CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. : 500-11-036133-094

SUPERIOR COURT

Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.,

and

ABITIBI-CONSOLIDATED INC.,

and

BOWATER CANADIAN HOLDINGS INC.,

and

the other Petitioners listed herein

Debtors

and

ERNST & YOUNG INC.,

Monitor

and

THE WOODBRIDGE COMPANY LIMITED

and

WOODBRIDGE INTERNATIONAL HOLDINGS S.A.

and

WOODBRIDGE INTERNATIONAL HOLDINGS LIMITED

Petitioners

DEBTORS' CONTESTATION OF THE MOTION IN APPEAL AND REVISION OF THE CLAIMS OFFICER'S DETERMINATION

TO THE HONOURABLE CLÉMENT GASCON J.S.C., SITTING IN COMMERCIAL DIVISION IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE DEBTORS RESPECTFULLY SUBMIT THE FOLLOWING:

*Unless otherwise indicated, all capitalized terms herein shall have the meaning attributed to them in the Notice of Motion and Motion in Appeal and Revision of the Claims Officer's Determination dated December 23, 2010 (the "**Woodbridge Appeal**") filed by The Woodbridge Company Limited, Woodbridge International Holdings S.A. and Woodbridge International Holdings Limited (singularly or collectively, as the context may require, "**Woodbridge**") or in the Initial Order issued by this Court on April 17, 2009, as amended (the "**Initial Order**"). The term "**Abitibi**" shall refer to the Debtors (singularly or collectively, as the context may require) and any reference to the "**CCAA**" shall refer to the version of the Creditors' Companies Arrangement Act R.S.C., 1985, c. C-36 in force prior to the amendments which came into force on September 18, 2009.*

I. OVERVIEW

1. The Woodbridge Appeal seeks to vary the determination rendered by the Claims Officer on December 13, 2010 (the "**Determination**"), with respect to the claim made by Woodbridge in the Abitibi CCAA proceedings (the "**Woodbridge Claim**"). The Claims Officer determined that the value of the Woodbridge Claim was US$24 million. By the Woodbridge Appeal, Woodbridge seeks to vary the Determination and establish the value of the Woodbridge Claim at US$110 million.

2. Abitibi submits that the appropriate standard of review of the Determination by the Claims Officer with respect to questions of fact is that his findings are not to be reversed unless it can be established that the Claims Officer made a palpable and overriding error. Abitibi submits that Woodbridge has failed to establish any such error.

3. Moreover, with respect to the evidence submitted by Woodbridge of the sale of the Augusta Mill subsequent to the Determination by the Claims Officer, Abitibi submits that if any weight is to be given to this sale, it should reduce and not increase the Determination by the Claims Officer.

II. BACKGROUND

<u>The Augusta Partnership</u>

4. The Augusta Partnership was at the relevant time a partnership between Abitibi and Woodbridge. Abitibi held a 52.5% interest in the Augusta Partnership and Woodbridge held the remaining 47.5% interest (the "**Woodbridge Interest**").

5. The Augusta Partnership owns a 416,000 metric tonne capacity newsprint mill in Augusta, Georgia (the "**Augusta Mill**").

The Partnership Agreement

6. Abitibi and Thomson Newsprint Inc. ("**Thomson**") entered into a partnership agreement governing the Augusta Partnership on August 17, 1981 as amended from time to time, including on September 6, 2001 (the "**Partnership Agreement**", Tabs A-1 and A-6).

7. The following provisions of the Partnership Agreement are relevant to the present matter:

- Distributions to the partners require the consent of both partners (section 4.3(a));
- Abitibi and the Augusta Partnership were to and did enter into a sales agreement (section 5.1);
- The Augusta Mill will be operated at a minimum of 90% of capacity for each calendar year (section 6.2 as amended).

Sales Agreement between Abitibi and the Augusta Partnership

8. Abitibi and the Augusta Partnership entered into a sales agreement on December 14, 1981, as amended from time to time prior to January 16, 2011, including on October 28, 1994 (the "**Sales Agreement**", Tabs A-2 and A-5).

