax withholdings have always been significantly less than his final hypothetical liability. This has conferred a benefit to Defendant by allowing him the use of significant amount of funds for a period of up to three years."¹⁴

[27] Both in his testimony and Report Bartolini drew a sharp distinction between what system he believed to be in place at Abitibi, and that of Allen Cruikshank, the expert witness of the Defendant Doughan. Cruikshank denied that Abitibi put in place a tax equalization program for Doughan; his position in testimony and in the written report is that Doughan benefited from what he characterized as a tax protection plan.

THE DIFFERENCE BETWEEN TAX EQUALIZATION AND TAX PROTECTION ACCORDING TO BARTOLINI

[28] Bartolini stated the distinction as follows:

"Tax Protection

Tax protection is a tax reimbursement method which protects employees on foreign assignments against the higher tax cost which may result from the assignment. Tax protection methods are designed to reimburse an employee to the extent that the employee's combined total income and social security taxes exceed the amount that the employee would have paid had he remained in his home country. Where the combined actual taxes are lower as a result of the foreign assignment, the employee will be entitled to keep the net tax benefit realized. This potential windfall differs from the tax equalization methodology as described above. Under the tax protection method an employee is required to fund the host and home taxes himself. If the total taxes he paid are in excess of the projected amount of stay-at-home taxes, he then shall request a refund from his employer.

Generally, under the tax protection method, the assignee is responsible for his host based taxes throughout the year. After the actual income tax returns have been prepared and filed, the company computes a stay-at-home tax for the assignee which should approximate the tax liability that the assignee would have incurred had he not gone on assignment. Therefore, for purposes of the stay-at-home tax calculation, all assignment related benefits received in the host location as income equalizers (e.g., housing and transportation differentials) are excluded.

Note that tax equalization and tax protection are mutually exclusive, once calculations are undertaken under one method, this method shall be continued in all succeeding years. Even if a change from one method to the other is possible, a clear agreement between the employee and his employer needs to be drafted to determine the financial responsibilities of each party involved."¹⁵

¹⁴ Id.

¹⁵ Id., pp. 5-6.

[29] According to Bartolini, Doughan did not meet the criteria for tax protection as the defense claims:

"It is evident from the description of tax protection that Defendant was not following this method as he has not been paying actual Canadian taxes during his assignment and he was not benefiting from any "windfall". Other indications that Defendant was tax equalized can be summarized as follow:

- For all the years, Canadian and U.S. tax advances were made by Plaintiff to fund Defendant tax liabilities. Under tax protection Defendant would have had to fund all the taxes and seek reimbursement afterward.
- On the tax equalizations prepared by PriceWaterhouseCoopers for 1995 to 1999 Defendant owes or owed substantial amount of money to Plaintiff. For the same reason stated above, if Defendant would have been tax protected, he would have had to claim a refund for the excess taxes he would have paid.
- The tax equalizations prepared by PriceWaterhouseCoopers for 1995 to 1997 indicates that Defendant and his spouse were tax equalized on their income from all source; i.e. employment, investment, capital gain etc, this would not have occurred had Defendant been tax protected."¹⁶

[30] The testimony of Bartolini was credible and entirely consistent with the substance of the Report he had produced. He successfully made the case that Mr. Doughan benefited from a tax equalization scheme when he was employed by Plaintiff, and that the effects of this device continued to operate, as a function of the tax consequences, beyond his employment, and extended to his return to residence in the United States.

[31] Mr. Bartolini testified at length on the elements of the arrangement between the parties which led him to conclude that they were operating under a tax equalization scheme to accommodate the work of Mr. Doughan in Canada. Bartolini testified as follows:

"Q- So, what are the elements which permit you to say that, here, we were in presence of an equalization instead of any other type of agreement? What are those elements?

A- One of the main elements which leads to my conclusion on that matter is that the employee was subject to an hypothetical tax which was applied on a pay per pay basis, be it twenty-four (24) pays or twenty-six (26) pays. Now, the principle of tax equalization in that regard is that someone who goes on assignment, the employer tells his employee, "Your responsibility while on assignment is as if you would have stayed at home. What we will do, we will assess you an hypothetical tax which we will withhold, which should duplicate what you would have paid had you stayed home". And

¹⁶ Id., p. 6.

then, the employer takes the responsibility of paying the actual taxes both in the home and host locations.”¹⁷

“A- Another indication that I've observed is that the Plaintiff has funded the actual taxes both in Canada and the US through advance which is in addition to the hypothetical taxes that were withheld on a pay cycle.”¹⁸

“A- [...] Now, the underwithholding in those situations can be generated... okay. These are settled at the year end on the tax equalization when you prepare the final reconciliation to show that the employee meets his stay at home taxes responsibilities through only his withholding plus any amount that he would have paid himself or, if it was, then that's where the settlement happens where there's an amount due to the employee or to the employer.

Now that follows through as I have observed in ninety-five ('95) and ninety-six ('96) that the Defendant saw those tax equalizations and did refund the Plaintiff for those amounts, those differentials of taxes that were owed because he had underpaid his hypothetical taxes.

Q- So, those refunds by Defendant, you consider that as another element to permit you to conclude that we were in presence of equalization?

A- That indicates tax equalization.

Q- Is there any other element that you saw in the file which supports your conclusion?

A- Well, there are other exhibits which have a bearing to indicate that tax equalization is followed. One of them is Exhibit D-18 where it's stated in paragraph...

[...]

Q- So, what element of that exhibit, Mr. Bartolini, are you referring to when you say that it supports your conclusion of tax equalization?

A- Number 1, it's stated that, for tax purposes, he, the Defendant, should be treated as if he continued to live in Chicago. Any additional tax liability would be borne by the company. Now, this is one of the premises of a stay at home tax. You are on assignment in Canada, but the additional Canadian tax liability will be borne by the company. That implies that tax equalization is definitely to be prepared to do that reconciliation.

¹⁷ Transcript of the testimony of Mr. Sandro Bartolini, November 7th, 2007, pp. 36-37.

¹⁸ Id., p. 38.

[...]

Q- Presumably. He wasn't writing as a chartered accountant or as a tax authority. What he's doing is he's talking about one of his senior employees and he's saying in paragraph 1 for tax purposes he, this present Defendant, will be treated as though he continued to live in Chicago. He goes on to say, "Any additional tax liability...", meaning any additional tax liability as a consequence of him living and working in Canada... because the tax rate was higher, correct?

A- Correct. ¹⁹

[32] **Mr. Allan Cruikshank** is a chartered accountant who filed an Expert Report²⁰ (hereinafter "Cruikshank Report") on behalf of Defendant, and as well gave testimony at trial.

[33] His Report of December 17, 2004 concentrated on the issue of foreign tax credits, their use, ownership, and value for the employee, in this case Mr. Doughan, the Defendant.

[34] The Cruikshank Report however considered to some extent the issue of the various types of relocation and tax equalization arrangements. This aspect of the Report is remarkable as it highlights only two basic categories of relocations plans. Cruikshank begins by giving priority to what he calls **TAX PROTECTION PLANS**, which reads as follows:

"(1) **"Tax Protection Plans"** under which the employee is protected against the higher rates of income tax levied in the jurisdiction(s) to which he is transferred over the tax levied in his home "country/location". Under such a plan, any tax benefits, enjoyed following the termination of employment, are for the employee's own account and not that of the employer. Employers, in my experience, often look upon any benefits which an employee may derive as added compensation or an inducement for any hardships or inconvenience which the employee may suffer from being removed from his home, family, friends, etc. The operation of tax equalization plans is described in VII (d) below.

Tax Protection Plans are regularly accorded to senior executives who are required to relocate in the course of their duties. ²¹

¹⁹ *Id.*, pp. 39-42.

²⁰ Exhibit D-93, dated December 17, 2004.

²¹ *Id.*, p. 9.

[35] Cruikshank cites no authority from any source for his assertion that these types of plans are "regularly accorded" as noted above; nor does the Report cite any of the voluminous documentary evidence produced in the present record which deals with the arrangements between Plaintiff and Defendant. It is a statement entirely unsupported by the evidence in the file for Cruikshank to say, as he has, that "Under such a plan, any tax benefits, enjoyed following the termination of employment, are for the employee's own account and not that of the employer."²²

[36] Apparently to satisfy the appearance of either fairness or impartiality, Cruikshank furnishes in his Report an anodyne definition of Tax Equalization, and does so without comment:

" "Tax Equalization" is a method by which a taxpayer, physically employed away from his normal work location, is remunerated by his employer in a manner such that his "net take home pay" in any given period will be equal to what he would have received in that period had he been subject to income tax at his normal work location. Depending on the nature of the calculation that location can mean a country, or political subdivision within a country."²³

[37] The Court finds it difficult to view as credible the testimony of an expert witness who, knowing that the opposite party has based its case on a proposition such as tax equalization which is well documented in the documents of the company, simply ignores the written evidence available without any comment, and espouses a theory without any references as to its validity or applicability to the facts of the present case.

PLAINTIFF'S NON EXPERT WITNESSES

[38] **Mr. Jacques Vachon** is 1st vice-president in charge of administration with Plaintiff and has held that position since 1999; prior to this posting, he was vice-president in the legal department of Plaintiff.

[39] Vachon filed a series of circulars²⁴ from the annual meetings of Abitibi for the years 1995 to 2000 all highlighting the fact of the tax equalization in place for Mr. Doughan.

[40] He testified that Doughan had been working with a tax equalization benefit since first working in Montreal for Stone Consolidated, prior to the amalgamation.²⁵

²² *Id.*

²³ *Id.*, p. 10.

²⁴ Exhibits P-20, pp. 10, 11, P-21, pp. 1, 8, 9, P-22, P-23, p. 9, P-24, p. 7, as well as D-61, p. J-42 which was filed by the Defense (emphasis added).

²⁵ Transcript of testimony of Mr. Vachon, November 5, 2007, pp. 14, 15, 16.

[41] Mr. Vachon stated that he attended a meeting of The human Resources and Compensation committee of the Board of Directors of Abitibi-Consolidated on August 11, 1997, the minutes of which read in part as follows:

"Messrs. Doughan and Oberlander 1997 Salary Review

The Chairman stated that, as agreed, Messrs. Doughan and Oberlander would receive equivalent compensation, except that Mr. Oberlander would not receive tax equalization payments as would Mr. Doughan. The Committee discussed the two executive compensation summaries presented earlier and recommended a salary of US\$625,000.00 effective June 1, 1997, for each of Messrs. Doughan and Oberlander.

Messrs. Doughan and Oberlander rejoined the meeting.

Mr. Doughan's Transition Severance Compensation Agreement

Mr. Doughan stated that since some of his responsibilities would be shared with Mr. Oberlander as a consequence of the amalgamation, his compensation severance agreement with Stone-Consolidated had been triggered which placed him in the same position as Mr. Oberlander. Given his plans to retire in two years' time, he would like a transition severance compensation agreement similar to Mr. Oberlander's which would permit him to take advantage of the agreement at the time of his retirement, provided he has remained in the employ of the Company for approximately 2 years. He would like to retain a specialist to prepare a draft agreement for submission to the Committee. After discussion, the Committee agreed to a transition severance compensation agreement for Mr. Doughan which, when drafted, would be recommended to the Board for approval.²⁶

[42] This meeting was attended by both Doughan and Oberlander, the latter being a Canadian citizen, who clearly was not going to benefit from a tax equalization scheme similar to that of Doughan.

[43] **Mr. Gerald Wood**, chartered accountant, was the partner in charge of international assignments for Price Waterhouse (hereinafter "Price") as of 1994; since he retired in July 2001, he has remained with Price as a consultant.

²⁶ Exhibit P-26.

[44] Mr. Wood described his work for Price: he advised people who were on international work assignments on the tax implications for them of changing countries, as well as the tax implications for their employers. He worked mainly on Canada/U.S.A. problems. Wood was the partner in charge of Abitibi from 1994 until his retirement.

[45] He testified that he was involved in the tax equalization calculations²⁷ for the years 1995, 1996, as well as for 1997²⁸, and that while he may not have prepared these calculations entirely by himself, he clearly remembers signing off on them.

[46] Wood went on to describe how Price contemplated a considerable saving to Abitibi with no prejudice to Doughan, both prior to and in respect of the very large severance anticipated for his retirement. He wrote to Doughan the following letter and memo on March 18, 1998:

"Price Waterhouse

March 18, 1998

Private and Confidential

Mr. James Doughan
Abitibi Consolidated Inc.
800 Rene Levesque Boulevard West
Montreal, Quebec
H3B 1Y9

Dear Mr. Doughan

Further to our conversation in February concerning the payment you will be receiving under your severance agreement with the Company, I have now studied the agreement and considered various possibilities for reducing the related tax burden. As a result, I believe that, with some slight changes in the arrangements which do not affect their substance, a significant tax reimbursement savings to the Company can be achieved. I am attaching a memorandum that outlines my proposal in detail.

I look forward to discussing this idea with you, and would be happy to come to Montreal if that would be helpful.

Yours sincerely

²⁷ Exhibits P-17, P-18.

²⁸ Exhibit P-19.

(Signed: Gerry Wood)
Gerry Wood

Encl:

**James Doughan
Retirement Severance Payment
Proposal to Reduce Tax Reimbursement Costs**

Issue

Mr. Doughan's employment arrangements require Abitibi Consolidated Inc. ("the Company") to compensate him for the excess of his actual Canadian income taxes over the United States income taxes that would apply on the same income (including any tax resulting from this excess tax reimbursement).

Under the terms of a "Severance Agreement" dated April 10, 1997, Mr. Doughan will be entitled to a special severance payment from the Company on his retirement at the end of 1999. It is anticipated that this payment will be substantial – perhaps as much as US \$3,500,000 to US \$4,000,000. The differential between Canadian and US taxes on US \$4,000,000 would be about US \$400,000. The tax reimbursement required to compensate Mr. Doughan for that differential plus the related Canadian tax would be about US \$850,000.

The following proposal is designed to reduce the excess tax reimbursement cost to the Company while leaving Mr. Doughan in the same after-tax-position.

Proposal

The Company would secure the payment to Mr. Doughan by a funding arrangement with a third party trustee (probably a trust company). There are essentially two approaches to such an arrangement.

1. The Company would currently fund the estimated severance obligation. When the actual amount was subsequently determined, the funding would be adjusted as necessary.

OR

2. The Company would:
 - a: agree to provide the trustee with the funds needed to meet the Company's obligation when it fell due, and to obtain a letter of credit to provide security in the interim.
 - b: In December, 1999, provide the trustee with the funds required to make the severance payment.

In either case, the trustee would make the payment to Mr. Doughan in January, 2000, subsequent to the time that he would have become a non-resident of Canada.

Cost Savings

This arrangement should result in tax reimbursement savings to the Company, on both current compensation and the special severance payment, in excess of US \$ 1,600,000.

* * *

Detailed Description of Proposal

Tax Consequences

[...]

Although this US tax treatment will initially produce a 1998 US tax liability substantially more than would otherwise be the case, that additional outlay should eventually be recouped by the carry back of excess foreign tax credits in Mr. Doughan's US tax returns for the years 1999 and 2000.

[...]

Fundings of 1998 additional tax costs

Since the additional US tax arising in 1998 as a result of this arrangement will eventually be recouped, It should not form part of the normal tax reimbursement process. Instead, we recommend that the amount be loaned to Mr. Doughan on a interest free basis. The loan would be repayable when Mr. Doughan received the refunds of US tax arising on the carry back of foreign tax credits to 1998.²⁹

[47] At trial Mr. Wood explained the memorandum (D-19) in the context of a savings to Plaintiff by a reduction of tax reimbursement costs:

"Q- And can you give us more details about that, what costs did the company have to bear?

A- Well, the arrangement, as I understood it, was that Mr. Doughan was to be kept in the same after-tax position as if he were still a resident of the U.S.

²⁹ Exhibit D-19.

And the company had undertaken to pay any difference between Canadian tax rates and U.S. tax rates and that had been occurring in prior years, but this severance payment was of such a size that the tax reimbursement cost associated with that was going to be very substantial and so, they were looking for ways to reduce that cost to the company.

Q- And you say... I'm always on the first page of the memo, and I'm looking at the third paragraph:

"The following proposal is designed to reduce the excess tax reimbursement cost to the company while leaving Mr. Doughan in the same after-tax position."

A- Yes.

Q- So, why... can you explain what you meant by that?

A- Well, first thing is obvious, is to try and reduce the tax reimbursement cost, but to do it in such a way that his personal situation wouldn't be affected so that his after-tax income would be the same as before, whatever proposal I was coming up with or would have been implemented.

Q- So, he will remain in the same position after tax as he would have been before or after the proposal?

A- Right.³⁰

THE RIGHT TO THE EXCESS FOREIGN TAX CREDITS

[48] The right to the use or benefit of any excess foreign tax credits cannot be considered in isolation from the issue of tax equalization. Yet again, the parties have expressed significantly divergent views on the foreign tax credit issue largely as a result of the opinions of their respective experts.

[49] The Bartolini Report stated the issue as follows:

"An employee's U.S. tax liability may be offset by a portion of the employee's foreign tax liability. This offset is referred to as a foreign tax credit. Since the U.S. tax rates are lower than the Canadian tax rates, most U.S. citizens working in Canada accumulate excess foreign tax credits. Foreign tax credits carried over to subsequent tax years may be used to reduce U.S. federal tax in years in which the employee earns foreign source income.

³⁰ Transcript of testimony of Wood, November 5, 2007, pp. 109,110.

Foreign tax credits generated by a tax equalized employee which are carried over to subsequent tax years are owned by the employer. The basis for this claim accrues to the fact that, for employees under tax equalization, the foreign taxes are funded by the employer on their behalf.

According to published statistics, 82% of U.S. companies try to maximize the benefits of excess foreign tax credits.

In the years after repatriation, the employer or the employer's tax advisor normally prepares a cost benefit calculations for employees with foreign tax credit carried forward. These calculations aim to determine if the monetary benefits associated with the credits are sufficient to consider a continuation of the tax equalization process for those employees."³¹

[50] Bartolini confirmed this proposition in his testimony:

"So, as I was explaining, the beneficial owner of the foreign tax would be to the Plaintiff who has funded those taxes, so economically speaking, they have an interest in trying to recoup any benefit which may or which is associated with those excess foreign taxes.

This is common practice in the world of tax equalization or employee relocation."³²

"Well, I would have to qualify that they're beneficially owned, obviously the ownership – and I am not a legal person, I'm an accountant – but anything that has to do with tax account related to an individual, normally it's the individual that's tied into that account.

But in this situation and in the situation of foreign tax credit, the employer who has paid those foreign tax credits has a beneficial ownership or an interest in using those foreign tax credits."³³

"Obviously, what I've seen in the agreement was for the Defendant to be in a position, tax-wise, he would have pay taxes as if he would have stayed at home.

And planning was set forth, and under that planning, is created a tax saving for the company which is relevant to the fact that part of that saving is tied into tax equalization process, and therefore there's an economic benefit tied in for the employer who has funded those foreign taxes."³⁴

³¹ Exhibit P-53, p. 8 (emphasis added).

³² Transcript of testimony of Mr. Bartolini, November 7, 2007 p.66.

³³ *Id.*, p.70.

³⁴ *Id.*, p.97 (emphasis added).

[51] An important element of the Bartolini testimony is that if a person works in his home country, no foreign tax credits are available to off set income earned in his home country.³⁵

[52] The Cruikshank Report (D-93), as it deals with the issue of foreign tax credits, is predicated on his view (expressed above) that the bargain between these parties was not one of tax equalization, but rather tax protection which has entirely different consequences. The Bartolini Report comments on that of Cruikshank as follows:

""Foreign Tax Credits and Foreign Tax Credits carried forward"

(...)

... the report fails to mention that the foreign taxes which can be used as a credit were paid by Plaintiff and not Defendant. Hence, the ownership and benefit from the use of the excess foreign tax credits should belong to Plaintiff.³⁶

DISCUSSION

[53] The parties and their respective experts hold entirely different views as to the precise nature of the agreement, and its consequences, both prior to the amalgamation and subsequent thereto until the end of Defendant's work with Plaintiff.

[54] The complexity of the matter can however be reduced to a few simply stated issues:

- 1 - Was the agreement between Doughan and his employer one of tax equalization, or alternatively, tax protection?
- 2 - What, if any, are the consequences of the distinction?
- 3 - To whom do the excess foreign tax credits belong, and thus who has the right to claim them?

[55] It must be recalled that when Mr. Doughan first discussed the matter of moving from Chicago to Montreal with Roger Stone of Stone Consolidated, Stone was primarily concerned that Doughan be treated fairly. That was the yardstick by which Mr. Stone wanted Doughan to move to Canada, and indeed the criterion for the arrangement was as Stone wished. Doughan was protected against the higher Canadian tax structure as though he had remained in the United States. This protection was at considerable cost to Plaintiff over the years. Neither party complained about the arrangement; not Plaintiff which paid the additional funds annually to satisfy the protective requirement for Doughan, nor the latter who benefited from the protection.

³⁵ Id., pp. 44-45.

³⁶ Exhibit P-53, p.11.

[56] The word tax equalization will not be found in any Canadian statute. Neither expert witness cited any authority for the definitions they dealt with in their respective reports. It has however a term which is used as a descriptive expression to determine an arrangement between an employee and an employer; it might be said that it is merely a term of convenience which over time has gained considerable usage, but which has behind it no force of law.

[57] What then was the arrangement between these parties? The evidence discloses that it was nothing more than what was agreed to between the two men who originally discussed it. It was a form of protection for James Doughan who wanted to come to Canada, but at the same time he needed the assurance that he would not be penalized by a tax system which could prove costly. It was clearly understood by all concerned that he would be, as indeed he was, protected against higher Canadian taxes. This simply meant that Plaintiff paid the difference such that, at the end of the day, he took home no more nor no less than the amount he would have received had he remained at home. His employer paid the difference. He thus had an arrangement which has been called tax equalization, but as already noted, it was a deal to protect Doughan. The letter Stone wrote (D-18) stipulated that he wanted to be fair to Doughan; and the arrangement was fair, because it worked for the benefit of Doughan as originally contemplated.

[58] The Cruikshank Report somewhat trivialized the distinction that the parties and their counsels were making between tax equalization and tax protection. Cruikshank virtually dismissed out of hand with no serious analysis the possibility that the arrangement between the parties was a tax equalization with the consequences that were attendant on this kind of arrangement, as a matter of practice, both generally and the manner which these parties conducted the issue of the benefits to Doughan over time. It is possible that this occurred as a result of the questions he was asked to answer in the mandate by Defendant's counsel which appear at the beginning of his Report; the questions dealt for the most part with the issue of foreign tax credits. For Cruikshank, the issue of tax equalization was of no particular importance.

[59] The Court finds that the Bartolini testimony and Report (P-53) stated the distinction on a basis which appears most closely in concert with the original understanding between Stone and Doughan. Fairness! It is not fair to Plaintiff to protect Doughan over a period of years from a higher tax structure, and then see Doughan reap an extra benefit from the tax credits which were yielded only as a result of the moneys paid by Plaintiff. By no measure could this be considered fair.

[60] Over a period of several years, the parties dealt with each other while operating what the Court finds to be a tax equalization agreement. This is what the facts in the record demonstrate. The Court finds the testimony and report of Bartolini to be compelling and credible, and finds that of Cruikshank lacking in objectivity and credibility.

[61] Thus the Court concludes that the beneficiary of the excess foreign tax credits must be Plaintiff.

THE BURDEN OF PROOF

[62] Abitibi clearly has the burden of proof demonstrating its right to claim the use of foreign tax credits which were accumulated as a result of the payments by Abitibi of Mr. Doughan's taxes in the years 1995 to 1998.

[63] The documentary evidence in the record as well as the testamentary evidence by both ordinary and expert witnesses is compelling and credible to the effect that the agreement between the parties was one of tax equalization, and that the consequence of this, both as a matter of simple logic but the actual practice of Plaintiff in its dealings with Doughan where Doughan did in fact return excess tax credit payments to his employer, leads to the observation that on the balance of probabilities, the agreement between the parties was one of tax equalization with the right of Abitibi to claim the excess foreign tax credits as result of the manner in which the equalization was effected to the benefit of Doughan throughout the period.

[64] The defense has suggested that as a result of the original letter of Roger Stone which deals only with the protective aspect of the agreement to the benefit of Doughan where he would have been penalized by the higher Canadian taxes rate, there is nothing in the letter which explicitly prevents Doughan from profiting from a reversal in the rates of the two countries and that as a result of this lacuna in the agreement, it must be interpreted in Doughan's favour allowing him to benefit from excess tax credits to the detriment of Abitibi which set the system up for one purpose only: to prevent Doughan from being prejudiced for the privilege of working in this country. The position of the defense on this issue is akin to the game children used to play years ago with coins: "Heads I win, tails you lose". This case however is not a child's game, and the assertion by defense must itself be subject to rules of evidence and the burden of proof.

[65] In the event, the burden of proof has shifted to the Defendant on the rights it is asserting. Mr. Justice Pierre Tessier and Monique Dupuis have stated the proposition as follows:

"En cours d'instruction, après clôture de la preuve de la demande, le fardeau de la preuve se déplace et repose dorénavant sur les épaules de la partie contestante qui, à partir de faits dont la preuve lui incombe, doit établir la nullité, la modification ou l'extinction du droit invoqué par la partie adverse en fonction du droit substantiel pertinent. La partie défenderesse ou intimée, à qui également incombe un fardeau de la preuve (art. 2803 C.C.Q.), présentera donc une preuve pour faire échec à celle de la demande.

[...]

Par le jeu de la preuve au procès, surtout en matière de présomptions de faits, s'opère un transfert de l'obligation de persuasion du plaideur :

« Il fallait donc que la défense, pour faire rejeter l'action, fournisse, une fois certains faits prouvés, qui, de l'avis de la cour, ont déplacé sur les défendeurs le fardeau de la preuve, des explications plausibles dégageant sa responsabilité ou, au moins, des explications pouvant faire douter la cour sur la responsabilité [...] »

[66] The Defendant has failed utterly to meet any burden of proof on the various positions it asserts. Speculation is not evidence, and argument by counsel, however eloquent as it was here in the written arguments presented, is not evidence. Neither are theories presented in the form of evidentiary propositions. Before an interpretation can be given life to a proposition asserted by a party to a litigation, hard evidence must be put in the record in support. The defense has failed to convince the Court that its burden, on the balance of probabilities has been met.

THE CLAIM OF ABITIBI

[67] SUMMARY OF ABITIBI CLAIM:

1999	\$1,536,324.39 Can.
1997	\$491,770.32 Can.
1998	\$386,765.78 Can.
2000, 2001, 2002	\$104,486.68 Can.
TOTAL :	\$2,519,347.17 Can.

[68] The amount of \$1,536,324 Can. is comprised of two amounts:

- 1 - \$590,621.00 U.S. which represents the excess foreign tax credits carried forward for the years 1995, 1996 and 1997³⁷;
- 2 - \$379,342.00 U.S.; this amount represents taxes paid by Plaintiff on behalf of Doughan on the filing of his 1999 tax returns³⁸. In any event, Defendant has admitted the payments in paragraphs 38 and 48 of his Plea and Cross-Demand to Re-Particularized and Re-Re-Amended Declaration of November 12, 2007.

³⁷ Exhibits D-83 and D-83A.

³⁸ Cheques filed as Exhibit P-4 confirming the payments.

[69] The exchange rate on the two amounts referred to in the preceding paragraph of \$590,621 U.S. and \$379,342 U.S. for conversion into the amount claimed of \$1,536,324.00 Can. has been calculated by applying the exchange rate on the date of institution of the proceedings (March 19, 2002) of 1.5839³⁹ to the two U.S. amounts referred to herein.

[70] The amount of \$491,770.32 Can. is claimed by Plaintiff for the taxation year 1997 representing the balance due by Defendant after having made a partial payment of \$340,634.79 Can.⁴⁰. Plaintiff has converted the amount due by using an exchange rate of 1.3844⁴¹. The amount claimed represents the outstanding balance of the 1997 tax equalization calculation after deduction by Plaintiff of the partial payment by the Defendant referred to herein.

[71] The amount of \$386,767.26 Can. is claimed by Plaintiff for the taxation year 1998 which represents the amount owed by Defendant as a result of the tax equalization calculation⁴² by Plaintiff's accountants. An exchange rate of 1.4831 was applied to the amount of \$260,782.00 U.S. yielding the amount claimed of \$386,767.26 Can.

[72] The amount of \$104,486.68 Can. is claimed by Plaintiff as a result of excess foreign tax credits utilized by the Defendant as indicated in his tax returns for the years 2000⁴³, 2001⁴⁴, and 2002⁴⁵. The amounts for the three years total \$111,643.00 U.S. which has been converted to \$104,486.68 by the use of an exchange rate of 1.0685.

[73] Defendant contends that the claim asserted by Plaintiff for the amount of \$491,770.32 as the outstanding balance in relation to the 1997 tax equalization calculation is prescribed as a result of the receipt by Plaintiff of a cheque dated October 30, 1998⁴⁶ in the amount of \$340,634.79, which was a partial payment by Defendant at which time prescription started to run; as the action was instituted by Plaintiff on March 20, 2002, it is prescribed according to the defense, as a result of article 2925 C.C.Q.

[74] Plaintiff contends that as the tax equalization for the taxation year 1998 was finalized in January 2000⁴⁷ only, Plaintiff was in no position to make any claim against Defendant as no debt was as yet exigible; hence, according to Plaintiff, the proceeding was brought well within the limit as prescribed by law. The Court finds this to be the case, and accordingly prescription does not apply here.

³⁹ Exhibit P-54.

⁴⁰ Cheque in that amount, Exhibit P-12.

⁴¹ Exhibit P-19.

⁴² Exhibit P-14.

⁴³ Exhibit P-10.

⁴⁴ Exhibit P-49.

⁴⁵ Exhibit P-50.

⁴⁶ Exhibit P-12.

⁴⁷ Exhibit P-14.

THE CROSS DEMAND

[75] Defendant/Cross-Plaintiff claims:

- 1 - \$491,000.00 U.S.

There is no evidence in the record to support this claim by Doughan which, it is alleged by the Cross-Plaintiff, is a consequence of the application of a theory by Price intended to benefit that party responsible for paying the equalizing part of tax equalization; and that party was not Mr. Doughan, but on the contrary, it was clearly Plaintiff. Accordingly, this claim is unfounded and will be dismissed.

- 2 - Legal fees: Can \$ 503,529.35

The basis of this claim are two agreements: the Severance Agreement, section 6.3(P-1), and the Severance Compensation Transition Agreement, section 10 (P-2).⁴⁸

Section 6.3

"The Company also shall pay to the Executive all legal fees and expenses incurred by the Executive in disputing in good faith any issue hereunder relating to the termination of the Executive's employment or in seeking in good faith to obtain or enforce any benefit or right provided by this Agreement. Such payments shall be made within five (5) business days after delivery of the Executive's written requests for payment accompanied with such evidence of fees and expenses incurred as the Company reasonably may require"

Section 10

"Expenses

The Executive shall have a right to legal fees and expenses on the same basis as he has pursuant to Section 6.3 of the Severance Agreement if his employment is terminated during the Term".

There is no evidence in the record that the employment of James Doughan was terminated. Nor is there evidence in the record that Abitibi has not fulfilled its obligations under either the Severance Agreement or the Severance Compensation Transition Agreement. If such is the case that Abitibi has fulfilled all its rights and obligations under the two above agreements referred to herein, then necessarily Doughan cannot raise a claim contending he is seeking to "enforce any benefit or right provided in this Agreement". The claim for legal fees does not therefore fall within

⁴⁸ Supra, note 5, paras. 69-71.

the ambit of the two agreements in question, as alleged, and thus this claim must fail for lack of evidence as to Cross-Plaintiffs entitlement.

Finally, on the issue of the claim for legal fees, Doughan has ignored the arbitration clause found in the Severance Agreement⁴⁹ which reads as follows:

"Any controversy, claim or dispute arising out of or relating to this Agreement including the interpretation, breach, termination or invalidity thereof (a "Dispute") **shall be definitively settled by arbitration** in accordance with the provisions on arbitration found in the C.C.P."

As the claim for legal fees is alleged to have as its basis the Severance Agreement and the Severance Compensation Transition Agreement, the wording of the arbitration clause ("shall be") constitutes a mandatory requirement to arbitrate, which Cross-Plaintiff has failed to do.

- 3 - The claim to recover the amount of \$189,069 U.S. for the costs of the expert Allan B. Cruikshank. As the Plaintiff's claim will succeed, and as that of Cross-Plaintiff will fail, there can be no justification for awarding experts costs as sought.

FOR THESE REASONS, THE COURT:

[76] **MAINTAINS** the action of the Plaintiff;

[77] **ORDERS** the Defendant James Doughan to pay to Plaintiff Abitibi-Consolidated Inc. the sum of \$2,519,348.65 Can., with interest and additional indemnity according to law from the date of the institution of the proceedings, with costs;

[78] **ORDERS** the Defendant James Doughan to pay to Plaintiff Abitibi-Consolidated Inc. the costs of the expert Sandro Bartolini in the amount of \$16,168.92 Can.;

[79] **DISMISSES** the cross-demand, with costs.

ROGER E. BAKER, J.S.C.

⁴⁹ Exhibit P-1, section 14 (emphasis added).

Me Suzanne Côté
Me Pierre-Paul Daunais
STIKEMAN, ELLIOTT
Attorneys for Plaintiff/Cross-Defendant

Me Sandor J. Klein
Me Arthur Bronstein
DE GRANDPRÉ CHAIT
Attorneys for Defendant/Cross-Plaintiff

Dates of hearing : November 5, 6, 7, 8, 9, 12, 13, 2007
Date of final written submission : January 18, 2008

(Chambre commerciale)

Nº. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE:

ABTIBIBOWATER INC. ET AL.

Requérantes

-et-

ERNST & YOUNG INC.

Contrôleur

9.

JAMES DOUGHAN ET AL.

Intimées

BS0350 r/dos.: 041053-1170

PIÈCE R-6

ORIGINAL

Me Mélanie Béliand (514) 397-3197

Fax: (514) 397-3591

STIKEMAN ELLIOTT

Stikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS

40^e Etage

1155, boul. René-Lévesque Ouest

Montréal, Canada H3B 3V2

PIÈCE R-7

CANADA

PROVINCE DE QUÉBEC
DISTRICT OF MONTRÉAL

No: 500-05-071231-029
C.A.M. No.:

SUPERIOR COURT

JAMES DOUGHAN, domiciled and
residing at 7685 Old Paint Trail,
Scottsdale, Arizona, 85262, USA

APPELLANT / Defendant/Cross-Plaintiff

v.

ABITIBI-CONSOLIDATED INC. a legal
person duly incorporated having its head
office and principal place of business at
1155 Metcalfe Street, Suite 990, in the
City and District of Montréal, Province of
Québec, H3B 5H2

RESPONDENT / Plaintiff/Cross Defendant

INSCRIPTION IN APPEAL
(Article 495, Code of Civil Procedure)

1. Appellant inscribes this case in appeal before the Court of Appeal sitting in Montréal.
2. This is an Appeal from a judgment of the Superior Court of the District of Montréal rendered on July 7th, 2008 by the Honourable Mr. Justice Roger E. Baker (the "**Trial Judge**"). The judgment maintained Respondent's action and dismissed Appellant's cross-demand, as follows:

[76] MAINTAINS the action of the Plaintiff;

[77] ORDERS the Defendant James Doughan to pay to Plaintiff Abitibi-Consolidated Inc. the sum of \$2,519,348.65 Can, with interest and additional indemnity according to law from the date of the institution of the proceedings, with costs;

[78] ORDERS the Defendant James Doughan to pay to Plaintiff Abitibi-Consolidated Inc. the costs of the expert Sandro Bartolini in the amount of \$16,168.92 Can;

[79] DISMISSES the cross-demand, with costs.

3. Proof and hearing in first instance lasted seven (7) days.
4. The Trial Judge erred in his judgment as set forth herein below:

INTRODUCTION

5. In 1993, Doughan was a U.S. citizen. He was also the President and CEO of a corporation known as Stone-Consolidated Corporation (hereinafter "Stone-Consolidated") which he was running from his offices in Chicago, Illinois¹.
6. In 1994 Doughan suggested to Mr. Roger Stone who was then the Chairman of Stone-Consolidated Corporation, that it would be better if Doughan could run Stone-Consolidated from Montréal.
7. Given the higher taxes in Canada, Roger Stone made the recommendation which is reproduced in paragraph 5 of the judgment, and which included the recommendation that:

"For tax purposes, [Doughan] should be treated as if he continued to live in Chicago. Any additional tax liability would be borne by the company".
8. The testimony of Roger Stone and of Doughan quoted in paragraphs 10 and 11 of the judgment makes it evident that this provision was intended for the protection of Doughan.
9. Doughan became a Canadian resident on January 1st, 1995 and remained as such until December 31st, 1998. Although he ceased being a Canadian resident on that date, he continued to act as President and CEO of Abitibi-Consolidated Inc. (hereinafter "ACI") until April 26th, 1999, when John W. Weaver took over his job. However, in 1999, Doughan was on the payroll not of ACI but of a U.S. entity related to ACI.
10. On April 10th, 1997, an agreement called "Severance Agreement" was entered into between Stone-Consolidated and Doughan (Exhibit P-1) which provides for various payments to Doughan including a severance payment, in circumstances which are described therein. These circumstances include a change in control or a change in the functions of Doughan. These circumstances were realized on May 30th, 1997 when Stone-Consolidated merged with Abitibi Price Inc. to form ACI.
11. A Severance Compensation Transition Agreement, (Exhibit P-2) was entered into as of May 30th, 1997 dealing with the consequences of the merger. This agreement was the implementation of a recommendation of Gerry Wood (hereinafter "Wood"), of PricewaterhouseCoopers It provided for the substantial

¹ Stone-Consolidated is Respondent's predecessor, as appears from paragraph 119 hereinbelow.

severance payment to Doughan after his change of residence to the US being made via a Retirement Compensation Arrangement (RCA).

12. Tax equalization calculations were prepared by PricewaterhouseCoopers for the years 1995 to 1998 during which Doughan was employed by ACI in Canada.
13. Each of these calculations shows amounts payable to Doughan to cover the additional taxes incurred as a result of his move to Canada.
14. Accordingly, payments were made by the employer to Doughan. These payments were included in Doughan's annual compensation as appears from company's Annual Proxy Statement and as appears from the testimony of Messrs. Milot and of Wood of PricewaterhouseCoopers.
15. These payments were treated as expenses on the books of the company, as appears from the evidence of Messrs. Milot and Wood.
16. At no time did the Proxy Statements or books and records of the company indicate that there was any possible claim by the company against Doughan as a result of the payments, as appears from said documents and from the Milot evidence.
17. Following the appearance in an important business newspaper of an article written by Doughan and which was very critical of the ACI management², ACI claimed from Doughan an amount which ACI justified based on the fact that Doughan's actual taxes in 1999 were less than what he would have paid if he had stayed in the United States.
18. This situation resulted from a combination of factors including Doughan's becoming a US resident in 1999, and his use of excess foreign tax credits built up during the years as a result of his having paid taxes in Canada that were higher than in the United States, as appears from the evidence of Doughan's expert, Allan B. Cruikshank (hereinafter "Cruikshank").
19. The Trial Judge relies on the use of the terms "equalization" in the PricewaterhouseCoopers calculations and the term "equalization payment" in the Proxy Statements of the employer to conclude that the agreement between the parties was a tax equalization agreement, *as the term is used by Plaintiff's expert, Bartolini.*
20. This conclusion does not follow from the evidence.
21. The term tax equalization was not used by Stone or Doughan in the dealings which led to Stone's recommendation and the agreement which followed.

² Exhibit D-26.

22. Subsequently, the term was used in calculations made by PricewaterhouseCoopers and in the employer's Annual Proxy Statements³.
23. In the annual proxy statements the term equalization is used to describe payments made to Doughan which are included in his annual compensation, and reported by the employer as an expense.
24. Neither the calculations nor the proxy statements use the term "tax equalization" to describe a relocation compensation arrangement.
25. ACI's expert Bartolini, on the other hand, uses the term "tax equalization" to describe a relocation compensation arrangement, despite the fact that the PricewaterhouseCoopers calculations and the proxy statements do not do so.
26. Cruikshank uses the term tax equalization to describe a method of calculation rather than a relocation compensation arrangement⁴.
27. It follows from the foregoing that the Trial Judge should not have concluded on the basis of the use of the term "equalization" in the PricewaterhouseCoopers calculations or in the employer proxy statements that the relocation arrangement in place was tax equalization arrangement, as the term is used by Bartolini.

The Trial Judge accepts the evidence of ACI's expert witness, Sandro Bartolini (hereinafter "Bartolini"), as well founded and credible, when, in fact, his essential assertions did not survive cross-examination

28. The Trial Judge accepts Bartolini's assertion that the repayment of specified amounts by Mr. Doughan "clearly indicates that Defendant was following the principles of tax equalization".
29. Paragraph 26 of the judgment thus contains the following quotation from the Bartolini report:

Defendant, in October 1998, refunded Plaintiff the amount he owed for his 1995 (US\$54,147) and 1996 (\$144,020) tax equalization (exhibits P-17 and P-18). For the 1997 tax equalization, documents indicate that a partial repayment of the US\$601,275 amount due to Plaintiff was made by Defendant. The repayment of these amounts clearly indicates that Defendant was following the principles of tax equalization.

30. This proposition, accepted by the Trial Judge, is manifestly unfounded.

³ These calculations were necessary, whether the arrangement is one of tax equalization, as the term is used by Bartolini, or Tax Protection, as that term is used by both Bartolini and Cruikshank.

⁴ November 8th, 2007, Q. 161 to 163.

31. In each and every one of the years in question, the comparison of taxes actually paid by Doughan ("Actual Taxes") and taxes he would have paid had he remained in the U.S. ("Stay-at-home Taxes") resulted in an amount payable to ACI, as appears from line 24 of the PricewaterhouseCoopers calculations for the years in question. The payments to which Bartolini refers in no way indicate that Doughan had an obligation to make payment to ACI in the event that Actual Taxes were less than Stay-at-home Taxes.
32. The PricewaterhouseCoopers calculation for each and every one of the years in question shows Doughan's Actual Taxes exceeding his Stay-at-home Taxes, as appears from line 24 of each of the calculations.
33. The payments which were made by Doughan to ACI result from the fact that the Company advanced more money in each of the years 1995 to 1998 than was necessary to cover the amount which it was obliged to add to Doughan's income, as per line 24 of the various equalization calculations.
34. Bartolini admitted that under the situation reflected by the PricewaterhouseCoopers calculations for each of the years 1995 to 1998 the end result, insofar as payment is concerned, would remain the same under what both he and Cruikshank have called⁵ Tax Protection arrangements, as under a tax equalization arrangement⁶.
35. Bartolini admitted that each of the payments made by Doughan to ACI in relation to each of the years 1995 to 1998 would have been required under a Tax Protection plan⁷;
36. The reliance on these payments as proof that what was in place was not a Tax Protection arrangement, as the term is used by both Bartolini and Cruikshank, but rather what Bartolini called a Tax Equalization arrangement and what Cruikshank called Income Assurance Plans, is a palpable and overriding error;
37. When the Trial Judge quotes the following, and accepts it as proven, he accepts Bartolini's statement in his report regarding the criteria which must be fulfilled for there to be a tax protection arrangement in place and accepts Bartolini's affirmation that Doughan did not meet the criteria for tax protection as the defense claims⁸.
 - "It is evident from the description of tax protection that Defendant was not following this method as he has not been paying actual Canadian taxes during his assignment and he was not benefiting from any "windfall". Other

⁵ Bartolini and Cruikshank both agree that Tax Protection arrangements protect only the employee.

⁶ Bartolini, November 7th, 2007, Q. 371 to Q. 391, esp. Q. 390.

⁷ November 7th, 2007, Q. 371.