9. Pursuant to the Sales Agreement, Abitibi was obligated, as long as it was a party to the Augusta Partnership, to purchase all of the production of the Augusta Mill (the "**Purchase Obligation**").

10. The purchase price charged by the Augusta Partnership to Abitibi was equal to the price at which Abitibi resold the newsprint to its customers, less delivery costs, and Abitibi's commission.

11. The purchase price was payable on the 15th day of the month for all newsprint shipped in the previous month.

12. In the event that Abitibi ceased to be a partner in the Augusta Partnership, the Sales Agreement automatically terminated.

13. It would appear that at least a portion of the production of the Augusta Mill for at least part of the period was sold to a Thomson affiliate (Tab A-4 – incomplete).

Call Agreement between Abitibi and Woodbridge

14. In September 2001, Thomson sold its interest in the Augusta Partnership to Woodbridge, a related party but one that was not a customer for the newsprint produced by the Augusta Mill.

15. At that time, Abitibi and Woodbridge entered into an amendment to the Partnership Agreement (Tab A-6), a guarantee (Tab A-7) (the "**Guarantee**") and a call agreement (the "**Call Agreement**").

16. The parties have produced the Amended and Restated Call Agreement dated July 1, 2004 and the further amendments on May 27, 2005 and February 23, 2007 (Tabs A-8, A-9 and A-10).

17. Under the Call Agreement, there are the following scenarios:

- Under sections 2 and 3, Abitibi had a call right, until December 31, 2009, to purchase the Woodbridge Interest at a specified price in excess of US$200 milion (the "**Call Right**");

- Under section 4.1(a), if Abitibi did not exercise its Call Right by December 31, 2009, Abitibi had the option, until December 31, 2010, to sell the entire Augusta Partnership, including the portion owned by Woodbridge (the "**Abitibi Forced Sale**"); and

- Under section 4.1(c), if the Abitibi Forced Sale did not occur by December 31, 2010, Woodbridge had the option, until December 31, 2011, to sell the entire Augusta Partnership, including the portion owned by Abitibi (the "**Woodbridge Forced Sale**").

18. Upon an Abitibi Forced Sale or a Woodbridge Forced Sale, Woodbridge was entitled to the first approximately US$215 million of sale proceeds (the "**Forced Sale Amount**") and Abitibi would only be entitled to the balance of the sale proceeds, if any.

Sale of the 2.5% Interest

19. On July 1, 2004, Woodbridge sold a 2.5% interest in the Augusta Partnership to Abitibi, such that the Woodbridge Interest was reduced to 47.5% and Abitibi held the remaining 52.5%.

20. The Call Agreement was amended at that time (see Tab A-8).

21. However, the Partnership Agreement was not amended at that time, such that Woodbridge continued to enjoy all of the rights of a 50% partner.

Rejection of the Call Agreement and the Guarantee

22. On April 16, 2009, certain Abitibi companies filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

23. On April 17, 2009, certain Abitibi companies filed for and obtained protection from their creditors under the CCAA pursuant to the Initial Order.

24. On May 5, 2009, Woodbridge announced to Abitibi its decision under the Partnership Agreement to withhold its consent to any distribution of revenues from the Augusta Partnership to the partners. As a result, there were no distributions between May 2009 and the eventual sale of the Woodbridge Interest in January 2011, and a sum of approximately US$40 million accumulated in the Partnership.

25. On June 15, 2009, Abitibi filed a motion in the Chapter 11 proceedings seeking authority to reject the Call Agreement.

26. On October 27, 2009, the U.S. Bankruptcy Court issued an Order confirming the rejection by Abitibi of the Call Agreement (Tab B-1).