⁸ Paragraphs 29 and 30.

indications that Defendant was tax equalized can be summarized as follow (sic):

- For all the years, Canadian and U.S. tax advances were made by Plaintiff to fund Defendant's tax liabilities. Under tax protection Defendant would have had to fund all the taxes and seek reimbursement afterward.
- On the tax equalizations prepared by PricewaterhouseCoopers for 1995 to 1999 Defendant owes or owed substantial amount of money to Plaintiff. For the same reason stated above, if Defendant would have been tax protected, he would have had to claim a refund for the excess taxes he would have paid.
- The tax equalizations prepared by PricewaterhouseCoopers for 1995 to 1997 indicates that Defendant and his spouse were tax equalized on their income from all source; i.e. employment, investment, capital gain etc, this would not have occurred had Defendant been tax protected."

38. In fact Mr. Doughan was paying actual Canadian taxes as appears from his various tax returns.
39. Bartolini states and the Trial Judge held that the fact that Doughan did not reap a windfall during his assignment in Canada rebuts any argument that a Tax Protection arrangement, protecting only the employee, was in place. This proposition lacks all logic since there was no opportunity for a windfall during Doughan's employment in Canada given the higher Canadian than U.S. taxes during the years in question. As noted above, Bartolini admitted in cross-examination at trial that the calculations would have been the same under Tax Protection i.e. that the calculations would show an amount payable by ACI to Doughan. And he admitted that for this reason there was no possibility of a windfall in relation to the years 1995 to 1998⁹.
40. The Trial Judge accepts the affirmation of Bartolini in his report that:
- For all the years, Canadian and U.S. tax advances were made by Plaintiff to fund Defendant tax liabilities. Under tax protection Defendant would have had to fund all the taxes and seek reimbursement afterward.
41. However at trial Bartolini admitted that Doughan funded his tax liabilities personally, at least in part, by deductions from his salary which were remitted to the Canadian and Quebec tax departments¹⁰.
42. More importantly, Bartolini admitted that you could have Tax Protection even where the employee did not fund the host and home taxes from funds already in his own pocket¹¹.

⁹ Nov. 7, 2007 Q. 432.

¹⁰ Nov. 7, 2007 Q. 133.

43. The Trial Judge accepts the affirmation in Bartolini's report that:
- On the tax equalizations prepared by PricewaterhouseCoopers for 1995 to 1999 Defendant owes or owed substantial amount of money to Plaintiff. For the same reason stated above, if Defendant would have been tax protected, he would have had to claim a refund for the excess taxes he would have paid.
44. As noted above, Bartolini admitted that a tax protection arrangement could be in place, even where the employee was not funding the host and home taxes when he admitted that such funding was not essential for a tax protection arrangement to be in place.
45. The Trial Judge accepts the affirmation of Bartolini in his report that the fact that the arrangement related to income of Doughan and his spouse from all sources (rather than relating only to Doughan's employment income) indicates that a Tax Protection arrangement was *not* in place:
- The tax equalizations prepared by PricewaterhouseCoopers for 1995 to 1997 indicates that Defendant and his spouse were tax equalized on their income from all source; i.e. employment, investment, capital gain etc, this would not have occurred had Defendant been tax protected. (Our emphasis)
46. However in cross-examination Bartolini admitted that "under a tax protection arrangement an employee can be protected in relation not only to employment income but in relation to income from all sources¹²?"
47. In light of the foregoing, and in the light of what appears in the following paragraphs, the Trial Judge's affirmation that "the testimony of Bartolini was credible and entirely consistent with the substance of the Report he had produced" is a palpable and overriding error.
48. The Trial Judge cites some of Bartolini's testimony which the Trial Judge describes as having led Bartolini to conclude that the parties were operating under a tax equalization scheme¹³.
49. The Trial Judge is referring to the following facts (or alleged facts), as testified to by Bartolini:

¹¹ Nov. 7, 2007 Q. 407-412; Cruikshank's evidence is to the same effect. (November 8, 2007, Q. 165).

¹² Nov. 7, 2007 Q. 437. 440.

¹³ Paragraph 31.

- a) That the employee paid to the employer an amount equivalent to the stay at home taxes, and the employer paid all taxes to the various governments.
- b) That the employer funded the actual taxes through advances.
- c) That in the years 1995 and 1996 the employee "refunded the employer for differentials of taxes that were owed because he had underpaid his hypothetical taxes".
- d) That Roger Stone's letter embodying his recommendation to the Stone-Compensation Compensation Committee, Exhibit D-18, included the following text:

- 1. For tax purposes, he should be treated as if he continued to live in Chicago. Any additional tax liability would be borne by the company.

50. The Trial Judge appears to accept each of these propositions, treated one after the other below, as having been established by the testimony of Bartolini.

- a) The Trial Judge erred in accepting the proposition that the employee paid to the employer an amount equivalent to the Stay-at-home Taxes, and the employer paid all taxes to the various governments. This proposition is not supported by the evidence. As noted above, the employee in fact paid significant amounts on account of his taxes, by way of deductions at the source, for which he received T slips which have been produced.
- b) The Trial Judge erred in accepting without qualification the statement that the employer funded the actual taxes through advances. This statement is only partly true, since a portion of the taxes were funded by deductions at source from Doughan's salary, in relation to which he received T slips which have been produced.
- c) The Trial Judge erred in accepting Bartolini's proposition that in the years 1995 and 1996 the employee refunded the employer for differentials of taxes "that were owed because he had underpaid his hypothetical taxes";

This proposition is clearly unfounded. Appellant did not refund any differential in taxes. In fact in each of these years there was a differential in taxes which was paid by ACI to Doughan. In each of the years 1995 and 1996 Actual Taxes exceeded Stay-at-home Taxes (which were also called "Theoretical Taxes in the Price-Waterhouse calculations and which Bartolini has called hypothetical taxes), with the result that under the arrangement between the parties the employer was obliged to pay an amount to Doughan pursuant to line 24 of the equalization calculations for these years. In fact, the differentials paid by the employee were made necessary by something entirely different from what

Bartolini affirms and the Trial Judge accepts: the fact that the employer disbursed in aggregate more than was necessary to cover the excess of Actual Taxes over the Stay-at-home Taxes;

Taking 1995 as an example, lines 21 to 24 of Exhibit P-17 show the calculation of the tax equalization amount, which is called Excess Tax Paid.

By deducting the Theoretical U.S. Tax Liability (line 22) from the total taxes paid (line 21) one arrives in line 24 at an amount of \$299,507, which is described as the "Excess Tax Paid". This is the tax equalization payment, as the term is used in the various proxy statements of ACI. Lines 25 to 27 are under the heading "Tax Equalization Settlement". These lines compare the Excess Tax Paid, taken from line 24, with the amount advanced by the Company, leading to line 27 "Cash Settlement Due to Employer or (Company)".

It is evident from the above that in the year 1995 there was an equalization payment owing to the employee, and that the only reason the employee had to make payment to the employer is that the employer advanced \$54,147 more than was required to cover the excess of Actual Taxes over Stay-at-home Taxes.

In the same way, the 1996 calculation, Exhibit P-18 has the employee owing the employer \$144,020. This results from the fact that while Excess Tax Paid was \$432,136 (line 24), the employer advanced \$144,020 more than that amount.

- d) Finally the Trial Judge accepts and relies on Bartolini's affirmation that the first numbered paragraph of Roger Stone's letter embodying his recommendation to the Stone-Compensation Compensation Committee, Exhibit D-18, which reads as follows, is indicative that a Tax Protection arrangement, (which both he and Cruikshank describe as protecting the employee *only*, was not in place:

- 1 For tax purposes, he should be treated as if he continued to live in Chicago. Any additional tax liability would be borne by the company.

To rely on this affirmation as "evidence" is a manifest error, since contract interpretation is certainly not within the expertise of Bartolini.

The Trial Judge rejected completely and out of hand all the evidence of Defendant's expert, Cruikshank, when there is no valid basis in fact or in law to do so

51. The Trial judge reproaches Appellant's expert Cruikshank, with highlighting only two basic categories of relocation plans¹⁴.
52. Earlier at paragraph 22 he cites Bartolini's list of the four commonly used methods of tax reimbursement¹⁵:
 - 1- tax equalization;
 - 2- tax protection;
 - 3- laissez faire;
 - 4- *ad hoc*. ...
53. The Trial Judge erred in making this reproach, since despite the fact that *laissez faire* is not a method of tax reimbursement it was in fact discussed by Cruikshank¹⁶; nor can *ad hoc* arrangement be considered as a method of tax reimbursement. This error is an overriding error, given that it would appear to be among the Trial Judge's reasons for rejecting the Cruikshank report.
54. In paragraph 35 the Trial Judge rejects Cruikshank's evidence that Tax Protection plans are regularly accorded to senior executives who are required to relocate in the course of their duties. The Trial Judge does so on the ground that Cruikshank cites no authority from any source for his assertion that these types of plans are regularly accorded. This rejection is manifestly unfounded, since expert witnesses are entitled to testify on the basis of their own experience.
55. The Trial Judge unfairly reproaches Cruikshank with not citing any of the voluminous documentary evidence produced in the present record and dealing with the arrangements between ACI and Doughan. However, it was not for the expert to refer to the evidence and argue the case. It was the expert's role to furnish to the Court the information not available to the Court and which the Court can only obtain from the expert, which is what he did.
56. The Trial Judge affirms that Cruikshank's statement that under a Tax Protection plan "any tax benefits, enjoyed following the termination of employment, are for the employee's own account and not that of the employer" is entirely unsupported by the evidence in the file¹⁷. This proposition is within Cruikshank's

¹⁴ Paragraph 34 of judgment.

¹⁵ Paragraph 32 of judgment.

¹⁶ November 8, 2007, Q. 149.

¹⁷ Paragraph 35 in fine.

field of expertise as to how Tax Protection plans generally operate, so that its rejection out of hand is a manifest error.

57. The Trial Judge reproaches Cruikshank with having furnished without comment an anodyne definition of Tax Equalization "apparently to satisfy the appearance of either fairness or impartiality"¹⁸.
58. This reproach focuses on wording rather than substance; The Trial Judge treats this paragraph as the sum and substance of Cruikshank's discussion of the relocation compensation arrangement which Bartolini called Tax Equalization. That is a manifest error. Cruikshank, in fact, dealt in some detail with the plans which Bartolini called tax equalization plans at page 9 of his report, under the heading of "Income Assurance Plans" and in his testimony¹⁹.
59. The Trial Judge affirms that "the proposition of tax equalization upon which ACI's expert was relying is well documented in the documents of the company", and reproaches Cruikshank with espousing a theory and ignoring the facts of the case, including the contrary written evidence upon which ACI was relying:

The Court finds it difficult to view as credible the testimony of an expert witness who, knowing that the opposite party has based its case on a proposition such as tax equalization which is well documented in the documents of the company, simply ignores the written evidence available without any comment, and espouses a theory without any references as to its validity or applicability to the facts of the present case.²⁰

60. If the Trial Judge is using the term Tax Equalization, as the term is used by Bartolini, ACI'S expert, who uses it to describe a foreign assignment arrangement, the Trial Judge's proposition that Tax Equalization is well documented in the documents of the company is unfounded: the term Tax Equalization is used by Bartolini to refer to an arrangement which is a two-way-street, not only providing for payments to the employee but also providing for payments from the employee to the employer when taxes in the assignment country are lower than taxes would have been in the country of origin.
61. When referring to the documents of the Company, the Trial Judge was no doubt referring to the various proxy statements of the Company²¹. He was also perhaps

¹⁸ Paragraph 36.

¹⁹ Cruikshank uses the term "tax equalization" to refer to a method of calculation. He and others who practise in the planning perspective use the term "Income Assurance Plan" to refer to the foreign assignment arrangement that has been referred to in court as "tax equalization" He testified that "those who practice in a compliance perspective generally call everything tax equalization" (November 8, 2007, Q 161 to 163).

²⁰ Paragraph 37.

²¹ Exhibits P-20 to P-25.

referring to the PricewaterhouseCoopers tax equalization calculations for the years 1995 to 1998²².

62. In the various proxy statements of ACI, the term "tax equalization" is not used to describe a foreign assignment arrangement, but rather to describe payments forming part of Doughan's compensation.
63. In Exhibits P-14 and P-17 to P-19 the term "tax equalization calculation" is not used to describe a foreign assignment arrangement; rather the term is used by PricewaterhouseCoopers to describe the annual calculations which determined amounts included in Doughan's compensation; and the term "tax equalization summary" is used in the same documents again not to describe a foreign assignment arrangement but rather to describe a summary of the calculation.
64. Whether the arrangement is Tax Equalization (as Bartolini uses the term) or Tax Protection as both he and Cruikshank use the term, these very same calculations and payments would have been made.
65. It follows from the foregoing that the Trial Judge's reproach to Cruikshank, which served to justify the rejection of Cruikshank's evidence, is a palpable and overriding error.
66. To reproach Cruikshank with ignoring the facts of the case is unfair in light of the prior decision of the Trial Judge not to allow attorneys for Doughan to cross-examine Bartolini in relation to Jacques P. Vachon's (hereinafter "Vachon") description of "tax equalization", which was one of the facts of the case; Vachon's position at ACI and the testimony in question are discussed at paragraph 74 hereinbelow.
67. In any event, a careful review of the Cruikshank report, Exhibit D-93, and of his evidence shows that Cruikshank responded to the questions put to him, commenting on evidence and documents when asked to do so²³.
68. The Trial Judge treats Cruikshank as though he were an expert in a construction case who analyzed a party's claim, evaluated same, and testified that the party should receive an award which he quantified. In such circumstances, it is legitimate to reproach the expert with having ignored documents.
69. However Cruikshank never espouses Doughan's cause, where the essential point at issue is to determine what was the agreement between the parties, something which lies within the province of the judge rather than the expert. What Cruikshank did was to provide useful technical information to the Trial Judge, by describing the various types of compensation arrangements in the

²² Exhibits P-17 to P-19 and P-14.

²³ Cruikshank comments on the Bartolini report at Q. 191 ff.

marketplace, the circumstances in which they are generally entered into, by explaining the tax system which gives rise to foreign tax credits, and by making certain calculations which required his expertise; in doing so he acted impeccably.

70. The Trial Judge has unfairly taxed Cruikshank with not having done what ultimately, it was for the Court to do. Since this is one of the reproaches which led the Trial Judge to dismiss Cruikshank's evidence, it is a palpable and overriding error.

The Trial Judge ignores Vachon's understanding of the term "tax equalization"

71. In paragraph 39 the Trial Judge referred to Vachon having filed a series of circulars from the annual meetings of Abitibi for the years 1995 to 2000. He then remarked that all the circulars highlighted the fact of the tax equalization in place for Mr. Doughan.
72. The Trial Judge appears to be relying on the proxy statements to support the finding that the parties were bound by a tax equalization agreement, although there is no explicit statement to that effect in the judgment. In fact, the proxy statements refer to equalization payments forming part of Doughan's compensation.
73. In any event, in order to draw any conclusion whatsoever from the use of the term "tax equalization" in the various proxy statements, it is necessary to know what that term meant for the preparers of the proxy statement.
74. Vachon, who was ACI's Senior Vice President, Corporate Affairs and Corporate Secretary, was intimately involved with the annual proxy statements of ACI, and signed same. He testified on discovery that equalization applied when assignment taxes are higher than stay at home taxes:

"R. Un tax equalization, c'est pas très complexe. Les grands principes, il y avait un employé qui était Américain, à l'origine, qui déménage au Canada. Son taux de taxation est plus élevé. Il y a une organisation qui s'est engagée à le compenser pour cette perte qu'il a, au niveau rémunérations. Et là, les comptables se mettent à travailler."²⁴

75. This testimony is another ground to hold that Trial Judge's erred when he concluded, based on the use of the term "tax equalization" in the various proxy statements to describe payments that the parties had agreed on a tax equalization arrangement as Bartolini uses the term.

²⁴ Paragraph 36 of judgment.

The Trial Judge erred in law when he relies on the Bartolini testimony to conclude that excess foreign tax credits belong to the employer

76. In paragraphs 48 to 52 the Trial Judge deals with the right to excess foreign tax credits.

77. Despite the fact that Bartolini was never qualified as an expert in law, and despite his affirmations that he is not an expert in law, and despite the Trial Judge's statement that he would not rely on Bartolini's affirmations as to the law, the Trial Judge seems to accept and rely upon Bartolini's evidence, that under what he describes as tax equalization plans, because foreign taxes are funded by the employer, the foreign tax credits generated by their payment belong to the employer. We submit that this evidence is beyond the competence of Bartolini and should not be taken into consideration.

78. It is a manifest error for the Trial Judge to rely on this evidence and not even to consider the evidence of Cruikshank, whose report states:

"...Foreign tax credits" and the related "excess foreign tax credits" are not property which can be bought or sold, exchanged, transferred, assigned, pledged or loaned to another party. Rather, they arise as a legislated equitable remedy (unilateral relief) to a particular taxpayer who would otherwise suffer income taxation on the same item of income by two (or more) countries; so-called "double taxation". In the absence of an agreement between the employee and the employer that the employee will in some way pay the employer for the tax benefits arising from the use of "foreign tax credits" or, as at issue here, "excess foreign tax credits" the employer could not point to any property represented by those credits....²⁵

The Trial Judge erred when he ignored the clear implication that excess FTC belong to Doughan which arises from the provisions of Sections 7(i) and 7(j) of the Severance Compensation Transition Agreement

79. Sections 7(i) and 7(j) of the Severance Compensation Transition Agreement envisage a situation where ACI would make a loan to Doughan, which Doughan would repay with the refund of taxes resulting from the use by Doughan "of the excess foreign tax credits which arose as a result of [his] employment in Canada". This is an indication that foreign tax credits belong to Doughan, since one can only repay a loan with one's own money.

²⁵ Cruikshank Report, Exhibit D-93, at page 10, item b.

The Trial Judge ignores the evidence that the implementation of the Wood Proposal was to leave Doughan with 75% of his Severance Payment, after all taxes were paid.

80. In paragraphs 46 and following the Trial Judge refers to the Wood Proposal, and, without comment, quotes extracts from same.
81. However, the Trial Judge ignores the crystal clear evidence that the Wood Proposal was to leave Doughan with 75% of his Severance Payment, after all taxes were paid. We refer to that evidence in paragraph 86.t) hereinbelow.
82. As we note below at paragraph 86.u), if the judgment in appeal is allowed to stand, Doughan will keep only about 57% of the Severance Payment, and not 75%.
83. Ignoring this is a palpable and overriding error.

The Trial Judge ignores innumerable relevant considerations when he concludes that it is "fair" for ACI rather than Doughan to have the benefit of excess foreign tax credits

84. The Trial Judge founds his decision to award ACI the sums claimed pursuant to the agreement between the parties on the basis of "fairness"²⁶. He writes that:

It is not fair to Plaintiff to protect Doughan over a period of years from a higher tax structure, and then see Doughan reap an extra benefit from the tax credits which were yielded only as a result of the moneys paid by Plaintiff. By no measure could this be considered fair.

85. In making this statement the Trial Judge took a very subjective view of fairness and ignored various factual considerations impacting on the interpretation of the agreement between the parties and on the question of fairness. To ignore these considerations is a palpable and overriding error.
86. Among the considerations ignored by the Trial Judge, in addition to those mentioned above, are the following:
 - a) the fact that the testimony of Doughan and the testimony of Stone indicate that the agreement was intended to protect Doughan²⁷.
 - b) the fact that there is nothing in the evidence, whether by way of testimony or documentation to indicate that the agreement was intended to protect ACI as well.
 - c) Mr. Stone's statement in the second to last paragraph of Exhibit D-18 that what he is suggesting is "pretty simple": the Trial Judge's interpretation of

²⁶ Paragraph 59.

²⁷ Testimony quoted in Paragraphs 10 and 11 of judgment.

the agreement envisages a system of great complexity, continuing for an indeterminate number of years after Doughan's employment in Canada ends.

- d) the fact that there would be no opening for ACI to claim had the parties, when they made their agreement, simply estimated the impact of higher taxes in Canada and adjusted Doughan's compensation accordingly, since no equalization calculation would ever be made, either before or after the end of his employment.
- e) the fact that what actually occurred is that Doughan's compensation was adjusted year by year by an amount sufficient to cover the additional taxes, as appears from the various PricewaterhouseCoopers calculations and from the ACI proxy statements.
- f) the fact that the only difference between the situations described in the preceding two paragraphs is that, as things were in fact done, the adjustment was made not in advance, but only after Doughan's annual tax returns had been filed and the amount needed to cover the additional taxes known with precision.
- g) the fact that Doughan's ownership of the tax equalization payments follows clearly from the statement in the Management Proxy Circular for the year ended December 31, 1997, exhibit P-21 (note 3 at page 9), where Doughan's tax equalization payments is included within Doughan's "perquisites and other benefits" among such things as housing loan subsidies, moving allowances, support payments for employees living abroad, and mortgage subsidies.
- h) the fact that the proxy statements of ACI state that the equalization payments are "absorbed" by ACI, and make no reference to a possible claim against Doughan other than to pay the balance which might be owing following each annual calculation.
- i) the fact that other proxy statements contain similar text.
- j) the testimony of Wood in his examination on discovery where he:
 - i) refers to the company absorbing what it pays "to settle its equalization obligations";
 - ii) states that the amounts were "ultimately absorbed by the company ...to settle its equalization obligations";
 - iii) states that what the company absorbs "is the ultimate cost to the company".

- k) the fact that any saving enjoyed by Doughan in later years, was an accessory of moneys which formed part of his compensation, and therefore belongs to him.
- l) the fact that the "extra benefit" received by Doughan from the use of excess foreign tax credits after he ceased being resident in Canada was not the inevitable or certain result of the payments received by him -- this extra benefit depended upon his return to the United States, which he was not obliged to do, and which he might not have done as appears from the report and testimony of Doughan's expert Cruikshank.
- m) Bartolini's acknowledgement that Tax Protection arrangements do exist which permit the employee to enjoy a windfall where, taxes paid as a result of the foreign assignment, are less than Stay-at-home Taxes. Bartolini acknowledges the existence of Tax Protection arrangements whereby the employee sees his compensation increased when assignment taxes are greater than Stay-at-home Taxes, but benefits from the lower taxes when such is the case; Cruikshank testified that Tax Protection arrangements are most frequent where senior executives are concerned²⁸; the existence of such arrangements where only the employee can benefit is indicative that the Trial Judge's subjective notion of fairness does not correspond with that of the market place.
- n) the total absence in the proxy statements of ACI, and in books and records of ACI of any indication that ACI expected to be recuperating from Doughan savings which might accrue to him following his employment in Canada.
- o) the fact that the relevant books and records of ACI treat equalization payments as expenses and not as advances.
- p) the fact that the books and records of ACI over the years never referred to any amount which might be owing by Doughan to ACI as a result of Foreign Tax Credits accruing to him and resulting from equalization payments made by ACI.
- q) the fact that if the judgment in appeal is confirmed what the company paid to Doughan as tax equalization will not be the ultimate cost to the company, as Wood testifies it would be²⁹.
- r) the fact that by returning to the United States when he did Doughan permitted ACI to avoid paying equalization in relation to his Severance Payment of \$4.3 million.