27. On December 24, 2009, Abitibi repudiated the Guarantee pursuant to the CCAA proceedings.

Woodbridge Proof of Claim and Revision by Monitor

28. On November 24 and 25, 2009, Woodbridge filed proofs of claim in the U.S. proceedings and in the CCAA proceedings asserting a claim for damages for rejection of the Call Agreement in the amount of US$213,750,000 less the value of the Woodbridge Interest (Tabs B-2 and B-3).

29. In Canada, the Monitor revised the Woodbridge Claim and reduced it to US$9 million (Tab B-4).

30. Woodbridge disputed the notice of revision (Tab B-5) and the matter was referred to the Claims Officer for determination.

Decision of the Claims Officer and Appeal

31. The hearing before the Claims Officer with respect to the Woodbridge Claim took place on September 17, 2010.

32. At the hearing, Woodbridge valued the Claim at US$110 million.

33. By Determination dated December 13, 2010 the Claims Officer further revised the Woodbridge Claim to US$24 million (Tab B-6).

34. Woodbridge has now filed a motion in appeal and revision of the Determination (Tab B-7).

III. STANDARD OF REVIEW

35. The standard of review in an appeal of a Claims Officer's determination, in circumstances where the Claims Officer and the parties have had the benefit of an adversarial proceeding, is that of an appellate court as described by the Supreme Court of Canada in the leading case of *Housen* v. *Nikolaisen*[1]. In this context, the role of the reviewing court is not to conduct a trial *de novo*[2].

36. Morawetz J. said the following in the *Tiercon Industries* case, which judgment was confirmed in appeal:

> *[11] The Claims Procedure Order provides that a party may appeal a final determination of the Claims Officer.*
>
> *[12] The appropriate standard of review for the appeal of the decision of the Claims Officer is as follows:*
>
>> *(a) With respect to pure questions of law, the standard of review is correctness.*
>>
>> *(b) With respect to questions of fact, the standard of review is <u>that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error.</u>*
>>
>> *(c) With respect to questions of mixed fact and law, the standard of review, is that, in the absence of an "extricable" legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with.*
>>
>> *(d) With respect to the assessment of damages, a damage assessment should not be overturned unless it is based upon a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages.*
>>
>> *(e) With respect to the appeal of the cost award, a high degree of deference is accorded to discretionary decisions with respect to an award of costs assessed following a hearing and the decision should be respected unless the decision maker*

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[1] *Housen* v. *Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.).

[2] See *General Motors Corporation* v. *Tiercon Industries Inc.*, 2009 CanLII 72341 (On. S.C.), paras. 11, 12 and 69, confirmed at 2010 ONCA 666 (On. C.A.); *Big Sky Farms Inc., Re*, 2010 SKQB 255, paras. 8 to 10; *1587930 Ontario Inc., Re*, 2006 CanLII 34422 (ON S.C.), paras. 4 to 7, *Triton Tubular Components Corp. v. Steelcase Inc.*, 2005 CanLII 33299 (On. S.C.), paras. 13 to 16; *Pine Valley Mining Corporation (Re)*, 2008 BCSC 356, paras. 8 to 13; Canadian Encyclopedic Digest - Companies' Creditors Arrangement Act - XVII Claims of Creditors- 11 Adjudication of Claims - (b) Proceedings before Claims Officer, paras. 939 and 940; cf *Canadian Airlines Corp.*, 2001 ABQB 146, paras. 14 to 17.

> *failed to consider relevant factors, reached an unreasonable conclusion, made an error in principle or if the costs award is plainly wrong.*
>
> *[…]*
>
> *[69] The role of the court on this appeal is to review the decision of the Claims Officer. It is not to conduct a trial de novo. In my view, there was ample evidence to support to support the findings of the Claims Officer and he was correct in his application of the law.* [Emphasis added]

37. It appears that the only condition required to exclude a trial *de novo* is that there was an adversarial proceeding before the Claims Officer, as appears from the *Triton* case:

> *[13] Counsel for Steelcase, Ms. Corne, submitted that an appeal court should conduct a hearing de novo and substitute its own decision for that of the Claims Officer.*
>
> *[14] It should be noted that the proceeding before the Claims Officer was not the usual summary proceeding. Rather, at the urging of Steelcase, it was a full blown trial-like proceeding. There were pleadings, document production, discoveries, full viva voce testimony with cross-examinations, demonstrative evidence, expert testimony and oral and written submissions throughout. By seeking a hearing de novo on this appeal, Steelcase is effectively requesting a second trial. If the threshold for permitting appeals to be heard on a de novo basis is set too low, it will encourage such reviews and thereby add significantly to the costs and length of proceedings which are inconsistent with the fundamental purposes of the CCAA and the Commercial List practice.*
>
> *[15] The appeal in this matter is similar to an appeal from a reference. In this case, the Claims Officer and the parties had the benefit of a thorough adversarial proceeding. The test to be applied in reviewing the Claims Officer's factual findings, in such circumstances, should be the usual standard of review in appellate proceedings whereby substantial deference is accorded to the findings of fact made by the trier of first instance. […]* [Emphasis added][3]

38. In *1587930 Ontario Inc.*, the Claims Officer received written evidence and written submissions only and made his determination on that basis, without any oral evidence despite the request of one party to adduce such evidence. In appeal, the appellant argued that there should be a *de novo* trial because there was no full-blown hearing like the one in the *Triton* case. This argument was rejected by the Ontario Superior Court which decided that there had been an adversarial proceeding and

[3] *Triton Tubular Components Corp. v. Steelcase Inc.*, 2005 CanLII 33299 (On. S.C.), paras. 13 to 16.

that the threshold for permitting the appeal to be heard on a *de novo* basis had not been met[4].

39. In the present matter, there is no doubt that the Claims Officer and the parties had the benefit of a thorough adversarial proceeding: affidavit evidence with document production including expert reports, viva voce testimony with cross-examinations at the hearing and oral and written submissions. Therefore, we submit that the appeal of the Claims Officer's Determination in the Quebec Superior Court should not be conducted on a *de novo* basis but rather by applying the standards of review of an appellate court.

40. Therefore, with respect to questions of fact, which are the sole basis for this appeal, Woodbridge is required to establish that the Claims Officer made palpable and overriding errors.

41. We submit that it is not possible for Woodbridge to establish that the Claims Officer made palpable and overriding errors with respect to questions of fact.

42. Indeed, Woodbridge failed to put in front of this Honourable Court, sitting in appeal, the evidence made during the hearing in front of the Claims Officer on September 17, 2010, i.g., the stenographic notes of the witnesses examined during this hearing: Gregory Dart from Woodbridge, Micheal Pun from RBC Dominion (for Woodbridge), Alex Morrison from Ernst & Young (for the Monitor) and Pierre Rougeau from Abitibi.

43. In this context, the jurisprudence of the Quebec Court of Appeal is clear that if an appellant fails to put in front of the appellate court all of the evidentiary record that was in front of the first judge, the factual determinations and conclusions of the first judge cannot be reviewed and the appellate court must take for granted the facts as reported by the first judge in his judgment:

- *Québec (Sous-ministre du Revenu)* v. *9087-3118 Québec inc.*, 2010 QCCA 1470 :

> *[14] Les parties, en particulier l'intimée, n'ont pas jugé utile de transcrire la preuve faite devant la Cour supérieure où quatre personnes ont témoigné. Nous n'avons même pas devant nous une copie de toutes les pièces produites. Il s'ensuit que les **déterminations et conclusions factuelles du premier juge ne peuvent être remises en cause. Les seuls faits à retenir sont ceux mentionnés au jugement de la Cour supérieure** et les nombreux autres allégués par l'intimée dans son mémoire doivent être ignorés.* [Emphasis added]

- *3979229 Canada inc.* v. *Commission des normes du travail*, 2010 QCCA 1412:

[4] *1587930 Ontario Inc., Re*, 2006 CanLII 34422 (ON S.C.), paras. 4 to 7 and 19 to 22.

> *[12] Notons tout d'abord que <u>le dossier d'appel **ne reproduit qu'une portion de la preuve** documentaire **et testimoniale présentée au juge de première instance.**</u> L'appelante s'est contentée de quelques pièces, ainsi que d'extraits choisis des témoignages, l'intimée a fait de même, avec des extraits à peine plus substantiels, sauf quant à M. Sam Moutsios dont le témoignage, qui s'avère crucial, est reproduit intégralement. <u>N'ayant pas en main ce qui lui permettrait de constater, le cas échéant, les erreurs factuelles qu'on reproche au juge de première instance, **la Cour s'en remettra aux déterminations de celui-ci à cet égard.**</u>* [Emphasis added][5]

- *Centre commercial Innovation inc.* v. *Lafleur*, 2009 QCCA 845 :

> *[8] La conclusion du juge du procès prend appui sur la preuve documentaire, mais surtout sur la <u>preuve testimoniale</u>. Or, <u>une grande partie de cette preuve ne nous a pas été fournie</u>, <u>**ce qui ne nous permet pas de décider du bien-fondé des déterminations factuelles attaquées**</u> : Pateras c. M.B., [1986] R.D.J. 441 (C.A.), 443. <u>**Dans ces circonstances, l'on ne saurait conclure à une erreur manifeste et déterminante du juge du procès justifiant notre intervention**</u> : F.H. c. McDougall, [2008] 3 R.C.S. 41, 63.*

44. By choosing not to have the hearing in front of the Claims Officer on September 17, 2010 recorded by an official stenographer, Woodbridge took the chance that the factual determinations and conclusions of the Claims Officer could not be reviewed in case the judgment was favourable to it but took also the opposite risk in case the judgment was not favourable to it. In this appeal, Woodbridge must support the consequences of its choice.

45. Therefore, Woodbridge's appeal should be rejected on the sole basis that it failed to put in front of this Court the evidence made during the hearing in front of the Claims Officer, thus rendering it impossible for this Court to find that the Claims Officer made palpable and overriding errors with respect to questions of fact, which are the only issues in this appeal.

46. Finally, in order to avoid any issue at the preliminary stages of this appeal, we have agreed with counsel for Woodbridge and counsel for the Monitor that we would each ensure that the affiants and the Monitor, all of whom testified before the Claims Officer, would be present at the hearing in Superior Court and would be available to testify if this Court concludes that Woodbridge has the right to proceed on a *de novo*

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[5] See also *Pateras* v. *M.B.*, [1986] R.D.J. 441 (C.A.); *Girard* v. *Syndicat de l'enseignement de Portneuf*, 2006 QCCA 556, paras. 32 to 35; *Entreprises RER inc.* v. *Banque HSBC Canada*, 2006 QCCA 678, para. 17; *Consoltex inc.* v. *155891 Canada inc.*, 2006 QCCA 1347, para. 36; *Royal Lepage Commercial inc.* c. *109650 Canada Ltd.*, 2007 QCCA 915, paras. 27 à 29; *9046-6533 Québec inc.* v. *Deschamps*, 2010 QCCA 866, para. 4.

basis, the whole without prejudice to our arguments exposed in the current contestation.

IV. REVIEW OF THE DETERMINATION BY THE CLAIMS OFFICER

47. Abitibi submits that there are no errors in the Determination by the Claims Officer, let alone any errors of fact that raise to the standard of "palpable and overriding".