²⁸ November 8, 2007, Q. 156.

²⁹ See paragraph 86.j)iii) above.

- s) the fact that ACI benefited from an enormous tax saving as a result of the implementation of the Severance Compensation Transition Agreement and Doughan's return to the U.S. at the end of 1998.
- t) the fact that the entire amount awarded as tax equalization in relation to 1999, depends upon the assumption that Doughan should, following the implementation of the Severance Compensation Transition Agreement, bear a tax equivalent to the Stay-at-home Tax, and not have an ultimate tax rate to him of 25% contrary to what is shown by Wood in Schedule I to his Proposal, and contrary to what is confirmed by Wood explicitly in his letter of May 11, 1999, dealing with "the "ultimate implications" of the tax withheld "to his personal situation" and where Wood wrote that "... of course, the ultimate tax rate to you through the use of the RCA mechanism is reduced to just 25%."
- u) the fact that it is the implementation of the Severance Compensation Transition Agreement which engendered the factual situation necessary for ACI to be able to assert a claim in relation to 1999 equalization. Had the Severance Compensation Transition Agreement not been put in place, the Severance Payment would have been taxed in Canada at the rate of 53%, and there would be no saving of taxes by Doughan resulting from the difference between stay-at-home tax at a rate of 43% and the non-resident tax at the rate 25% for ACI to claim from Doughan.
- v) the fact that Doughan, under the judgment, loses this saving which he was led to believe would be for his account when arrangements were made for him to receive his Severance payment after becoming a non-resident of Canada³⁰.
- w) the fact that as a result of Section 11 of the Severance Compensation Transition Agreement the Severance Payment must be excluded from the equalization process.
- x) the fact that, even using ACI'S concept of tax equalization, the exclusion of the Severance Payment from the 1999 calculation, eliminates any amount payable to ACI as equalization for year 1999, and in fact leads to an amount payable to Doughan of US\$218,617.00, as appears from line 24 of Exhibit D-89, which is a comparison of P-4 with and without the

³⁰ The judgment awards to ACI the amount claimed in Exhibit P-4. That amount includes an amount of \$590,622 US as per line 24 of Exhibit P-4. That amount is the difference between the total taxes paid (line 21) and the total theoretical stay at home tax (line 14) As a result of the use of FTC carried forward, the only tax paid on the Severance Payment was the Canadian withholding on RCA income (line 20). The theoretical taxes include taxes at the US rate of 43%. As a result of this calculation, Doughan bears the normal rate of about 43% on his severance payment, rather than the non-resident rate of 25% which he was led to believe would be his ultimate tax liability with regard thereto.

Severance Payment of US\$4,300,000, and from Cruikshank's testimony with regard to that exhibit.

The "heads I win, tails you lose" image is inapt

87. In paragraph 64 the Trial Judge characterizes Doughan's interpretation of the agreement as being akin to what he calls a children's game. In fact what he is referring to is merely a juvenile's proposal for a game of chance, which removes all chance: "Heads I win, tails you lose":

The defense has suggested that as a result of the original letter of Roger Stone which deals only with the protective aspect of the agreement to the benefit of Doughan where he would have been penalized by the higher Canadian taxes rate, there is nothing in the letter which explicitly prevents Doughan from profiting from a reversal in the rates of the two countries and that as a result of this lacuna in the agreement, it must be interpreted in Doughan's favour allowing him to benefit from excess tax credits to the detriment of Abitibi which set the system up for one purpose only: to prevent Doughan from being prejudiced for the privilege of working in this country. The position of the defense on this issue is akin to the game children used to play years ago with coins: "Heads I win, tails you lose". This case however is not a child's game, and the assertion by defense must itself be subject to rules of evidence and the burden of proof.

88. But we are not dealing with a game of chance, but with a contract. Plaintiff's expert, Bartolini, acknowledges the existence in the market place of Tax Protection arrangements which from the employee's point of view are indeed "Heads I win, tails you lose"; if taxes are higher in the assignment country than in the country of origin, the employer covers the difference; if the taxes are lower, the employee benefits from a windfall. He refers to a survey showing the small extent of use of Tax Protection arrangements among employees, most of whom were not senior executives given the range of their earnings, as reported in the survey.
89. Doughan's expert, Cruikshank, testified that Tax Protection plans were frequent for senior executives, and were given as an additional incentive to take up foreign assignments. Doughan, the President and CEO of ACI was obviously a very senior executive.
90. In light of this evidence, the Trial Judge was in error when, on the basis of the "heads I win, tails you lose" analogy, he rejected Doughan's interpretation of the Stone letter, and, more importantly, the existence of a Tax Protection arrangement.

The Trial Judge's comments regarding the burden of proof

91. In paragraph 63, the Trial Judge states his reasons for holding that the agreement in place was tax equalization, as the term is used by Bartolini.

92. Apart from a general reference to all the proof, he relies on his erroneous assertion of what he calls the "actual practice" of ACI in its dealings with Doughan where Doughan did in fact return excess tax credit payments to his employer "as indicating on the balance of probabilities that the agreement between the parties was one of tax equalization with the right of Abitibi to claim the excess foreign tax credits...".
93. This holding, which is one of the major underpinnings of the judgment, is blatantly wrong since Doughan did not return excess tax credit payments to ACI, as appears from paragraph 50.c) hereinabove.
94. Accordingly, there was no shifting of the burden of proof to Doughan, either to prove extinction of the obligation, or to rebut a conclusion arising from presumptions of facts as the Trial Judge states³¹.
95. The trial judge wrongly decides that the burden of proof had shifted to Doughan. The burden was always on ACI to prove that it was entitled to recover from Doughan the benefit of excess foreign tax credits built up during his employment and used thereafter. For the Trial Judge to state otherwise is a palpable and overriding error.

QUANTUM

96. The Trial Judge Summarizes ACI'S claim as follows and then proceeds to condemn Doughan to pay the amount of \$2,519,348.65, (with no explanation for the insignificant difference of \$1.48)³²

[67] SUMMARY OF ABITIBI CLAIM:

A)	1999	CA\$1,536,324.39
B)	1997	CA\$491,770.32
C)	1998	CA\$386,765.78
D)	2000, 2001, 2002	<u>CA\$104,486.68</u>

TOTAL: CA\$2,519,347.17

97. The Trial Judge described the two components of the 1999 claim as follows:

³¹ Paragraphs 64-65.

³² Paragraph 67.

[68] The amount of CA\$1,536,324 is comprised of two amounts:

- 1 - U.S.\$590,621.00 which represents the excess foreign tax credits carried forward for the years 1995, 1996 and 1997;
- 2 - U.S.\$379,342.00; this amount represents taxes paid by Plaintiff on behalf of Doughan on the filing of his 1999 tax returns. In any event, Defendant has admitted the payments in paragraphs 38 and 48 of his Plea and Cross-Demand to Re-Particularized and Re-Re-Amended Declaration of November 12, 2007.³³

The award of the Canadian equivalent of U.S.\$590,621 as tax equalization for the year 1999 is unfounded

98. In describing the amount of U.S.\$590,621 as representing the excess foreign credits carried forward for the years 1995, 1996 and 1997, the Trial Judge departs from ACI's declaration and from the calculation in Exhibit P-4, where the claim is made on the basis of the difference between Actual Taxes in 1999 and Stay-at-home Taxes; in any event, the Trial Judge's award in this regard is unfounded for the reasons set out hereinabove.

Conversion errors, 1999, 1998

99. The Trial Judge errs in converting the amount claimed by ACI in relation to the year 1999 at the rate in force on March 19, 2002, when ACI instituted its proceedings (i.e. 1.5839), rather than the rate in force on January 19, 2000 when ACI was first in a position to make the claim (i.e. 1.5144).
100. The resulting excess is approximately \$70,000 which should not have been awarded to ACI, given its neglect.
101. The Trial Judge errs in converting the amount claimed by ACI in relation to the year 1998 at the unexplained rate of 1.4831, even though this amount was first claimed by ACI in its answer to plea of May 14, 2004; the Trial Judge should have used the rate in force on May 14, 2004 when Doughan was put in default (i.e. 1.3912).
102. The resulting excess is approximately \$35,000 which should not have been awarded to ACI, given its neglect.

³³ Paragraph 67 footnote omitted.

The award in relation to advances made by ACI for Doughan in relation to his 1999 taxes is manifestly too great – the Trial Judge accepts the conversion of a Canadian Dollar advance to US dollars and then back to Canadian dollars, at different rates

103. The condemnation in relation to the year 1999 includes the amount of U.S.\$379,342 representing amounts advanced by ACI in relation to Doughan's 1999 taxes.
104. This amount awarded related to the amounts of CA\$137,311 and CA\$139,555 advanced on Doughan's behalf by ACI to the Quebec and Canadian Federal tax authorities, as claimed.
105. In Exhibit P-4 these advances are converted to US currency at a rate of 1.4858 and then converted back to Canadian in ACI's proceedings at a rate of 1.5743.
106. As a result, an amount advanced of \$137,311 Canadian ends up as an award of \$145,490; similarly, an amount of \$139,555 advanced ends up in an award of \$147,867.00. The result is that ACI is awarded \$16,491 (plus interest and indemnity thereon) to which it is manifestly not entitled.

The Trial Judge condemned Doughan to pay to ACI an amount of \$491,770.32 in relation to the year 1997, despite the fact that this claim was prescribed by the time proceedings were instituted by ACI

107. The Trial Judge held that ACI's 1997 claim was not prescribed, accepting ACI's argument that "because tax equalization for the taxation year 1998 was finalized in January 2000 only"... "Plaintiff was in no position to make any claim against Defendant as no debt was as yet exigible" and that as a result "the proceeding was brought well within the limit as prescribed by law"³⁴. This holding is patently ill-founded. The due date in relation to the 1998 claim has no impact on the prescription of the 1997 claim.

The Trial Judge awarded interest and indemnity on all items of the claim from the date of the institution of proceedings despite the fact that the 1997 and 1998 claims were made for the first time long after the institution of proceedings

108. The Trial Judge awarded interest and indemnity on the amount \$491,770.32 awarded in relation to the year 1997 and on the amount of \$386,765.78 CAN awarded in relation to the year 1998 despite the fact Doughan was not in default in relation thereto until ACI claimed by way of its answer to plea of May 14, 2004;

³⁴ Paragraphs 73 and 74 of judgment.

The Trial Judge erred in condemning Doughan to pay to ACI \$104,486.68 CAN in relation to the years 2000, 2001 and 2002 and erred in awarding interest and indemnity in relation to the 2002 amount from the date of institution of proceedings since no savings were made prior to the filing of the 2002 return in 2003

109. The award in relation to the years 2000, 2001 and 2002 is ill-founded for the following reasons:

- a) Doughan was no longer resident in Canada or employed in Canada during these years so that, even if what was called a tax equalization agreement is considered to be a two-way street, the agreement no longer applied;
- b) the award is founded on the proposition that excess tax credits belong to ACI, which does not follow from the evidence, as appears hereinabove;
- c) The Trial Judge awarded interest on the amount of CA\$104,486.68 from the date of the institution of proceedings on March 20, 2002 despite the fact that for the year 2002 the tax credits on the basis of which the award was made were only used, and the benefit thereof only obtained, when Doughan's U.S. tax return was filed in 2003. If these amounts are awarded, the interest and indemnity should only run on the 2002 component of the amount awarded from the date of the filing of Doughan's 2002 U.S. tax return;

THE CROSS-DEMAND

US\$491,000

The Trial Judge's implicit but unfounded rejection of Doughan's argument that the Severance Payment was excluded from the equalization process by Section 11 of the Severance Compensation Transition Agreement, led to the granting of ACI's claim for tax equalization in 1999 and was also the ground for the rejection of Doughan's claim for U.S.\$491,000

- 110. Section 11 of the Severance Compensation Transition Agreement provides that said agreement "constitutes the entire agreement between the parties pertaining to the subject matter hereof".
- 111. The Severance Compensation Transition Agreement deals with the creation of the RCA and the tax consequences of same.
- 112. The creation of the RCA is dealt with in Section 7, and tax issues in sections 7(h), 7(i) and 7(j).
- 113. It follows from the foregoing, that the Severance Payment which was paid pursuant to the RCA must be excluded from the equalization process.

114. The Trial Judge does not deal with this issue, despite the fact that it was specifically pleaded in paragraphs 48(a) and following of Doughan's Plea and Cross-Demand to the Re-particularized and re-re-amended declaration of November 12, 2007.
115. With the Severance Payment excluded from Doughan's 1999 income, Doughan becomes entitled to an amount of approximately US\$218,500 as appears from line 24 of Cruikshank's D-89 calculation, which when "grossed up" comes to the amount of approximately US\$491,000 claimed by Doughan.
116. For the Trial Judge to ignore the foregoing is a palpable and overriding error.

The Trial Judge rejected Doughan's claim for legal fees and expenses on the basis of an erroneous interpretation of the Severance Agreement and Severance Compensation Transition Agreement, and on the basis of an unfounded application of a provision requiring arbitration

117. The Trial Judge quotes the provisions of these agreements relating to legal fees and expenses, and then concludes that legal fees and expenses were not payable by the company, as follows:

There is no evidence in the record that the employment of James Doughan was terminated. Nor is there evidence in the record that Abitibi has not fulfilled its obligations under either the Severance Agreement or the Severance Compensation Transition Agreement. If such is the case that Abitibi has fulfilled all its rights and obligations under the two above agreements referred to herein, then necessarily Doughan cannot raise a claim contending he is seeking to "enforce any benefit or right provided in this Agreement". The claim for legal fees does not therefore fall within the ambit of the two agreements in question, as alleged, and thus this claim must fail for lack of evidence as to Cross-Plaintiffs entitlement³⁵;

118. The Trial Judge is in error when he affirms, in the context of the Severance Agreement and Severance Compensation Agreement, that the employment of Doughan had not been terminated.
119. The employment agreement between Doughan and his employer, Stone-Consolidated Corporation did indeed come to an end, with the merger of Stone-Consolidated Corporation and Abitibi-Price Inc. on May 30, 1997, referred to in paragraph C of the Recitals in the Severance Compensation Transition Agreement.;
120. When ACI and Doughan entered into the Severance Compensation Transition Agreement they confirmed that, for the purposes of that agreement, Doughan's

³⁵ Paragraph 75, *in fine*.

employment had terminated when his duties were altered and his responsibilities changed.

121. Thus, in Section 4 of the Severance Compensation Transition Agreement Doughan agrees to "accept" employment with ACI; rather than to "continue" employment with ACI.
122. In the Severance Compensation Agreement ACI assumes the obligations of Stone Consolidated Corporation³⁶.
123. Section 2 (b) of the Severance Compensation Transition Agreement amends the Severance Agreement, to acknowledge that the various amounts which under subsections (A), (C) and (D) of Section 6.1 of the Severance Agreement are payable upon termination of his employment, are in fact payable.
124. Section 6.1 (D) is the section under which ACI paid Doughan \$4.3 million in severance.
125. The parties have recognized that for all intents and purposes, Doughan's employment had terminated, giving rise to his rights under the Severance Agreement as amended and under the Severance Compensation Transition Agreement; the payment of the Severance Payment into an RCA was to be done on December 29, 1998, well before the termination of Doughan's employment by ACI which was to take place on December 31, 1999³⁷.
126. In any event, the Trial Judge erred in holding that Section 10 of the Severance Compensation Transition Agreement did not apply unless Doughan's employment under that contract was terminated; Section 10 does not stipulate a condition for the payment of legal fees, but rather fixes the basis of such payment, without repeating all the verbiage of Section 6.3 of the Severance Agreement.
127. Section 6.3 of the Severance Agreement, provides that "The Company also shall pay to the Executive all legal fees and expenses incurred by the Executive ... in seeking in good faith to obtain or enforce any benefit or right provided by this Agreement." The termination of Doughan's employment is not required for a claim to be possible under this paragraph, that being but one of the situations on the basis of which Doughan is entitled to claim.
128. As appears herein below, Doughan's Severance Payment and his Pension payments are rights provided by the Severance Agreement, and which ACI by the terms of the Severance Compensation Transition Agreement specifically undertakes to fulfill.

³⁶ Exhibit P-2, Section 3.

³⁷ See Sections 7 (a) and 2 of the Severance Agreement, Exhibit P-1.

129. The covenants of the Company are described as following in Section 3 of the Severance Agreement.

"the Company agrees, under the conditions described herein, to pay the Executive the Severance Payments and the other payments and benefits described herein...."

130. Pension benefits are explicitly described in Section 15(R) of the Severance Agreement which defines the term "Pension Plan" to include "any registered or unregistered supplementary pension plan maintained by the Company....".
131. The Company has thus undertaken in the Severance Agreement, as amended by the Severance Compensation Transition Agreement, to pay to Doughan his Severance payment and his pension benefits.
132. Doughan should have been awarded his legal fees in contesting the proceedings in first instance the consequence of which is to deprive him of the full benefit of the Severance Payment.
133. Doughan should also have been awarded the legal fees in relation to the declaratory proceedings, in first instance and in appeal, since those proceedings sought to obtain pension payments withheld by ACI, as appears from the liasse of documents in relation to said proceedings produced as Exhibit D-92A, including the judgment in first instance, which has been confirmed by this Honourable Appeal Court³⁸.
134. Under Section 6.3, these legal fees are payable, whether Doughan succeeds or not, providing he claims in good faith, and there is no suggestion in the evidence that this is not the case.
135. The Trial Judge rejected this argument. He held that Sections 6.3 and 10 did not apply where ACI had fulfilled all of its obligations under the said agreements, apparently being of the view that such was the case.
136. The Trial Judge appears to be relying on the first sentence of Section 7(e) of the Severance Compensation Transition Agreement which reads as follows:

"7(e) The Corporation's obligations to the Executive pursuant to the Severance Agreement shall be fully discharged upon making the Severance Payment to the RCA trust fund in accordance with section 7(a) hereof. ..."

137. Despite the broad language of the first sentence, it is clearly not the intention of the parties that Doughan's right under the Severance Agreement terminate upon the deposit of monies into the RCA.

³⁸ ACI's motion for leave to appeal said judgment is pending before the Supreme Court.

138. Interpreted as broadly as Plaintiff attempts to interpret this article, it conflicts with the final sentence in Section 11 of the SCTA:

"At the end of the Term, the Executive shall remain subject to the terms of the Severance Agreement (as amended by this Agreement) or such other agreement as may have been entered into by the Executive and the Corporation."

139. Moreover, it was clearly not the intent of Section 7 e) of the SCTA to override the provision in the Severance Agreement providing that "the obligations of the Company and the Executive under this Agreement which by their nature may require either partial or total performance after the expiration of the Term, including, without limitation, those under Sections 6 and 7 hereof" shall survive such expiration.
140. The intent of the Section 7(e), which in its full text reads as follows, is to limit the company's obligations arising from the creation of the RCA³⁹.

"7(e) The Corporation's obligations to the Executive pursuant to the Severance Agreement shall be fully discharged upon making the Severance Payment to the RCA trust fund in accordance with section 7(a) hereof. The funds paid into the RCA trust fund shall be invested in accordance with the investment instructions given by the Executive or the Executive's agent to the trustee of the RCA. The Company will not be liable to the Executive if any investments made pursuant to the investment instructions given by the Executive or the Executive's agent result in losses of any nature. In the event that the value of the RCA trust fund increases as a result of any investments made between the date of the Severance Payment is contributed to the RCA trust fund and the date that the Executive's employment is terminated (the "Investment Gains"), the Corporation and the Executive shall, as soon as practicable after the Executive's employment with the Corporation is terminated, jointly direct the trustee of the RCA to remit to the Corporation an amount equal to the difference between the Severance Payment and the Investment Gains."

141. The object of Section 6.3 of the Severance Agreement and Section 10 of the Severance Compensation Transition Agreement is to ensure that Doughan receives the full benefit of the Severance Payment and other payments due him without incurring any expense to obtain such full payment, and this can only be achieved by condemning ACI to pay to Doughan the legal fees and expenses, which he has claimed, and including the expenses related to the Cruikshank report and testimony.

³⁹ see Articles 1425, 1427 CCQ and more particularly 1431 CCQ.

The Trial Judge was wrong in holding that Doughan's failure to arbitrate is a bar to his claim for legal fees

142. The Trial Judge cited Doughan's failure to arbitrate as an additional ground for rejecting Doughan's claim for legal fees.
143. It is blatantly wrong to rely on the failure to arbitrate as a ground for refusing fees in relation Doughan's contestation of the proceedings in first instance which were instituted not by Doughan, but by ACI.
144. It is also wrong to invoke the failure to arbitrate as a ground for refusing fees in relation to Doughan's successful proceedings for declaratory judgment. Under the terms of article 940.1 CPC, ACI's right to complain in this regard came to an end as soon as the declaratory case was inscribed for proof and hearing.
145. Moreover, Doughan is entitled to the fees as long as he acted in good faith, and there is nothing to suggest that he was in bad faith when he proceeded by way of declaratory judgment.

THE APPELLANT SHALL ASK THE COURT OF APPEAL TO:

GRANT the present appeal, with costs;

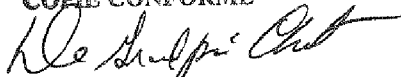
DISMISS Plaintiff's suit with costs, including the cost of expertise;

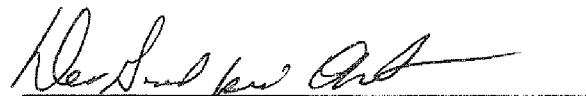
MAINTAIN Defendant Cross-Plaintiff's cross-demand, with costs and condemn Plaintiff-Cross-Defendant to pay to Defendant-Cross-Plaintiff the sum of Can \$1,545,431.76, with interest, indemnity and costs, including the cost of expertise;

Appellant hereby notifies Messrs Stikeman Elliott (Me Suzanne Côté), Attorneys for the Respondent of the present Inscription in Appeal.