48. The issues can be divided into three big headings:

1. The general formula to evaluate the Woodbridge Claim;

2. The evaluation of the amount that Woodbridge would have received under the Call Agreement; and

3. The value of the Woodbridge Interest without the Call Agreement.

A. General Formula as to the Valuation of the Woodbridge Claim

49. All of the parties agreed on the general formula:

> *"[36] All the parties agree on the formula for determining the damages incurred by Woodridge as a result of the rejection of the Call Order, namely:*
>
> *The difference between:*
>
> *1. The sale proceeds resulting from a Forced Sale of the Augusta Partnership pursuant to the Call Agreement (up to approximately US$215M) and;*
>
> *2. The value of Woodbridge's 47.5% interest in the Augusta Partnership without a Call Agreement in place.*
>
> *[37] The parties also agree that the date for evaluating the Woodbridge claim is the US filing date of April 16, 2009."*

B. Likely Proceeds under the Call Agreement

1. <u>Woodbridge's Position</u>

50. Woodbridge's position at the hearing and on the appeal is that a purchaser would pay between US$145 million and US$180 million for the Augusta Mill on a forced sale under the Call Agreement. Woodbridge relied on a Value Assessment Report prepared by RBC Capital Markets (Tab C-5).

51. RBC assumed that it would be a sale by Woodbridge in June 2011, following a 6-month sale process that would start January 1, 2011 when Woodbridge had the right to sell the Augusta Mill. Ultimately, RBC also considered the scenario where

the sale would take place on January 1, 2010 or June 30, 2010 and it concluded that the value was essentially the same regardless of the date of the sale.

52. For the purposes of its valuation, RBC used a discounted cash flow approach and established the high and the low end of its evaluation using two different scenarios:

(i) Partnership Continuation Forecast:

The Partnership Continuation Forecast established the high end of the range. It was based on the assumption that the operations of the Augusta Mill would continue as is notwithstanding the sale. Effectively, this forecast assesses the value of the Augusta Mill to Abitibi.

(ii) Standalone Forecast:

The Standalone Forecast is based on the assumption that there is a third party purchaser. The assumptions underlying the Standalone Forecast were of fundamental importance before the Claims Officer. The key assumptions can be summarized as follows:

(1) RBC accepted that the Augusta Mill would initially have no customers, but assumed that the Augusta Mill could find customers for all of its production within 12 months by offering a $30.00 per tonne discount for 12 months;

(2) RBC recognized that the Augusta Mill currently has no sales force and estimated that a sales force would cost the Augusta Mill 2% of its overall revenue; and

(3) RBC assumed that no other adjustments were required to the expected cash flow for any efficiencies or accelerated payments from which the Augusta Mill benefitted by being in the Abitibi group.

53. RBC also performed a precedent transaction analysis which, it concluded, confirmed the range of the values under the discounted cash flow.

2. **Monitor's Position**

54. The Monitor's analysis (Tab D-2 and D-3) started with the assumption that the sale would take place on January 1, 2010, because it would be in Abitibi's interest to sell the Augusta Mill at the earliest possible date given that Woodbridge was blocking the cash flow.

55. Moreover, because of declining demand, excess production capacity and declining price, the Monitor assumed that the Augusta Mill would only be interesting to a newsprint producer who could move production from an existing less efficient mill to the Augusta Mill, or to a purchaser who might be interested in converting the Augusta Mill from a newsprint mill to a mill producing higher value paper

products. In the first instance, the purchaser would pay a price based on the potential cost savings less the closing costs of its inefficient mill, and in the second scenario, the purchaser would take into account the additional capital expenditure that would be required to carry out the conversion.

56. Based on this analysis, the Monitor concluded that a reasonable valuation of the Augusta Mill was in the US$90 million range. This valuation included a US$10 million provision for severance and termination costs, which the Monitor characterized as conservative.

57. The Monitor also pointed to the proceeds received by Abitibi on the sale of other closed mills, as well as the sale of White Birch, a paper company, to show values well below the figure of US$90 million.

3. Abitibi's Position

58. Abitibi essentially supported the Monitor's position and produced an affidavit by Pierre Rougeau, who was at the time the Executive Vice President, Operations and Sales of AbitibiBowater Inc. He was cross-examined before the Claims Officer.