MONTREAL, August 4, 2008

COPIE CONFORME


DE GRANDPRÉ CHAIT


DE GRANDPRÉ CHAIT S.E.N.C.R.L./LLP
Attorneys for Appellant
Defendant/Cross-Plaintiff

NO : . 500-17-071231-021

**SUPERIOR COURT
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL**

JAMES DOUGHAN, retired, domiciled and residing at
7685 Old Paint Trail, Scottsdale, Arizona, 85262, USA

Appellant / Defendant/Cross-Plaintiff

v. 1

ABITIBI-CONSOLIDATED INC., a legal person duly
incorporated having its head office and principal place of
business at 1155 Metcalfe Street, Suite 990, in the City
and District of Montréal, Province of Québec, H3B 5H2

Respondent / Plaintiff/Cross Defendant

INSCRIPTION IN APPEAL

Copy for STIKEMAN ELLIOTT

Me Suzanne Côté

1155 René-Lévesque Blvd West

Montréal (Québec) H3B 3V2

Me Sandor J. Klein

O /Ref. : 50013-10

DE GRANDPRÉ CHAÏT S.E.N.C.R.L./LLP

Lawyers

1000 De La Gauchetière St. West

Suite 2900

Montréal (Québec) H3B 4W5

Telephone: 514 878-4311

Fax: 514 878-5765

BD-0085

RECEIVED
9/11/11
9h14hrs
PAQUETTE & ASSOCIES
DE L'ETUDE
SIGNIFIÉ
40972

(Chambre commerciale)

Nº. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ABITIBI BOWATER INC. ET AL.

Requérantes

-et-
ERNST & YOUNG INC.

Contrôleur

9

JAMES DOUGHAN ET AL.

Intimés

BS0350 u/dos.: 041053-1170

PIÈCE R-7

ORIGINAL

Me Mélanie Béland (514) 397-3197
Fax: (514) 397-3591

STIKEMAN ELLIOTT
Stikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS
40^e Étage
1155, boul. René-Lévesque Ouest
Montréal, Canada H3B 3V2

PIÈCE R-8

Agreement

Supreme Court

ACI desists from its inscription in appeal to the Supreme Court pursuant to the judgment granting leave to appeal, and renounces to costs in relation to the Motion for Leave and in relation to the appeal.

Pension arrears suit

Proceedings in appeal in relation to the Corriveau judgment on pension arrears shall be suspended until final judgment in the Baker case, at which time ACI shall desist from the appeal. Compensation shall then take place, *le cas échéant*.

Doughan shall accept the desistment from the appeal without costs and renounces to costs in the Superior Court.

Declaratory

Doughan renounces to the declaratory judgment rendered by the Appeal Court and ACI accepts same without costs. Attorneys for Doughan renounce to court costs in appeal, including the \$5,000 fee awarded by the Appeal Court.

ACI confirms validity of pension payments made to date, reiterates its undertaking of August 31, 2004, and agrees to continue pension payments in accordance with the provisions of the SERP and the Pension Plan for Executive Employees of ACI, notwithstanding alleged compensation. When final judgment is rendered in the Baker suit, including the exhausting of all proceedings in the Supreme Court in relation to the Baker suit, *le cas échéant*, ("**Final Judgment**"), compensation will take place between the amount owed to Doughan in virtue of the Corriveau judgment and any amount payable to ACI, up to the amount of the lesser debt.

In calculating any costs which might be payable to ACI in the Baker suit, the amount recognized as owing to Doughan in the Corriveau Judgment will be deducted from the amount awarded.

Baker case – claim for legal fees in declaratory proceedings

The present agreement is without prejudice to any and all claims made by Doughan in the proceedings in the Baker file and shall not be invoked in any appeal in relation to the Baker Judgment.

Claim for legal fees and expenses in any appeal in relation to the Baker judgment

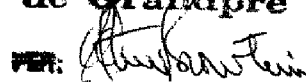
The present agreement is without prejudice to Doughan's right to claim from ACI legal fees and expenses in relation to any appeal in relation to the Baker Judgment, which claim is contested by ACI.

SCOTTSDALE, this 6th day of November 2008.


JAMES DOUGHAN

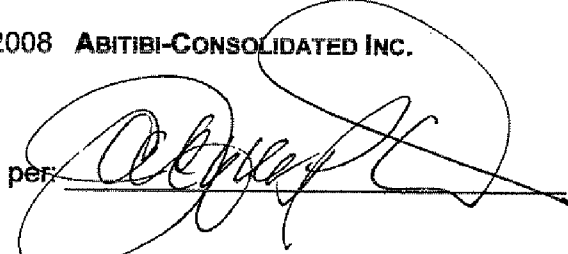
MONTREAL, this 12th day of November 2008

de Grandpré Chait

per: 

DE GRANDPRE CHAIT LLP
Attorneys for James Doughan

MONTREAL, this 14 day of January 2008 ABITIBI-CONSOLIDATED INC.

per: 

MONTREAL, this 17th day of November 2008


STIKEMAN ELLIOTT LLP
Attorneys for Abitibi-Consolidated Inc.

C O U R S U P É R I E U R E
(Chambre commerciale)

N°. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ABITIBOWATER INC. ET AL.

Requérantes

-et-

ERNST & YOUNG INC.

Contrôleurs

c.

JAMES DOUGHAN ET AL.

Intimés

BS0350

n/dos.: 041053-1170

PIÈCE R-8

ORIGINAL

Me Mélanie Béland

(514) 397-3197

Fax : (514) 397-3591

STIKEMAN ELLIOTT

Stikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS

40^e Étage

1155, boul. René-Lévesque Ouest

Montréal, Canada H3B 3V2

PIÈCE R-9

**SUPPLEMENTARY EXECUTIVE RETIREMENT COMPENSATION
ARRANGEMENT TRUST AGREEMENT**

Entered into on April 23, 2004

BETWEEN: **ABITIBI-CONSOLIDATED INC.**, a legally incorporated corporation having its head office at 1155 Metcalfe Street, Suite 800, Montreal, Quebec, H3B 5H2, herein acting and represented by Pierre Rougeau, Senior Vice President and Chief Financial Officer, and Allen Dea, Vice President and Treasurer, both duly authorized as they so declare,

(Hereinafter referred to as the "**Trustor**")

AND: **DESJARDINS TRUST INC.**, a corporation legally incorporated, having its head office at 1, Complexe Desjardins, Suite 1422, Montréal, Québec, H5B 1E4, herein acting and represented by Brigitte Gascon, Vice President, Clients Custody and Pension Plans and Serge Paré, Project Manager and General Director, both duly authorized hereunto as they declare,

(Hereinafter referred to as the "**Trustee**")

WHEREAS The Trustor has adopted a retirement arrangement, The Canadian Supplemental Executive Retirement Plan (SERP) For Executive Employees of Abitibi-Consolidated Inc., effective January 1, 1999, and the Trustor and The Price Company Limited have entered into certain written Management Supplementary Benefit Agreements ("MSBAs") that require the benefits to be secured in a trust fund, (together the "Arrangement"), for the benefit of the Trustor's, its affiliated companies', any subsidiary's or associated company's employees who participate in the Arrangement ("Beneficiaries");

AND WHEREAS Abitibi-Consolidated Company of Canada ("**ACCC**") is a subsidiary of the trustor;

AND WHEREAS the Arrangement requires that certain of the benefits provided, or a portion thereof, be secured in accordance with the terms of the SERP, the Trustor's Funding Policy for the SERP or the MSBAs, as the case may be, but excluding the benefits for members who elect or have elected in writing to waive the security provisions of the Arrangement (hereinafter referred to as the "Secured Benefits");

AND WHEREAS for the Arrangement's purposes, the Trustor wants to establish a trust under the Civil Code of Quebec in order to transfer to that trust the initial contribution and that contributions be paid thereto by the Trustor or ACCC, in accordance with the Arrangement (the "Contributions"), and/or to hold therein one or several Letters of Credit to fund or secure all or part of the benefits granted and vested under the Arrangement to the extent that the Arrangement requires that such benefits be secured, less

any assets remaining in any other funding or securing mechanism in connection with the Arrangement;

AND WHEREAS the amount of security required in accordance with the Arrangement shall be determined by an independent actuary designated by the Trustor (the "Actuary");

AND WHEREAS the Trustee has agreed to hold and administer the Trust Estate in accordance with article 1.5 hereinafter;

AND WHEREAS the parties want to describe, under the present trust agreement (the "Trust Agreement") created for the Arrangement's purposes, the rights and obligations of the Trustor and the terms and conditions under which the Trustee shall hold and administer the Trust Estate, as defined hereinafter;

AND WHEREAS the Trustor may, from time to time, extend the participation in the Arrangement to eligible employees of certain of its affiliate or partner companies, in which case the Trustor agrees to notify the Trustee in writing of the participation in the present Trust Agreement of eligible employees of the said affiliate companies;

AND WHEREAS each of the Beneficiaries has been informed of the existence of the present Trust Agreement and of its content.

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. CREATION AND ADMINISTRATION

1.1 Acceptance

1.1.1 The trustee hereby accepts the rights, terms, conditions and obligations of the Trust Agreement.

1.2 Creation of the Trust Estate

1.2.1 The Trustor establishes, for this Agreement's purposes, a private utility trust (the "Trust Estate") under the name of "Abitibi-Consolidated Inc. Supplementary Executive Retirement Compensation Arrangement Trust" and, for this purpose, transfers from its estate to the Trust Estate that is hereby constituted, an initial contribution of ten (10) dollars. The hereby established Trust Estate's purpose is for capitalizing or securing, partially or totally, the Trustor's commitments toward its Beneficiaries and to pay them pension benefits.

1.2.2 The assets of the Trust Estate are composed of the following:

(a) the initial contribution of ten dollars (\$10);



- (b) all Contributions paid by the Trustor or ACCC at the effective date of the Trust Estate and all future Contributions paid into the Trust Estate as provided for by the Arrangement;
 - (c) revenues, profits and capital gain realized by the Contributions, substituted property and entitlement to a refund of the withholding tax from the Canada Revenue Agency, minus any benefit paid or any other authorized payment as provided for by the present Trust Agreement.
 - (d) all Letters of Credit issued in accordance with article 6 hereinafter, as well as the proceeds of such Letters of Credit.
- 1.2.3 The Trust Estate shall be used for the purpose of the provision of benefits to employees and former employees pursuant to the Arrangement, and also for the purposes specifically provided for elsewhere in this Trust Agreement.
- 1.2.4 The Contributions shall be net of the refundable 50% withholding income tax that has been or will be remitted to the Canada Revenue Agency in the name of the Trust Estate, in compliance with the *Income Tax Act* (Canada) and regulations (the "ITA"). In the case where one or more Letters of Credit are called as per Section 6.2 below, the refundable tax shall be remitted to the Canada Revenue Agency by the Trustee before transferring the funds into the Trust Estate.

1.3 Nature of the Trust Agreement and Definitions

- 1.3.1 The parties agree that the present trust constitutes a "retirement compensation arrangement" and that the Trustee is the "custodian" of the said retirement compensation arrangement according to the meaning given to these expressions by the ITA.
- 1.3.2 For the present Trust Agreement purposes, "Instructions" designate the guidelines, notices, requests and objections given in accordance with this Agreement to the Trustee by a person acting in the name of the Trustor or of an adviser (the "Adviser"), who may be the Trustor itself, or a Trustor's committee constituted for these purposes, and who is identified in the "Authorized Signatories" form attached hereinafter to the present Trust Agreement as Schedule "A", or by an investment adviser designated for these purposes.
- 1.3.3 For the present Trust Agreement purposes, a Letter of Credit ("Letter of Credit") means one or several Letters of Credit issued by one or more financial institutions, in accordance with the International Chamber of Commerce regulations, and that provides for encashment, such Letter of Credit being similar to the model attached herein in Schedule "B". Any reference to the expression "Letter of Credit" also includes any renewal or substitution of such Letter of Credit, except when the context demands a different interpretation.



1.4 Benefit payments

- 1.4.1 Upon receiving Instructions from the Trustor, the Trustee agrees to pay benefits to the Beneficiaries and, in authorized instances, to the Trustor, in the manner and according to the amounts authorized by the Arrangement and by the Trust Agreement either directly from the Trust Estate or through a separate account established for this purpose and funded by the Trustor.
- 1.4.2 Upon payment, the amount paid in accordance with given Instructions shall be deemed as no longer being part of the Trust Estate.
- 1.4.3 Instructions to the Trustee must include an attestation that said Instructions are in compliance with the terms of the Arrangement and the Trust Agreement.
- 1.4.4 In the case where, in accordance with the Arrangement and/or the Trust Agreement, the complete and final payment for Secured Benefits has been made to the Beneficiaries, any balance remaining in the Trust Estate shall be paid to the Trustor or at the request of the Trustor, to ACCC, by the Trustee.

Secured Benefits are determined by the Trustor or, when Section 6.3 below is in effect, by the Trustee and paid in compliance with the terms of the Arrangement. The Trustor and/or the Trustee may require the Actuary to calculate such benefits.

1.5 Administration of the Trust Estate

- 1.5.1 All amounts and other assets of the Trust Estate are invested and reinvested by the Trustee in guaranteed investment certificates issued by the Trustee or any other recognized financial institution, Government of Canada Treasury bonds or any other debt or stock security issued or guaranteed by the Government of Canada or by any province, without the Trustee being limited to authorized trustee investments as prescribed by any provincial or federal Act. The Trustee must act as would a prudent and diligent administrator.
- 1.5.2 Notwithstanding paragraph 1.5.1, the Trustor may, from time to time, notify the Trustee in writing that the Trust Estate shall be reinvested in accordance with Instructions from an Adviser. The Adviser may manage the investment of the Trust Estate's assets to its entire discretion and is responsible for compliance with any Federal or Provincial Act and the provisions of this Trust Agreement. The Trustee is entirely protected as long as it acts in accordance with the Adviser's Instructions and cannot be held responsible of any loss or reduction of the Trust Estate ensuing from any action in accordance with the Adviser's Instructions or resulting from the absence of such Instructions from the Adviser.
- 1.5.3 Notwithstanding paragraph 1.5.2, no more than 10% of the assets of the Trust Estate shall be invested in securities from any one issuer, unless the



securities are issued or guaranteed by the Government of Canada (up to 100%), one of its Provinces (up to 20%), or the Government of the United States (up to 100%).

- 1.5.4 Notwithstanding paragraph 1.5.2, no portion of the assets of the Trust Estate shall be invested in debt securities or stock issued by the Trustor or any related party unless such securities are acquired by an independent Adviser, acting without influence from the Trustor, and held in the same proportion as in similar accounts under the Adviser's control.
- 1.5.5 Except in the case where they have previously been paid by the Trustor or ACCC, the Trustee must pay, from and out of the Trust Estate, any expenses, fees and costs authorized in the Trust Agreement, including expenses and fees of the Trustee, any income tax and assessments in compliance with current and future laws; in which case the Trustee shall also withhold any income tax or other amounts required by fiscal laws on benefits paid to Beneficiaries.
- 1.5.6 The Trustee may demand from the Trustor, the Beneficiaries, the rightful owners or the legal agents, any necessary information, report or document for Trust Estate administration purposes, including for payment of benefits under the Arrangement.
- 1.5.7 Should the Trustor at any time furnish the Trustee with a certificate signed by the Actuary certifying the amount, if any, by which the assets of the Trust Estate plus the assets of any other funding or securing mechanism in connection with the Arrangement, including any Letters of Credit held therein, exceed the liabilities of the Trust Estate for Secured Benefits as of December 31st of the then preceding year, determined in accordance with Section 6.1.3 below, the Trustee shall, if directed by the Trustor, forthwith pay to the Trustor or at the request of the Trustor, pay to ACCC the amount of such excess or such lesser amount as may be specified by the Trustor.
- 1.5.8 Notwithstanding anything contained herein, in the event that the Trustor shall transfer any part of its business to any other company (the "Transferee") and in connection with such transfer, one or more employees entitled to Secured Benefits pursuant to the Arrangement (the "Transferred Employees") cease to be employees of the Trustor and become employees of the Transferee, and the Trustor furnishes to the Trustee a report from the Actuary satisfactory to the Trustee establishing the amount of assets of the Trust Estate relative to the funded accrued liabilities under the Arrangement with respect to the Transferred Employees, the Trustor shall have the right, at its sole and entire discretion, to direct the Trustee, in writing, to transfer the amount of assets established by the Actuary's report from the Trust Estate to a new trust fund (the "New Fund") established by the Transferee, to secure or fund part or all of the accrued liabilities of the Arrangement towards the Transferred Employees.

2. **POWERS AND DUTIES OF THE TRUSTEE**

- 2.1 The Trustee and/or the agents or depositories which it may appoint from time to time shall have custody of the assets of the Trust Estate at all times.
- 2.2 The Trustee shall have all the powers necessary for it to fulfill its role as set forth in this Agreement. Without limiting the generality of the foregoing, the Trustee shall be entitled to register securities held by it in its own name or in the name of any nominee and it shall be entitled to hold any security in bearer form, provided the registers of the Trustee indicate at all times that such securities form part of the Trust Estate; it shall also be entitled to execute, sign and deliver all agreements, deeds, contracts, releases and other written instruments which are necessary or useful in order to exercise the powers mentioned above.
- 2.3 The Trustee shall pay, from and out of the Trust Estate, all real estate taxes, income taxes and other taxes and levies assessed in respect of the assets of the Trust Estate.
- 2.4 Notwithstanding any provision to the contrary, the Trustee shall be entitled to dispose of any of Trust Estate's assets upon such conditions as it shall determine in order to satisfy any of the Trust Estate's obligations.
- 2.5 The Trustor acknowledges that due to the practices adopted by securities markets (book based system or securities clearing corporations system), the Trustee shall have to have recourse to agents and custodians in order to perform its obligations pursuant to this Agreement, and the Trustor accepts same and authorizes the Trustee to proceed in this manner.

3. **INVESTMENTS**

- 3.1 The Trust Estate shall be invested in accordance with Instructions given to the Trustee by the Trustor or any Adviser and in accordance with section 1.5.1 to 1.5.4.
- 3.2 Every Instruction shall be received by the Trustee at least two business days prior to a transaction (except as regards money markets).
- 3.3 The Trustee shall not assume any obligation or liability as regards compliance by the Trust Estate's investments with legislation governing pension plans or the investment policy of the Arrangement.
- 3.4 The Trustor shall be entitled to remove any Adviser by means of an Instruction given to the Trustee.

4. **ENCASHMENT**

- 4.1 The Trustee shall detach and encash interest coupons attached to bonds or other securities and which are payable to bearer, and it shall present such coupons for encashment on their due date. Moreover, it shall claim and collect all dividends, interest and bonuses which are payable as well as all other income arising from

the securities entrusted into its custody; consequently, it shall be entitled to endorse all cheques, negotiable instruments or bills that are payable.

- 4.2 Nonetheless, the Trustee undertakes to encash retractions only under the express condition that the retraction notice shall have been published in one of the following publications:

La Gazette officielle du Québec
The Gazette
The National Post
The Globe & Mail

- 4.3 All amounts received and encashed by the Trustee shall immediately be deposited in the Trust Estate's account or used in accordance with any instructions that have been given.
- 4.4 As regards dividends payable in respect of the securities held in the portfolio entrusted into the custody of the Trustee, it shall credit such dividends to the Trust Estate's account (whether or not such dividends have been received) on the date provided for the payment of such dividends.

Any amount so paid into the Trust Estate's account shall be considered to be an advance of monies by the Trustee and, in the event that payment of the dividends in question is not received within a reasonable period following the date on which they were payable, the Trustee shall be entitled to be reimbursed by the Trust Estate with interest on the advances calculated in accordance with the method set forth in Article 5 hereof.

- 4.5 Upon encashment of an amount paid in a foreign currency, the Trustee shall, as soon as possible, convert such amounts into Canadian currency. In that regard, the Trustee shall not be responsible for fluctuations in the exchange rates, and the Trust Estate shall bear all costs relating to the currency conversion.
- 4.6 Moreover, as soon as it becomes aware of any notice of a bid, conversion, reorganization or other transaction regarding the said securities and requiring the approval of the Trustor or the Adviser, the Trustee shall transmit such notice to the Trustor or to the Adviser who shall, if applicable, provide its instructions to the Trustee within the deadline stipulated in the notice.

5. **INTEREST ON CASH BALANCE OR CASH DEFICIT**

- 5.1 As regards any cash balance, the Trustee shall pay interest at the rate and in accordance with the method set forth herein below, and as regards any monies advanced to the Trust Estate in order to cover a cash deficit, it shall be entitled to receive interest at the rate and in accordance with the method set forth herein below.
- 5.2 As regards any daily cash balance (CAD), the Trustee shall pay interest at a rate equal to three (3) percent below the prime rate of the Caisse Centrale Desjardins du Québec but, in any case, not less than one quarter of one percent (0.25%).

Two handwritten signatures in black ink, one on the left and one on the right, appearing to be initials or names.

As regards any daily cash balance (US), the Trustee shall pay interest at a rate equal to five percent below the prime rate of the Caisse Centrale Desjardins du Québec but, in any case, not less than one quarter of one percent (0.25%).

- 5.3 As regards any daily cash deficit (CAD), the Trustee shall charge interest at a rate equal to one (1) percent above the prime rate of the Caisse Centrale Desjardins du Québec.

As regards any daily cash deficit (US), the Trustee shall charge interest at a rate equal to one (1) percent above the prime rate of the Caisse Centrale Desjardins du Québec.

Nonetheless, the Trustee shall never be required to maintain a cash deficit; it shall have the discretion to sell any of the Trust Estate's assets which it deems to be appropriate in order to cover such cash deficit.

- 5.4 The Trustee shall be entitled, at all times, to modify the method for calculating the interest on such cash balances or deficits, but it shall give a thirty (30)-day prior written notice thereof to the Trustor.

6. **LETTER OF CREDIT AND ADMINISTRATION OF SECURITY FOR BENEFICIARIES**

- 6.1 The Trustor shall:

- 6.1.1 Beginning in 2004, on or before March 31st of each year, provide the Trustee with an actuarial valuation report prepared by the Actuary and based on membership data as at December 31st of the year preceding the year in which the actuarial report is provided to the Trustee. The report shall be based on accepted actuarial practices applied in accordance with the Trustor's policies. The actuarial report will contain a list of the Beneficiaries with Secured Benefits and will provide the amount required to protect and secure the Secured Benefits under the Arrangement. The actuarial report will come into effect on July 1st of the year in which it is provided to the Trustee and will remain in effect for a 1-year period for both the list of Beneficiaries with Secured Benefits and the amount of security required.
- 6.1.2 No later than June 30th, 2004, and no later than June 30th of each year thereafter, so long as Secured Benefits provided for under the Arrangement remain payable from the Trust Estate and are not secured by cash or other property held in the Trust Estate and/or any other funding or securing mechanism in connection with the Arrangement, provide or instruct ACCC to provide to the Trustee the amount required to purchase a Letter of Credit from one or more financial institutions in an amount determined by the Actuary in accordance with Section 6.1.1 above. Alternatively, notwithstanding Section 1.5.7, the fees to be paid to a financial institution to purchase such Letter of Credit may be paid by the Trustee from any assets of the Trust Estate if so directed by the Trustor.
- 6.1.3 At least 2 business days prior to the expiry of any Letter of Credit held by the Trust Estate and provided that Secured Benefits remain payable that



are otherwise unsecured, provide or instruct ACCC to provide to the Trustee the amount required to purchase a successor Letter of Credit and/or pay other acceptable contributions effective at the latest on the day following the expiry date of the prior Letter of Credit totalling an amount determined by the Actuary in accordance with Section 6.1.1 above.

- 6.1.4 Upon receipt of notice from the Trustee of the impending expiry of a Letter of Credit and provided that Secured Benefits remain payable that are otherwise unsecured, deliver to the Trustee, not later than fifteen (15) days prior to the expiry date, a notice of intention to renew or replace the Letter of Credit and/or provide other acceptable contributions in connection with the Arrangement.
 - 6.1.5 Any and all Letters of Credit purchased to secure benefits and held in the Trust Estate shall be issued by a recognized financial institution with a credit rating of single A minus (A-) or better substantially in the form attached hereto as Schedule "B".
 - 6.1.6 The Trustor or ACCC, at their discretion, may contribute amounts to the Trust Estate. Such Contributions, together with earnings, profits and increments thereto, along with any refundable tax thereon together with the assets of any other funding or securing mechanism in connection with the Arrangement, shall be taken into account by the Actuary when ascertaining if a Letter of Credit is required and, if one is required, the amount of the Letter of Credit.
 - 6.1.7 Pay or instruct ACCC to pay to the relevant tax authorities the amount of any taxes, refundable or otherwise, required under the ITA, as a result of payments to the Trustee under Sections 6.1.2 or 6.1.3. To the extent that such taxes are refundable, they shall form part of the Trust Estate to be claimed by the Trustee in accordance with Section 7.1 and the provisions of the ITA.
- 6.2 The Trustee shall:
- 6.2.1 Send a notice to the Trustor's Treasurer at least sixty (60) days prior to the expiry date of any Letter of Credit held in the Trust Estate substantially in the form attached hereto as Schedule "C", along with a copy of Section 6 of this Trust Agreement. In the event that the Trustor does not respond with the notice of intention to pay the Trustee the amount required to renew or replace the Letter of Credit and/or provide acceptable contributions in connection with the Arrangement, as described in Section 6.1.4 above and provided that Secured Benefits remain payable that are otherwise unsecured, send a notice to the issuer(s) of the Letter of Credit, not later than ten (10) days prior to the expiry date substantially in the form attached hereto as Schedule "D", with a copy to the Chief Financial Officer of the Trustor, of the intention to call the Letter of Credit on the due date.



- 6.2.2 Provided that Secured Benefits remain payable that are otherwise unsecured, draw the full balance of the Letter of Credit if the Trustor makes an assignment for the benefit of its creditors, becomes insolvent or bankrupt, is wound up or dissolved, or if any receiver, trustee, liquidator, or sequestrator of or for the Trustor or any substantial portion of its property is appointed and is not discharged within a period of sixty days. If the Trustee does not receive such discharge before the expiry date of any Letter of Credit and has not received the amount required to obtain a replacement Letter of Credit and/or other acceptable contributions in connection with the Arrangement, the Trustee shall draw the Letter of Credit even though such period of sixty days is still outstanding.
- 6.2.3 Provided that Secured Benefits remain payable that are otherwise unsecured, draw the full balance of the Letter of Credit on the expiry date or, if the expiry date is not a day on which both the Trustee and the issuer of the Letter of Credit are open for business, on the last day immediately prior to the expiry date on which both the Trustee and the issuer of the Letter of Credit are open for business; unless the Trustee has received the amount required to obtain a successor Letter of Credit and/or other acceptable contributions in connection with the Arrangement.
- 6.2.4 In the event that the Trust Estate has been unable to make benefit payments or to settle a claim by a Beneficiary for a period of thirty consecutive days and provided that these payments or claims are for Secured Benefits and are in accordance with the terms of the Arrangement, the Trustee shall draw the full amount of the Letter of Credit.
- 6.2.5 In the event that the actuarial report has not been received by March 31st of the year in which it was due, the Trustee shall send a notice to the Trustor no later than April 15th, substantially in the form attached hereto as Schedule "E", along with a copy of Section 6 of this Trust Agreement. In the event that the actuarial report has not been received by June 30th of the year in which it was due, the Trustee may draw the full amount of the Letter of Credit.
- 6.3 If the Letter of Credit is drawn in accordance with Section 6.2 above, the Trustee shall:
- 6.3.1 Remit any withholding taxes that are required on contributions to a Retirement Compensation Arrangement (RCA) and/or any other taxes that may be required at the time.
- 6.3.2 Invest the net proceeds in Canadian short-term, interest-bearing securities rated R-1 or better. Up to 30%, or \$10 million, whichever is larger, may be invested in an interest bearing account at a bank affiliated with the Trustee.
- 6.3.3 Unless the Trustor makes arrangements satisfactory to the Trustee for the security of benefits in accordance with the terms of the Arrangement and the continuation of the Trust Estate, notify the Beneficiaries, within 90 days of the drawing of the Letter of Credit, that the Trust Estate will be



wound up and most assets, excluding refundable taxes, distributed within 180 days.

- 6.3.4 Withdraw from the Trust Estate the reasonable compensation of the Trustee and any other proper charges that may be outstanding including the funds required to pay agents, advisors, auditors, actuaries or other persons whose services are required to the extent permitted under Section 16.4 below.
- 6.3.5 Allocate the balance of the Trust Estate based on the current entitlement for Secured Benefits as at the date the Letter of Credit was drawn, to each Beneficiary included in the actuarial report that was in effect on that date. The current entitlement shall be calculated by the Actuary using accepted actuarial practices applied in accordance with the Trustor's policies as at the date the Letter of Credit was drawn. If the Trust Estate is not sufficient to meet these current entitlements, the Trust Estate shall be allocated on a pro-rata basis.
- 6.3.6 Within 180 days of the Letter of Credit being drawn, notwithstanding any provisions of the Arrangement, pay a lump sum to each Beneficiary, included in the actuarial report that was in effect on the date the Letter of Credit was drawn, equal to the lesser of their current entitlement for Secured Benefits or pro-rata share of the Trust Estate, as determined in Section 6.3.5 above, less their pro-rata share of refundable taxes on deposit and any withholding taxes that may be required, using the last available information from the administrator of the Arrangement. Additional payments to Beneficiaries from refundable taxes, up to their allocated entitlement determined in Section 6.3.5, shall be made within 30 days of receipt of the refund.
- 6.3.7 In the event that the Trust Estate is sufficient to cover the full current entitlement for Secured Benefits, as determined in Section 6.3.5, the Trustee shall pay the balance remaining in the Trust Estate to the Trustor or, at the Trustor's request, to ACCC.
- 6.3.8 Have the right to liquidate any investments or other assets held in the Trust Estate to fund payments to beneficiaries.
- 6.3.9 Make appropriate filings to terminate the Trust Estate once all assets have been distributed.

7. REFUNDABLE INCOME TAX

- 7.1 The Trustor agrees to pay or instruct ACCC to pay to the Canada Revenue Agency any refundable income tax as provided by the ITA and that can be required with regard to a Contribution paid to the Trust Estate or with the issuance of the Letter of Credit. Any refundable income tax payable in accordance with tax laws pertaining to income and capital gains of the Trust Estate, or the calling of the Letter of Credit, shall be paid by the Trustee to the Canada Revenue Agency out of the Trust Estate. The Trustee agrees to claim the income tax refund in accordance with the ITA.



8. FISCAL OBLIGATIONS

- 8.1 The end of the fiscal year of the Trust Estate is set to December 31.
- 8.2 The Trustee must file the necessary income tax reports with regard to the Trust Estate, as well as any other information required by tax laws, and shall provide Beneficiaries and the Trustor with any report or taxation slip required by income tax laws. Any income tax payable according to tax laws shall be paid out of the Trust Estate, and any income tax refund shall become part of the Trust Estate.
- 8.3 The Trustee shall revise all income tax assessments in relation with the Trust Estate, for contestation purposes and in the case where the said assessment is subject to contestation, shall notify the Trustor immediately so the Trustor can make a decision on the contestation of the assessment.

9. LIMITATION OF LIABILITY

- 9.1 The Trustee shall act with prudence, diligence and skill.
- 9.2 The Trustee shall not be liable for losses suffered by the Trust Estate, unless it has failed to comply with the standard described in Section 9.1 or to fulfill its obligations under this Trust Agreement.
- 9.3 The Trustee shall not incur any liability as a result of having acted in accordance with an Instruction and it shall not be required to make any inquiry whatsoever as regards any statement contained in an Instruction and it shall at all times be entitled to rely on such statement as being true and accurate.
- 9.4 The Trustee cannot be held responsible for collecting the Contribution, nor for the sufficiency of the Trust Estate, for benefit payment purposes as authorized by the Trust Agreement.
- 9.5 The Trustor shall indemnify and hold harmless the Trustee and its directors, officers and employees from and against all costs and expenses and any liability (including reasonable expenses incurred in order to defend themselves against any legal proceedings) arising from the obligations set forth in this Agreement or the transactions contemplated or described herein (including, but without limitation, any investment made, held or disposed of in accordance with the Instructions of the Trustor or the Adviser), except to the extent that such costs, expenses or liabilities are attributable to the fault or negligence of the Trustee or its failure to perform its obligations pursuant to this Agreement.

10. REPORTS

- 10.1 The Trustee shall send periodically to the Trustor the reports described in Schedule "G" hereinafter.
- 10.2 If, within 2 years after the Trustee has sent a report, the Trustor has not objected to the content of the report, the report is accepted and the Trustor declares itself satisfied.



- 10.3 All entry books pertaining to the Trust Estate are accessible for review and verification purposes by the Trustor, Beneficiaries or the Trustor's auditor, during normal business hours and upon receiving a twenty four (24) hour advance notice.

11. FEES AND EXPENSES

- 11.1 The Trustor shall pay or instruct ACCC to pay or see to the payment of fees to the Trustee in accordance with the fee scale set forth in Schedule F. The Trustee shall be entitled to amend Schedule F upon giving a prior written notice of ninety (90) days. Moreover, as regards all conversion costs, transfer costs, taxes, income taxes, value added taxes, if any, including any expense related to the creation of the Trust Estate and all other costs and fees incurred by the Trustee on behalf of the Trust Estate within the scope of this Agreement, the Trustor shall reimburse or instruct ACCC to reimburse same to the Trustee or see to it that same are reimbursed to the Trustee.
- 11.2 As regards any amount which has not been paid by or on behalf of the Trustor within ninety (90) days following the sending of an invoice or statement of account, the Trustee shall be entitled to take such amount out of the Trust Estate's Assets. Upon the termination of this Agreement the Trustee shall be entitled to the fees and expenses provided for herein up until the moment all of the Trust Estate's Assets have been transferred in accordance with the instructions that have been received.
- 11.3 Unless Instructions are given, all fees, expenses and disbursements payable to the Trustee pursuant to this Agreement shall be debited monthly to the Trust Estate.

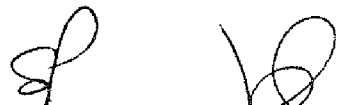
All conversion costs, transfer costs and other costs which have been reasonably incurred by the Trustee on behalf of the Trust Estate shall be debited to the Trust Estate.

12. AMENDMENTS TO THIS AGREEMENT

- 12.1 The parties hereto may amend, add or rescind any provisions or terms and conditions set out in this Agreement through a written agreement specifying the provisions amended, added or rescinded; such agreement duly executed and dated shall be attached hereto and shall be deemed to be an integral part of this Agreement.

13. RESIGNATION OR REMOVAL OF THE TRUSTEE

- 13.1 The Trustee shall be entitled to resign at any time by giving a prior written notice of ninety (90) days to the Trustor.
- 13.2 The Trustor shall be entitled to remove the Trustee at any time by giving a prior written notice of thirty (30) days.
- 13.3 If the Trustee resigns or is removed, the Trustor shall appoint a new trustee forthwith. If the Trustor fails to appoint a new trustee within ninety (90) days

Two handwritten signatures in black ink, one on the left and one on the right, appearing to be initials or names.

following the reception of the prior written notice, the Trustee shall be entitled to ask a court to do so, and the costs shall be assumed by the Trust Estate.

- 13.4 The Trustee shall transfer the assets of the Trust Estate to the new trustee, as such Trust Assets are held by the Trustee, provided, however, that all disbursements, costs, fees and advances as well as all levies or taxes of any kind whatsoever which the Trustee may have been required to pay within the scope of this Agreement shall have been reimbursed to it in full. The Trustee shall then be free of any responsibility and obligation in accordance with the present Trust Agreement.

14. TERMINATION OF THE TRUST AGREEMENT

- 14.1 Except for the possibility of the Trustor applying article 13.2 provisions, the Trust Agreement shall be terminated only by written consent of the Trustee and the Trustor.
- 14.2 Upon termination of the present Trust Agreement, the Trustee must, if applicable, liquidate the Trust Estate and remit the Trust Estate's assets to those who are entitled to receive them in accordance with the Trust Agreement and the Arrangement, make a final report to the Trustor, produce all final income tax reports and declarations required under the provincial and federal tax laws, and obtain any necessary discharge for final distribution.

15. NOTICES

- 15.1 All Instructions of the Trustor or an Adviser given to the Trustee pursuant to any of the provisions of this Agreement shall be in writing and signed by an authorized officer, person or other representative of the Trustor or Adviser, and the Trustee shall be fully protected in acting in accordance with such Instruction. Instructions given by telegram, telegraph, telex, telefax, SWIFT, directly between electro-mechanical or electronic terminals or devices shall be deemed to be in writing and signed by an authorized representative. The Trustor and each Adviser shall, from time to time, provide the Trustee with a certificate substantially in the form of Schedule A attached hereto stating the name of the authorized officer, person or other representative so authorized to act on behalf of the Trustor or Adviser, together with specimen signatures of all such officers, persons or other representatives, and the Trustee shall be entitled to rely upon the identification of such persons as specified in such certificate as the persons entitled to act on the behalf of the Trustor or Adviser for the purposes of this Agreement until a later certificate respecting the same is delivered to the Trustee.
- 15.2 In addition to Instructions, the Trustee is authorized to act on telephone instructions. The Trustor shall forward Instructions confirming telephone instructions on the same day that such verbal instructions are given to the Trustee. The fact that such confirming Instructions are not received or that contrary instructions are received by the Trustee shall in no way affect the validity of transactions effected by the Trustee on the basis of the telephone instructions as if they were Instructions by the Trustor, and, when so given, shall be deemed to have been effectively and sufficiently given for all purposes of this Agreement.

Two handwritten signatures in black ink, one on the left and one on the right, appearing to be initials or names.

- 15.3 Every notice given to the Trustor shall be addressed as follows:

Abitibi-Consolidated Inc.
1155 Metcalfe Street
Suite 800
Montreal, Quebec
H3B 5H2

Attn: Vice-President and Treasurer

Telephone: (514) 394-2375
Fax: (514) 394-2267

- 15.4 Every notice given to the Trustee shall be addressed as follows:

Desjardins Trust Inc.
1 Complexe Desjardins
P.O. Box 34, Station Desjardins
Montréal, Québec
H5B 1E4

Attn: Vice President, Clients Custody and Pension Plans

Telephone: (514) 286-3666
Fax: (514) 286-1131

16. MISCELLANEOUS PROVISIONS

- 16.1 The fact that a court of competent jurisdiction rules that a provision of this Agreement is illegal or invalid shall not affect the validity of the other provisions of this Agreement; the illegal or invalid provision shall simply be deemed to be null and void.
- 16.2 The Trustee shall not be entitled to assign this Agreement without the Trustor's written consent; the Trustor shall be entitled to assign this Agreement to any successor that takes over its activities or to any corporation with which it amalgamates or which is created as a result of the Trustor's restructuring or reorganization.
- 16.3 The Trustor hereby represents and warrants as follows:
- (a) It has the power and the authorization to retain the services of the Trustee pursuant to this Agreement; and
 - (b) The retention of the Trustee's services pursuant to this Agreement is duly authorized by the constituting instruments of the Plans or pursuant to a delegation of powers relating thereto, as the case may be, and it is *intra vires* the powers set forth therein.
- 16.4 The Trustee may, at the expense of the Trustor or the Trust Estate, have recourse to legal advisors (who may be the legal advisors of the Trustor),



auditors, actuaries, agents and other persons which the Trustee reasonably requires in order to perform its functions in accordance with this Agreement and, provided that the Trustee shall have chosen such persons with reasonable care, it shall be protected and have no liability whatsoever as a result of having acted in good faith upon the opinion, advice or information provided by the legal advisors, auditors, advisors, actuaries, agents or other persons whose services have been retained by the Trustor or the Trustee with respect to any matter raised within the scope of the management of the Trust Estate.

- 16.5 Every corporation with which the Trustee amalgamates, every corporation resulting from an amalgamation to which the Trustee has been a party and every corporation to which all or substantially all of the trust business of the Trustee has been transferred shall become the successor of the Trustee pursuant to this Agreement, without it being necessary to file any document whatsoever or take any steps whatsoever; however, notice thereof shall have been given to the Trustor.
- 16.6 The Trustee shall be entitled to entrust one or more persons with the performance of all or part of the services it is required to provide pursuant to this Agreement.
- 16.6.1 For the purposes of this section and the Trust Agreement, "Default" of the Trustor includes an assignment for the benefit of creditors, insolvency, bankruptcy, winding up, liquidation, dissolution, arrangement with creditors or the appointment of any receiver, trustee, liquidator, sequestrator or administrator, with or without a court intervention or supervision, wilfully or unwillingly.
- 16.6.2 The powers, obligations and rights conferred or granted to the Trustor under sections 1.3.2, 1.4.1, 1.4.4, 1.5.2, 1.5.6, 1.5.7, 1.5.8, 2.5, 3.1, 3.4, 4.6, 6.1.1 to 6.1.6, 11.1, 13.1, 13.2, 13.3, 14.1, 15.1, 15.2, 16.2, 16.4, 16.6 may only be exercised by the Trustor prior to a Default of the Trustor or an event of Default of the Trustor.
- 16.6.3 Upon a Default or an event of Default, the powers, obligations, and rights described in the sections enumerated in section 16.6.2 may, until the Trustor has been discharged of the Default or the event of Default, only be enforced and exercised by a person designated by a majority of the Beneficiaries, each of the Beneficiaries being only entitled to one vote and all notices and consents referred to or requested thereunder shall only be given by such person.
- 16.7 For purposes of this Agreement, unless the context indicates otherwise, words in the plural shall include the singular and words in the masculine gender shall include the feminine gender, and vice versa.
- 16.8 This Agreement shall be interpreted, governed and applied in accordance with the laws applicable in the Province of Québec and the federal laws of Canada applicable thereto, and the Trustee shall only be required to account for its activities before the courts of the Province of Quebec.

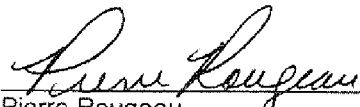
Two handwritten signatures in black ink, one on the left and one on the right, appearing to be initials or names.

- 16.9 This Agreement and its schedules shall constitute the entire understanding between the parties as regards the subject matter thereof; it shall cancel and replace all prior written or verbal agreements.
- 16.10 The parties hereto have requested that this Agreement and all documents ancillary thereto be drafted in English. Les parties aux présentes ont exigé que ce contrat ainsi que tout document s'y rapportant soient rédigés en anglais.

Two handwritten signatures in black ink, one on the left and one on the right, positioned at the bottom right of the page.

IN VIRTUE WHEREOF the parties have signed this Agreement **effective as of March 1, 2004.**

ABITIBI CONSOLIDATED INC.

Per: 
Pierre Rougeau

Per: 
Allen Dea

Date: 7 mai 2004

DESJARDINS TRUST INC.

Per: 
Brigitte Gascon

Per: 
Serge Paré

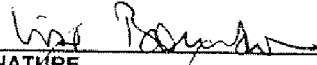
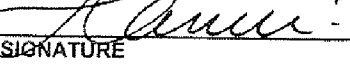
Date: 12 mai 2004

SCHEDULE "A"

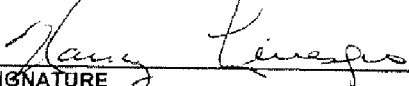
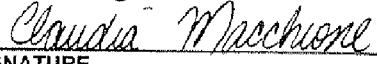
AUTHORIZED SIGNATURES

THE CANADIAN SUPPLEMENTAL EXECUTIVE RETIREMENT PLAN (SERP) FOR EXECUTIVE EMPLOYEES OF ABITIBI CONSOLIDATED INC.

We hereby authorize the following persons to transmit payment instructions to Desjardins Trust regarding:

A. Authorizations relating to pension benefit payments, contribution refunds and/or transfers.	
LISE BOURDON NAME (block letters)	 SIGNATURE
Nancy Lévesque NAME (block letters)	 SIGNATURE
VIATCHESLAV CARAIRO NAME (block letters)	 SIGNATURE

☒ Check here if two (2) signatures are required.

B. Modifications and/or addition for: Life insurance, taxable advantages, direct deposit, death, or other modifications (except modifications and/or addition to pension benefit payments).	
Nancy Lévesque NAME (block letters)	 SIGNATURE
CLAUDIA MACCHIONE NAME (block letters)	 SIGNATURE
Josée Clermont NAME (block letters)	 SIGNATURE

☒ Check here if two (2) signatures are required.

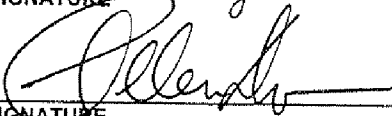
Approval of authorized signature(s)

Pierre Rougeau
NAME (block letters)

Allen Dea
NAME (block letters)

DATE: 7 mai 2004


SIGNATURE


SIGNATURE

We hereby authorize the following persons to transmit payment instructions to Desjardins Trust regarding:

**THE CANADIAN SUPPLEMENTAL EXECUTIVE RETIREMENT PLAN (SERP) FOR
EXECUTIVE EMPLOYEES OF ABITIBI CONSOLIDATED INC.**

C. Authorizations relating to investments (other than those transmitted by your portfolio manager), fund transfers, payment of professional fees (such as actuaries, managers, auditors), committee expense refunds, etc.	
<u>LISE BARRON</u> NAME (block letters)	<u>Lise Barron</u> SIGNATURE
<u>Nancy Lévesque</u> NAME (block letters)	<u>Nancy Lévesque</u> SIGNATURE
<u>VIATEUR CAMIRE</u> NAME (block letters)	<u>Viateur Camire</u> SIGNATURE
<u>See below for additional persons</u>	

☒ Check here if two (2) signatures are required.

Approval of authorized signature(s)
for the pension plan

DATE: 7 mai 2004

Pierre Rougeau
NAME (block letters)

Pierre Rougeau
SIGNATURE

Allen Dea
NAME (block letters)

Allen Dea
SIGNATURE

Julie Lalonde

Julie Lalonde

Yvan Sanchez-Habney

Yvan Sanchez-Habney

Allen Dea

Allen Dea

Pierre Rougeau

Pierre Rougeau

SCHEDULE "B"

LETTER OF CREDIT

DATE OF ISSUE: _____

APPLICANT:

Abitibi-Consolidated Company of Canada
1144 Metcalfe Street, Suite 800
Montréal, Québec
H3B 5H2

BENEFICIARY:

Fiducie Desjardins, as Trustee under the
Trustee Agreement
1 Complexe Desjardins
P.O. Box 34, Succ. Desjardins
Montréal, Québec H5B 1E4

Amount : _____

At the request of Abitibi-Consolidated Company of Canada (the « Applicant), We, _____ (the "Bank") hereby issue our irrevocable Demand Guarantee (the "Guarantee") and undertake to pay you on first demand the amount specified in such demand up to a maximum of CDN \$_____. The Guarantee is in effect from _____ "Date" up to and including, but not after _____ "Date" (the "Expiry Date").

This Guarantee is issued to guarantee the performance of the Applicant in connection with a Trust Agreement between the Applicant and the Trustee establishing a retirement compensation arrangement for its management supplementary benefit plan (the "Trust Agreement"). This Guarantee is transferable in its entirety. Upon receipt by the Bank of the Certificate of transfer duly signed by Fiducie Desjardins establishing the second beneficiary, the transfer being acceptable to the Bank, we, upon return of the original of the present Guarantee, will issue a new irrevocable and transferable Guarantee in favour of the second beneficiary containing the same terms and conditions of this Guarantee.

Partial drawings under this Guarantee are not permitted.

Payment under this Guarantee shall be made on or before the expiry date upon your presenting a written demand for payment to the Bank at the branch of the Bank located at _____ "address" accompanied by this Guarantee. Your written demand for payment shall refer to this Guarantee by the above number, shall state the amount demanded and shall state:

- a) that the Applicant has failed to perform its obligations under the Trust Agreement and is in default thereunder; and
- b) that you have requested payment of the entire amount of this Guarantee from the Applicant and have not received payment.

Upon receipt by the Bank at the said branch of the said demand referred to above, on or before the expiry date, the Bank shall pay to you the amount of this Guarantee, to be payable to you

without enquiring whether you have a right to such amount as between yourself and the Applicant.

This Guarantee may be cancelled prior to the Expiry Date, upon receipt by the Bank, at the address indicated herein, of the original hereof and a written request for cancellation signed by the Applicant and by the beneficiary of this Letter of Guarantee, in form and substance satisfactory to the Bank (the "Notice of Cancellation"). Such cancellation shall be effective on the date of receipt by the Bank of the Notice of Cancellation (the "Cancellation Date"). No partial cancellation shall be permitted and the Bank shall have no obligation to re-issue this Letter of Guarantee once it has been so cancelled.

Unless otherwise specified, this Guarantee is subject to the Uniform Customs and Practice for Documentary Credits 1993 revision, I.C., publication number 500.

"Bank"

Authorized signature

Authorized signature

SCHEDULE "C"

EXPIRY OF LETTER OF CREDIT – PRELIMINARY NOTICE

Vice-president and Treasurer
Abitibi-Consolidated Inc.

Dear Sir/Madam:

We are hereby notifying you that the Letter of Credit n° _____ issued to the order of Desjardins Trust, in compliance with the Trust Agreement entered into by _____ and Desjardins Trust Inc. on _____ shall expire on _____.

According to paragraph 6.2.3 of the said Trust Agreement, if at least 2 business days prior to the expiry date of the said Letter of Credit, the Trustee has not received the amount required to obtain a successor Letter of Credit and/or other acceptable contributions in connection with the Arrangement (SERP), and provided that Secured Benefits remain payable that are otherwise unsecured, Desjardins Trust Inc. shall request payment in accordance with the Letter of Credit on the day corresponding with the expiry date of the said Letter of Credit or, if the expiry date of the Letter of Credit is not a business day, the latest previous business day.

Please advise us of your intention to renew the Letter of Credit or to otherwise secure the benefits by (date).

cc: Director of Pension Fund Investments – Abitibi-Consolidated Inc.

SCHEDULE "D"

EXPIRY OF LETTER OF CREDIT – SECOND NOTICE

In compliance with paragraph 6.2.1 of the Trust Agreement entered into by _____, and Desjardins Trust Inc. on _____, we are hereby notifying you that Desjardins Trust is holding a Letter of Credit n° _____ issued in its favour as Trustee of the Trust Estate established according to the present Trust Agreement.

The said Letter of Credit shall expire on _____. Desjardins Trust Inc. has already notified in writing _____, on _____ of the upcoming expiration of this Letter of Credit.

However, to this day, Desjardins Trust has not received the amount required to obtain a new Letter of Credit or to renew the Letter of Credit about to expire or no monetary contribution of an equivalent amount, as provided for in paragraphs 6.1.2 and 6.1.6 of the Trust Agreement.

According to paragraph 6.2.3 of the said Trust Agreement, if at least 2 business days prior to the expiry date of the said Letter of Credit, the Trustee has not received the amount required to obtain a successor Letter of Credit and/or other acceptable contributions in connection with the Arrangement (SERP), and provided that Secured Benefits remain payable that are otherwise unsecured, Desjardins Trust Inc. shall request payment in accordance with the Letter of Credit on the day corresponding with the expiry date of the said Letter of Credit or, if the expiry date of the Letter of Credit is not a business day, the latest previous business day.

cc: Chief Financial Officer – Abitibi-Consolidated Inc.

SCHEDULE "E"

NON-RECEIPT OF ACTUARIAL REPORT – NOTICE

Vice-president and Treasurer
Abitibi-Consolidated Inc.

Dear Sir/Madam:

We are hereby notifying you that the Actuarial Report required on March 31st in accordance with the Trust Agreement entered into by Abitibi-Consolidated Inc. and Desjardins Trust Inc. on (date) has not been received as of this date.

According to paragraph 6.2.5 of the said Trust Agreement, if the Actuarial Report is not received by (date), the Trustee may draw the full amount of the Letter of Credit and then, in accordance with paragraph 6.3, distribute the Trust assets to the Beneficiaries and wind up the Trust.

Please advise us as soon as possible as to when we may expect to receive the aforementioned report.

cc: Director of Pension Fund Investments – Abitibi-Consolidated Inc.

SCHEDULE "F"

ANNUAL FEES

SET-UP FEE

For the preparation of documentation, and for the verification, discussion and establishment of the Retirement Compensation Arrangement

Hourly Rates:	\$200.00
Minimum Fees :	\$1,500.00

SAFE CUSTODY AND ADMINISTRATION OF ASSETS (Canadian, U.S. and Euroclear)

A) Letter of Credit \$3,500.00

Yearly fees are in the amount of \$3,500.00 when the assets in trust contain a letter of credit.

B) Statements to be produced (in two copies)

- Monthly cash statement;
- Monthly portfolio.

FINANCIAL STATEMENTS

Department of National Revenue and other
Government Reports and Regulatory Filings

R.C.A. year end tax filing	\$250.00/per report
----------------------------	---------------------

BENEFIT PAYMENT SERVICES

BASIC SERVICES

A) Payment of retirement benefits in the form of

Cheque:	\$1.50 (plus postage)
---------	-----------------------

Direct Deposit:	\$1.00 (plus postage if applicable)
-----------------	--

B) Lump sum payments (termination refunds, transfer to another plan, purchase of annuities, etc.)

\$10.00 per payment.

\$15.00 of additional fees per special or urgent payment made manually on the same day that the instruction is received.

C) Maintaining pension benefits file up to date

Annual fees of \$2.00 per beneficiary (annuitant) payable in four quarterly instalments, subject to minimum annual fees of \$100.00.

The number of beneficiaries shall be the number at the end of the current fiscal year (including inactive and transferred beneficiaries, beneficiaries entitled to a deferred pension, pensioners and persons entitled to pension benefits upon the death of a beneficiary). For billing purposes, the number of beneficiaries at the beginning of the year shall be used, and adjusted taking into account the number of beneficiaries at the end of the said year, as described above.

D) Direct deposit revocation (to cancel a direct deposit) \$25.00

E) Electronic fund transfer (in place of a direct deposit) \$25.00

F) Stop payment \$25.00

G) Cheque issuing (in place of original) \$25.00

H) Tax slips

Original issuing: Free

Substitution (duplicate):

Current year: \$10.00

Preceding years: \$25.00

I) Garnishment (alimony, Revenue Canada)

Opening of a beneficiary file: \$100.00

Closing of a beneficiary file: \$100.00

Administration cost (per garnishment, per month): \$10.00

ADDITIONAL SERVICES

A)	<u>Beneficiary label (per thousand or part of thousand)</u>	\$50.00
B)	<u>Other deductions administration (other than Income Tax)</u>	
	Per deduction type, yearly:	\$180.00
C)	<u>Foreign currency conversion surcharge</u>	\$25.00
D)	<u>Copy of cheque produced or cashed</u>	\$25.00
E)	<u>Additional statement's copies (per statement, per recipient)</u>	\$25.00

OTHER

SPECIAL SERVICES AND REPORTING

Special services and reports not described herein will require separate hourly charges depending on the amount of staff involvement required. Desjardins Trust's hourly rates are as follows:

Administrative staff:	\$100.00 per hour
Management/consultative staff:	\$150.00 per hour
Internal legal staff:	\$200.00 per hour

OUT-OF-POCKET EXPENSES

Out-of-pocket expenses are billed in addition to fees. These expenses include bank charges, clearing settlement charges, depository certificate charges, armoured car charges, courier charges, document retrieval, postage, etc.

BILLING

Fees are calculated and based on the total market value (in Canadian dollars) and are billed quarterly.

COMING INTO EFFECT OF THE PRESENT SCHEDULE

This Schedule "F" cancels and replaces on April 30, 2004 any other previous Schedule "F" and is an integral part of the Retirement Compensation Arrangement Trust Agreement signed by the parties on April 23, 2004.

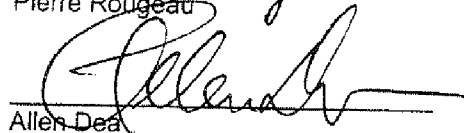
IN VIRTUE WHEREOF, the parties have signed this schedule in two copies.

ABITIBI-CONSOLIDATED INC.

Per:


Pierre Rougeau

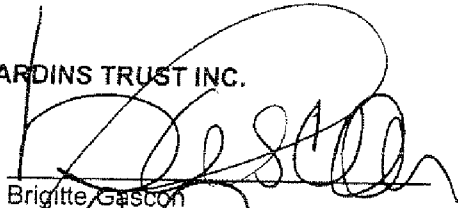
Per:


Allen Dea

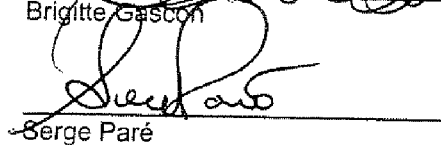
Date: 7 mai 2004

DESJARDINS TRUST INC.

Per:


Brigitte Gaston

Per:


Serge Paré

Date: 12 mai 2004

(Chambre commerciale)

Nº. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE:

ABTIBBOWATER INC. ET AL.

Requerantes

1

ERNST & YOUNG INC.

Contrôleur

9

JAMES DOUGHAN ET AL.

Intimées

BS0350 n/dos.: 041053-1170

PIÈCE R-9

ORIGINAL

Me Mélanie Béland (514) 397-3197

Fax : (514) 397-3591

STIKEMAN ELLIOTT

Stikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS

40^e Etage

1155, boul. René-Lévesque Ouest

Montréal, Canada H3B 3V2

PIÈCE R-10



Trade Finance Centre

11 July 2005

Place and date of issue Lieu et date d'émission

3621348
2106C 211-0309

Letter of Credit Reference No. SBGM735258

Beneficiary:

Fiducie Desjardins as Trustee under
The Trust Agreement, 14th floor
South Tower 1 Complexe Desjardins
Montreal, Quebec H5B 1E4

Applicant:

Abitibi-Consolidated Company of
Canada Inc.
1155 Metcalfe Street, Suite 800
Montreal, Quebec H3B 5H2

Amount: CAD 6,164,000.00
Six Million One Hundred and Sixty Four
Thousand Canadian Dollars

Date of Expiry: 14 July 2006

At the request of Abitibi Consolidated Company of Canada (the "Applicant"), we, Canadian Imperial Bank of Commerce (the "Bank") hereby issue our Irrevocable Standby Letter of Credit (the "Credit") and undertake to pay Fiducie Desjardins, as Trustee under the Trust Agreement (the "Trustee") on first demand the amount specified in such demand up to a maximum of CAD6,164,000.00 (Six Million One Hundred and Sixty Four Thousand Canadian Dollars). This Credit is in effect from July 15, 2005 up to and including, but not after July 14, 2006 (the "Expiry date").

This credit becomes operative on July 15, 2005.

This Credit is issued to guarantee the performance of the Applicant in connection with a Trust Agreement between the Applicant and the Trustee made as of March 1, 2004, as amended from time to time, establishing a retirement compensation arrangement for Abitibi Consolidated Inc. Supplementary Executive Plan (the "Trust Agreement").

This standby letter of credit is transferable. The rights and obligations of the beneficiary under this standby letter of credit are transferable to their entirety (but not in part) to any transferee, provided that the beneficiary presents to us the original of this standby letter of credit (together with any amendments hereto) and beneficiary's completed and signed certificate substantially in the form of "EXHIBIT-A" below and upon receipt of the said documents, we shall forthwith transfer the rights and obligations of the beneficiary to the transferee by issuing an irrevocable transferable standby letter of credit in favour of the transferee, for the amount of this standby letter of credit less any drawings paid and/or any reductions in amount by way of amendment(s) hereto as authorized by you, consistent with all other terms and conditions of this standby letter of credit.

At the time of request for a transfer under this standby letter of credit, the fees payable for such transfer must be paid to us by the beneficiary.

Partial drawings under this Credit are not permitted.

Payment under this Credit shall be made on or before the expiry date upon your presenting a written demand for payment to the Bank at the Trade Finance Centre located at 1155 Rene-Levesque Boulevard, 12th floor, Montreal, Quebec H3B 3Z4, accompanied by this Credit. Your written demand for payment shall refer to this Credit by the above number, shall state the amount demanded and shall state:

A) that the Applicant has failed to perform its obligations under the Trust Agreement and is in default thereunder; and

B) that you have requested payment of the entire amount of this Credit from the Applicant and have not received payment.



Trade Finance Centre

11 July 2005

Place and date of issue / Lieu et date d'émission

5621244
2106C BR-0309

This Page forms an integral part of our Letter of Credit No. SBGM735256.
Upon receipt by the Bank at the said branch of the said demand referred to above, on or before the expiry date, the Bank shall pay to you the amount of this Credit, to be payable to you without enquiring whether you have a right to such amount as between yourself and the Applicant.

This Credit may be cancelled prior to the Expiry Date, upon receipt by the Bank, at the address indicated herein, of the original hereof and a written request for cancellation signed by the Applicant and by the Beneficiary of this Standby Letter of Credit, in form and substance satisfactory to the Bank (the "Notice of Cancellation"). Such cancellation shall be effective on the date of receipt by the Bank of the Notice of Cancellation (the "Cancellation Date"). No partial cancellation shall be permitted and the Bank shall have no obligation to re-issue this Standby Letter of Credit once it has been so cancelled.

Unless otherwise specified, this Standby Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits 1993 revision, I.C.C. publication 500.

The beneficiary's complete address is:
Fiducie Desjardins as Trustee under The Trust Agreement
14th floor, South Tower
1 Complexe Desjardins
P.O. Box 34, Succ. Desjardins
Montreal, Quebec H5B 1E4

Quote

EXHIBIT - A

CERTIFICATE

Date: XXXXXXXXXXXX

To: Canadian Imperial Bank of Commerce
Trade Finance Centre
1155 Rene-Levesque Boulevard West, 12th Floor
Montreal, Quebec H3B 3Z4

Re: Transfer of Irrevocable transferable Standby Letter of Credit No SBGM735256.

For value received, the undersigned beneficiary hereby requests you to transfer the above-referenced irrevocable transferable standby letter of credit (the "enclosed letter of credit") by issuing in favour of:

(Name of New Beneficiary)

(Address)



Trade Finance Centre

11 July 2005

Place and date of issue / Lieu et date d'émission

5621348
2104C 34-0309

This Page forms an integral part of our Letter of Credit No. SBGM735258.

A new irrevocable transferable standby letter of credit on terms consistent with those of the enclosed letter of credit.

We hereby waive all of our rights as beneficiary under the enclosed letter of credit, the original of which (together with all amendments thereto, if any) is returned to you herewith.

Please forward the new original irrevocable transferable standby letter of credit to the new beneficiary designated above for the attention of: XXXXXXXXXXXXXXXXXXXXXXXX.

In consideration of your issuing a new irrevocable transferable standby letter of credit, we enclose the applicable transfer fee.

Yours very truly,

Fiducie Desjardins, as Trustee under the Trust Agreement
14th floor, South Tower
1 Complexe Desjardins
P.O. Box 34, Succ. Desjardins
Montreal, Quebec H5B 1E4

By:
(Authorized Officer)

Unquote.



Imperial Bank of Commerce

G. JEANNOIE
Counter Signature

G. Jeannoie
5678

Authorized Signature

R. SCURALEY
2368
R. SCURALEY



Trade Finance Centre

7 July 2006

Place and date of issue / Lieu et date d'émission

5621348
2106C 28-0309

Letter of Credit Reference No.

SBGM735256

Amendment No.

AMD001

Beneficiary:

Fiducie Desjardins as Trustee under
The Trust Agreement, 14th floor
South Tower 1 Complexe Desjardins
Montreal, Quebec H5B 1E4

Applicant:

Abilibi Consolidated Company of
Canada Inc.
1155 Metcalfe Street, Suite 800
Montreal, Quebec H3B 5H2

This letter of credit has been amended as follows:

1. The amount of this standby letter of credit is increased by \$5,464,000.00 CAD for a new amount of \$11,628,000.00 CAD.
2. The expiration date is extended to July 13, 2007.

All other terms and conditions of this credit remain unchanged.

This amendment is to be considered as part of the above credit and must be attached thereto.

For Canada Imperial Bank of Commerce

R. JEANNOTTE

Counter Signature

Authorized Signature

R. SCORATTO

VOID

VOID



Trade Finance Centre
10 July 2007

3021348
2104C BIL-0308

Place and date of issue / Lieu et date d'émission

Letter of Credit Reference No.

SBGM735256

Amendment No.

AMD002

Beneficiary:
Fiducie Desjardins as Trustee under
The Trust Agreement, 14th floor
South Tower 1 Complexe Desjardins
Montreal, Quebec H5B 1E4

Applicant:
Abitibi-Consolidated Company of
Canada Inc.
1155 Metcalfe Street, Suite 800
Montreal, Quebec H3B 5H2

This letter of credit has been amended as follows:

1. The amount of this standby letter of credit is increased by \$5,825,000.00 CAD for a new amount of \$11,628,000.00 CAD.
2. The expiration date is extended to July 14, 2008.

All other terms and conditions of this credit remain unchanged.

This amendment is to be considered as part of the above credit and must be attached thereto.

For Canadian Imperial Bank of Commerce

D. JEANNOTTE
Counter Signature

M. CAPANO
Authorized Signature

C 2113

10 July 2007

Place and date of issue / Lieu et date d'émission

2041.000
2108C 24-0107

Letter of Credit Reference No.

SBGM735256

Amendment No.

AMD003

Beneficiary:
Fiducie Desjardins as Trustee under
The Trust Agreement, 14th floor
South Tower 1 Complexe Desjardins
Montreal, Quebec H5B 1E4

Applicant:
Abilibi-Consolidated Company of
Canada Inc.
1155 Metcalfe Street, Suite 800
Montreal, Quebec H3B 5H2

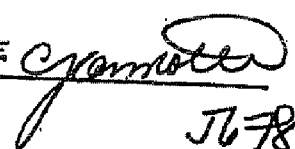
This letter of credit has been amended as follows:

New total amount amended to read \$17,453,000.00 CAD instead of \$11,828,000.00 CAD

All other terms and conditions of this credit remain unchanged.

This amendment is to be considered as part of the above credit and must be attached thereto.

For Canadian Imperial Bank of Commerce


Counter Signature


Authorized Signature

C 2113



Trade Finance Centre
26 June 2008

5621348
2108C 8L-0309

Place and date of issue Lieu et date d'émission

Letter of Credit Reference No.

SBGM735256

Amendment No.

AMD004

Beneficiary:

Fiducie Desjardins as Trustee under
The Trust Agreement, 14th floor
South Tower 1 Complexe Desjardins
Montreal, Quebec H5B 1E4

Applicant:

Abitibi-Consolidated Company of
Canada Inc.
1155 Metcalfe Street, Suite 800
Montreal, Quebec H3B 5H2

This letter of credit has been amended as follows:

1- This Standby Letter of Credit has been decreased by \$879,000.00 CAD for a new amount of
\$16,574,000.00 CAD.

2- The expiration date is extended to July 14, 2009.

All other terms and conditions of this credit remain unchanged.

This amendment is to be considered as part of the above credit and must be attached thereto.

For Canadian Imperial Bank of Commerce

Counter Signature

TE-1240

G. M. TANG

G. JEANNOTTE

Authorized Signature

5678



Trade Finance Centre

03 July 2008

Place and date of issue Lieu et date d'émission

Letter of Credit Reference No. SBCM742775

Beneficiary:

Desjardins Trust Inc., South Tower
1 Complexe Desjardins, 14th Floor
P.O. Box 34, Desjardins Station
Montreal, Quebec H5B 1E4

Applicant:

Abitibi-Consolidated Company Of
Canada
1155 Metcalfe Street, Suite 800
Montreal, Quebec H3B 5H2

Amount: CAD 624,000.00

Six Hundred and Twenty Four Thousand
Canadian Dollars

Date of Expiry: 14 July 2008

Whereas a Trust Agreement (the "Trust Agreement") has been entered into by Desjardins Trust Inc. (the "Beneficiary") and Abitibi-Consolidated Inc. on November 1st, 2006 and in compliance with article 6 of the said Trust Agreement, a standby Letter of Credit must be issued.

At the request of Abitibi-Consolidated Company of Canada (the "Applicant"), we, Canadian Imperial Bank of Commerce, Trade Finance Centre, 1155 Rene-Levesque Blvd. W., 12th Fl. Montreal QC CA, H3B 3Z4 ("CIBC"), hereby issue in favour of Desjardins Trust Inc. (the "Beneficiary") this irrevocable standby Letter of Credit (the "Letter of Credit") guaranteeing the obligations of Abitibi-Consolidated Inc. for the maximum amount of CAD624,000.00 (Six Hundred and Twenty Four Thousand Canadian Dollars).

The amount payable, in accordance with the present Letter of Credit, shall be to the Beneficiary upon its first request, notwithstanding any contestation or litigation between the Beneficiary and Abitibi-Consolidated Inc. which request must bear the Letter of Credit reference number SBCM742775, be accompanied by the following original documents and be presented to CIBC at Trade Finance Centre, 1155 Rene-Levesque Blvd. W., 12th Fl. Montreal QC CA, H3B 3Z4:

1) a) A certificate issued by the Beneficiary, bearing the signature of a purportedly authorized agent of the Beneficiary, and certifying that Abitibi-Consolidated Inc. is in failure to pay with cash and/or the guarantee required in compliance with article 5.04 of the Trust Agreement; or

b) In one or the other situation provided for by article 5.08 of the Trust Agreement, accompanied by:

i) A certified copy of the sequestration order pronounced against Abitibi-Consolidated Inc. by a competent bankruptcy court; or

ii) A certified copy of the disposal filed by Abitibi-Consolidated Inc. with the bankrupt trustee in compliance with the Bankruptcy Act, R.S., 1985, c. B-3; or

iii) A certificate issued by the Beneficiary bearing the signature of a purportedly authorized agent of the Beneficiary, and stating the insolvency, liquidation and/or dissolution of the Corporation, other than a voluntary liquidation or dissolution as described in article 5.08.

2) The present Letter of Credit

Partial drawings are permitted hereunder.

This Letter of Credit shall be reduced automatically, by the amount of each drawing paid hereunder, and/or by amendment, by the amount of reduction that may be authorized by the Beneficiary from time to time by their signed written request given to CIBC.



Trade Finance Centre
03 July 2008

Place and date of issue / Lieu et date d'émission

HEURE DE RECEPTION AVR. 3. 1:34PM

5621348
2106C 81L-0309

This Page forms an integral part of our Letter of Credit No. SBGM742775.

This Letter of Credit will expire on July 14, 2008 at the counters of CIBC at the above-noted address.

It is a condition of this Letter of Credit that it shall be deemed to be automatically extended without amendment for twelve months periods from the present or any future expiration date hereof, unless at least thirty (30) days prior to any such expiration date, CIBC notifies the Beneficiary in writing by registered mail or courier that CIBC elects not to consider this Letter of Credit renewed for such additional period of twelve months. Upon receipt by the Beneficiary of such notice of non-renewal, the Beneficiary may draw for payment of up to the full amount outstanding under this Letter of Credit at any time on or before the expiration date, against presentation of the above-mentioned documents.

Notwithstanding the expiration date and the condition above, this Letter of Credit shall be cancelled effective the date of receipt by CIBC of the original Letter of Credit and a dated letter addressed to CIBC, signed by a purportedly authorized agent of the Beneficiary, referencing this Letter of Credit number SBGM742775 and requesting the cancellation of same.

Provisions of the present Letter of Credit state all conditions for our commitment, which cannot in any case be modified or have a large scope in the case of reference to documents, proceedings or guarantees mentioned in the present Letter of Credit or that refer to the present Letter of Credit, or to which the present Letter of Credit refers, such a reference not including, by cross-reference, any document, proceeding or agreement.

The present Letter of Credit is unassignable and not transferable.

The Beneficiary may from time to time advise CIBC of the Beneficiary's address by letter to CIBC at CIBC's address stated above, dated and signed by the Beneficiary and quoting this standby letter of credit number. Any notice by CIBC to the Beneficiary regarding this Letter of Credit shall be adequately given if sent by registered mail or courier to the last address so advised, or if no address has been so advised, then to the address of the Beneficiary stated above.

Any correspondence must bear the Letter of Credit number SBGM742775 and be forwarded to CIBC at the above noted address.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, current at the time of issuance of this Letter of Credit and engages us in accordance with the terms thereof.

For Canadian Imperial Bank of Commerce

Counter Signature

Ahleng T-1249
A. H. TANG

Authorized Signature

G. JEANNOU

G. Jeannou
5678



Trade Finance Centre

14 July 2008

To: Desjardins Trust Inc., South Tower
1 Complexe Desjardins, 14th Floor
P.O. Box 34, Desjardins Station
Montreal, Quebec H5B 1E4
Attention: Lina-Maria Maia; Fax: 514-286-1131; Tel: 514-286-3685

Re: Standby letter of credit No.: SBGM742775
In your favour
For Account of: Abitibi-Consolidated Company of Canada
Amount: 624,000.00 CAD

We refer to the above-noted standby letter of credit and write to confirm that the expiry date of this credit has been automatically extended to July 14, 2009.

Please be advised that the term of the credit will be automatically extended for additional period, without an amendment or any formal notice to you. A formal notice of cancellation will be issued only in the event of cancellation of the credit.

For any inquiries, please contact our office Quoc Hue Tang @ (514) 376-4766 or by fax @ (514) 393-9489.

Please direct your correspondence to CIBC, 1155 Rene Levesque Blvd. W., 12th Fl, Montreal QC CA, H3B 3Z4, Attn: **Standby Letters of Credit** quoting our reference.



Trade Finance Centre

13 March 2006

Place and date of issue / Lieu et date d'émission

5621348
2106C BIL-0309

Letter of Credit Reference No. SBGM737244

Beneficiary:

Fiducie Desjardins As Trustee under
the Trust Agreement, 1 Complexe
Desjardins, P.O. Box 34, Succ.
Desjardins, Montreal, QC H5B 1E4

Applicant:

Abitibi-Consolidated Company of
Canada
1155 Metcalfe Street, Suite 800
Montreal, Quebec H3B 5H2

Amount: CAD 40,000,000.00
Forty Million Canadian Dollars

Date of Expiry: 14 March 2007

At the request of Abitibi-Consolidated Company of Canada (the "Applicant"), we, Canadian Imperial Bank of Commerce (the "Bank") hereby issue our irrevocable Standby Letter of Credit (the "Credit") and undertake to pay Fiducie Desjardins, as Trustee under the Trust Agreement (the "Trustee") on first demand the amount specified in such demand up to a maximum of CAD40,000,000.00 (Forty Million Canadian Dollars). This Credit is in effect from March 14, 2006 up to and including, but not after March 14, 2007 (the "Expiry date").

This Credit becomes operative on March 14, 2006.

This Credit is issued to guarantee the performance of the Applicant in connection with a Trust Agreement between the Applicant and the Trustee made as of March 1, 2004, as amended from time to time, establishing a retirement compensation arrangement for its management supplementary benefit plan (the "Trust Agreement").

This Credit is transferable. The rights and obligations of the beneficiary under this Credit are transferable in their entirety (but not in part) to any transferee, provided that, the beneficiary presents to us the original of this Credit (together with any amendments hereto) and beneficiary's completed and signed certificate substantially in the form of "EXHIBIT-A" below and upon receipt of the said documents, we shall forthwith transfer the rights and obligations of the beneficiary to the transferee by issuing an irrevocable transferable standby letter of credit in favour of the transferee, for the amount of this Credit less any drawings paid and/or any reductions in amount by way of amendment(s) hereto as authorized by you, consistent with all other terms and conditions of this Credit.

At the time of request for a transfer under this Credit, the fees payable at the rate of 1/8 of 1% for such transfer must be paid to us by the beneficiary.

Partial drawings under this Credit are not permitted.

Payment under this Credit shall be made on or before the expiry date upon your presenting a written demand for payment to the Bank at the Trade Finance Centre located at 1155 Rene-Levesque Boulevard, 12th floor, Montreal, Quebec H3B 3Z4, accompanied by this Credit. Your written demand for payment shall refer to this Credit by our above reference number, shall state the amount demanded and shall state:

A) that the Applicant has failed to perform its obligations under the Trust Agreement and is in default thereunder; and

B) that you have requested payment of the entire amount of this Credit from the Applicant and have not received payment.



Trade Finance Centre

13 March 2006

Place and date of issue / Lieu et date d'émission

5621348
2106C BIL-0309

This Page forms an integral part of our Letter of Credit No. SBGM737244.

Upon receipt by the Bank at the address noted above of the said demand referred to above, on or before the expiry date, the Bank shall pay to you the amount of this Credit, to be payable to you without enquiring whether you have a right to such amount as between yourself and the Applicant.

This Credit may be cancelled prior to the Expiry Date, upon receipt by the Bank, at the address indicated above, of the original of this Credit and a written request for cancellation signed by the Applicant and by the Beneficiary of this Credit, in form and substance satisfactory to the Bank (the "Notice of Cancellation"). Such cancellation shall be effective on the date of receipt by the Bank of the Notice of Cancellation (the "Cancellation Date"). No partial cancellation shall be permitted and the Bank shall have no obligation to re-issue this Credit once it has been so cancelled.

Unless otherwise specified, this Credit is subject to the Uniform Customs and Practice for Documentary Credits 1993 revision, I.C.C., publication 500.

The beneficiary's complete address is:
Fiducie Desjardins as Trustee under The Trust Agreement
14th floor, South Tower
1 Complexe Desjardins
P.O. Box 34, Succ. Desjardins
Montréal, Quebec H5B 1E4

Quote

EXHIBIT - A

CERTIFICATE

Date: XXXXXXXXXXXXX

To: Canadian Imperial Bank of Commerce
Trade Finance Centre
1155 Rene-Levesque Boulevard West, 12th Floor
Montreal, Quebec H3B 3Z4

Re: Transfer of Irrevocable transferable Standby Letter of Credit No SBGM737244.

For value received, the undersigned beneficiary hereby requests you to transfer the above-referenced irrevocable transferable standby letter of credit (the "enclosed standby letter of credit") by issuing in favour of:

(Name of New Beneficiary)
(Address)



Trade Finance Centre

5621349
2106C BIE-0309

13 March 2006

Place and date of Issue / Lieu et date d'émission

This Page forms an integral part of our Letter of Credit No. SBGM737244.

A new irrevocable transferable standby letter of credit on terms consistent with those of the enclosed standby letter of credit.

We hereby waive all of our rights as beneficiary under the enclosed standby letter of credit, the original of which (together with all amendments thereto, if any) is returned to you herewith.

Please forward the new original irrevocable transferable standby letter of credit to the new beneficiary designated above for the attention of: XXXXXXXXXXXXXXXXXXXX.

In consideration of your issuing a new irrevocable transferable standby letter of credit, we enclose the applicable transfer fee.

Yours very truly,

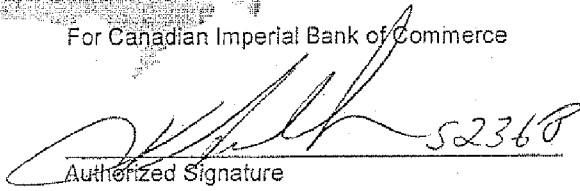
Fiducie Desjardins, as Trustee under the Trust Agreement
14th floor, South Tower
1 Complexe Desjardins
P.O. Box 34, Succ. Desjardins
Montreal, Quebec H5B 1E4

By:
(Authorized Officer)

Unquote.

For Canadian Imperial Bank of Commerce


E. JEANNOTTE
Counter Signature


Authorized Signature

R. SCURAT



Trade Finance Centre

12 March 2007

Place and date of issue / Lieu et date d'émission

5621348
2105C BIL-0309

DUPLICATE

Letter of Credit Reference No.

SBGM737244

Amendment No.

AMD001

Beneficiary:

Fiducie Desjardins As Trustee under
the Trust Agreement, 1 Complexe
Desjardins, P.O. Box 34, Succ
Desjardins, Montreal, QC H5B 1E4

Applicant:

Abitibi-Consolidated Company of
Canada
1155 Metcalfe Street, Suite 800
Montreal, Quebec H3B 5H2

This letter of credit has been amended as follows:

The expiration date is extended to March 14, 2008.

All other terms and conditions of this credit remain unchanged.

This amendment is to be considered as part of the above credit and must be attached thereto.

For Canadian Imperial Bank of Commerce

Counter Signature

M. CAPANO

Authorized Signature

R. SCURALLI



Trade Finance Centre
12 March 2008

5621348
2106C BIL-0309

Place and date of issue / Lieu et date d'émission

Letter of Credit Reference No.

SBGM737244

Amendment No.

AMD002

Beneficiary:

Fiducie Desjardins As Trustee under
the Trust Agreement, 1 Complexe
Desjardins, P.O. Box 34, Succ.
Desjardins, Montreal, QC H5B 1E4

Applicant:

Abitibi-Consolidated Company of
Canada
1155 Metcalfe Street, Suite 800
Montreal, Quebec H3B 5H2

This letter of credit has been amended as follows:

1. The expiration date is extended to December 31, 2008.

All other terms and conditions of this credit remain unchanged.

This amendment is to be considered as part of the above credit and must be attached thereto.

C. JEANNOTTE

Counter Signature

For Canadian Imperial Bank of Commerce

Authorized Signature

M. CAPANO

C 2113



Trade Finance Centre
23 December 2008

5621348
2106C BIL-0309

Place and date of issue *Lieu et date d'émission*

Letter of Credit Reference No.

SBGM737244

Amendment No.

AMD003

Beneficiary:

Fiducie Desjardins As Trustee under
the Trust Agreement, 1 Complexe
Desjardins, P.O. Box 34, Succ.
Desjardins, Montreal, QC H5B 1E4

Applicant:

Abitibi-Consolidated Company of
Canada
1155 Metcalfe Street, Suite 800
Montreal, Quebec H3B 5H2

This letter of credit has been amended as follows:

The expiration date is extended to December 31, 2009.

All other terms and conditions of this credit remain unchanged.

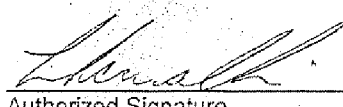
This amendment is to be considered as part of the above credit and must be attached thereto.

For Canadian Imperial Bank of Commerce

Counter Signature

 T-1249
D. H. TANG

Authorized Signature

 S 7418
LUCY SOURALLÉ

(Chambre commerciale)

Nº. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ABTIBIBOWATER INC. ET AL.

Requérantes

-et-

ERNST & YOUNG INC.

Contrôleur

9.

JAMES DOUGHAN ET AL.

Intimés

BS0350 n/dos.: 041053-1170

PIÈCE R-10

ORIGINAL

Me Mélanie Béland (514) 397-3197

Fax: (514) 397-3591

STIKEMAN ELLIOTT

Sikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS

40^e Étape

1155, boul. René-Lévesque Ouest

Montréal, Canada H3B 3V2

PIÈCE R-11



DE GRANDPRÉ CHAÏT S.B.N.C.R./LLP

AVOCATS - LAWYERS
1000, RUE DE LA GAUCHETIÈRE OUEST, BUREAU 2900
MONTREAL (QUEBEC) CANADA H3B 4W5
T 514 878-4311 F 514 878-4333 WWW.DEGRANDPRE.COM

Direct line: 514 878-3285
Direct Fax: 514 878-5785
E-mail: abronstein@degrandpre.com

BY MESSENGER

May 11, 2009

Fiducie Desjardins Inc.
Custody and Pension Plans Department
2, Complexe Desjardins, 27th Floor
East Tower
Montréal (Québec) H5B 1C1

RE: James Doughan ("Mr. Doughan") and Abitibi-Consolidated Inc. ("ACI")

Our reference: 204-50013-12

Dear Sirs:

We represent Mr. Doughan, retired President and Chief Executive Officer of ACI.

Mr. Doughan is a former officer and employee of ACI who has been and continues to be entitled to the benefits under the Canadian *Supplemental Executive Retirement Plan (SERP)* for Executive Employees of Abitibi-Consolidated Inc.

According to Section 4.03 of the SERP, the payment of benefits provided under the SERP "*shall be secured in whole or in part, in accordance with the Corporation's Policy. Such security shall be provided either through contributions paid to a trust fund to be established for the purpose of this SERP and/or through the depositing into such trust fund of a letter of credit issued by a financial institution*".

During the course of his testimony on June 21, 2004, in a trial involving Mr. Doughan and ACI, Mr. André Dion of Mercer testified that Fiducie Desjardins holds a letter of credit ("**Letter of Credit**") in order to secure the payment of the SERP benefits by ACI.

Mr. Dion stated that the Letter of Credit is payable to Fiducie Desjardins, as trustee of a special trust whose sole purpose is to hold the Letter of Credit and in the event that any party entitled to the benefits of the Letter of Credit should demand payment, Fiducie Desjardins is to act accordingly, namely by demanding payment from the financial institution who is responsible for the payment, so that the persons entitled to the benefits of the SERP receive payment.

Mr. Dion informed the Court that the persons protected by the Letter of Credit are not Fiducie Desjardins but the beneficiaries of the SERP.

ACI has not paid the pension payment to Mr. Doughan, in virtue of the SERP, that was due May 1, 2009 in the amount of CDN \$32,339.34.

As you are undoubtedly aware, in the context of a petition by ACI and others for the issuance of an Initial Order under the *Companies' Creditors Arrangement Act*, under record number 500-11-036133-094, on April 17, 2009, the Honourable Mr. Justice Clément Gascon ordered (at paragraph [13]) as regards ACI *inter alia*, "any Person who provided any kind of Letter of Credit . . . at the request of the Petitioners shall be required to continue honouring any and all such letters, issued on or before the date of the Order".

The judgment further ordered (at paragraph [21]) that ACI *inter alia* is entitled to pay the following expenses, whether incurred prior to or after the Order: a) all current pension contributions and other benefits, . . . and other amounts payable to former employees, officers or directors, on or after the date of the Order.

Consequently, as trustee of a special trust, you are hereby called upon to demand payment of the instalment of pension payable to Mr. Doughan from the financial institution who issued the Letter of Credit and to pay the proceeds to Mr. Doughan in accordance with ACI's obligations to him under the SERP, and to effect payment by way of cheque payable to the order of Mr. James Doughan within fifteen (15) days from the date hereof, failing which our instructions are to institute legal proceedings against you for the recovery of same immediately thereafter without further notice or delay.

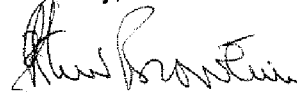
Furthermore, you are called upon to do likewise in respect of all future monthly payments to which Mr. Doughan is entitled under the SERP so long as the amount payable under the Letter of Credit, after deduction of payments pursuant to the conditions of its issue, is available to make the payments to Mr. Doughan, unless other arrangements satisfactory to Mr. Doughan will have been made.

Please effect payment as aforesaid in care of this office.

At the same time, we will appreciate receiving from you a copy of the Letter of Credit.

Trusting that it will not be necessary for us to institute legal proceedings for recovery of the amount due, we remain,

Yours truly,



Arthur Bronstein

AB/nn

c.c. Fishman Flanz Meland Paquin, attorneys for Ernst & Young, Monitor
Me Suzanne Côté, Stikeman Elliott, attorneys for Abitibi-Consolidated Inc. ✓

C O U R S U P É R I E U R E
(Chambre commerciale)

N°. 500-11-036133-094

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

DANS L'AFFAIRE DU PLAN
D'ARRANGEMENT DE :

ABITIBOWATER INC. ET AL.

Requérantes

-et-

ERNST & YOUNG INC.

Contrôleur

c.

JAMES DOUGHAN ET AL.

Intimés

BS0350

n/dos.: 041053-1170

PIÈCE R-11

ORIGINAL

Me Mélanie Béland

(514) 397-3197

Fax : (514) 397-3591

STIKEMAN ELLIOTT

Stikeman Elliott S.E.N.C.R.L., s.r.l. AVOCATS

40^e Étage

1155, boul. René-Lévesque Ouest

Montréal, Canada H3B 3V2