59. Rougeau's affidavit showed that it would have been in the best interest of Abitibi to sell the Augusta Mill as quickly as possible after January 1, 2010, principally because the Sale Agreement required Abitibi to buy from the Augusta Mill to the detriment of other Abitibi mills and because Woodbridge was blocking the distribution of the cash. He also testified that there was excess capacity in the system in January 2010 and explained that since then, Abitibi had closed lower cost mills at Coosa Pines and Thorold.

60. Rougeau's affidavit also emphasized the following elements:

- The Augusta Mill would be sold with no customers and it would have difficulty obtaining new customers because of excess capacity and declining demand and because of the fibre quality at the Augusta Mill, which is not suited for all markets or customers;
- Payment by these new customers will not be made as quickly as Abitibi was required to pay;
- Commissions paid to the new sales force will be higher than the commissions paid to Abitibi;
- Freight will be higher without the Abitibi order booking system; and
- The Augusta Mill will no longer benefit from Abitibi purchasing power.

61. Finally, Rougeau testified as to the situation with the Boise mill in De Ridder, Louisiana, where, until February 2009, Abitibi purchased all of the newsprint produced. After that arrangement was terminated, it took Boise 18 months to

generate sufficient customers for one of the two machines in DeRidder, but it has not yet found sufficient customers to justify opening the second machine.

4. Determination

62. In his Determination, the Claims Officer first concluded that the appropriate date for the sale would be early 2010:

> *"[55] It is my view that, as at April 16, 2009, one would foresee an Abitibi Forced Sale of the Augusta Mill in the early months of 2010 and that it would be sold as a Standalone Operation."*

63. He went on to conclude that the Monitor's approach to value was the more realistic of the two:

> *"[56] I consider Woodbridge's assumption of acquiring a customer-base within 12 months, by giving discounts and turning a profit and the expectation of a rise in the prise of newsprint in 2013-2014 very speculative and overly optimistic.*
>
> ...
>
> *[58] In my view the assessment by the Monitor is a more practical one based on the actual situation, on the ground, as it were, relying on experience in the newsprint industry, taking into account the current situation and the changes, if any, which one could (in April 2009) anticipate for early 2010. I find that the approach of Woodbridge, although well presented is, nonetheless a more theoretical one having the inherent weaknesses of forecasting future events in the economic sphere in a troubled industry."*

64. The Claims Officer did find, however, that the Monitor had not given sufficient weight to the particular interest of Abitibi in acquiring the Mill or the protective interest of Woodbridge in insuring that the price was sufficiently high. The Claims Officer therefore added US$10 million to the US$90 million valuation set by the Monitor to come to a total of US$100 million.

5. Analysis

(a) Date

65. The date issue seems to be moot in that Woodbridge takes the position that the value is essentially the same, regardless of the date of the hypothetical sale.

66. However, and to the extent that the Court concludes that the issue is not moot, Abitibi submits that the Claims Officer was clearly correct in concluding that "the Abitibi-Bowater Group would, at the earliest opportunity (January 1, 2010) proceed with a Forced Sale of the Augusta Partnership" (para. 52).

67. The key factors that the Claims Officer invoked are:

(i) Woodbridge's refusal to consent to the distribution to any of the profits from the operation of the Augusta Mill; and

(ii) the prevailing situation was one of cutbacks in newsprint production in the closing of entire mills.

68. In those circumstances as Rougeau pointed out, the continued operation of the Augusta Mill without any distribution of the cash would mean that the Augusta Mill was being operated for the sole benefit of Woodbridge at a time when Abitibi was closing lower cost mills. This clearly makes no economic sense. The Claims Officer was correct in concluding that the sale would have taken place in early 2010.

(b) <u>The Assumptions Underlying RBC's Standalone Forecast</u>

69. The Claims Officer was also correct in rejecting the assumptions underlying RBC's Standalone Forecast, the most important of which was that the Augusta Mill would start the year with no customers but would resume full operations within 12 months by offering a $30 per tonne discount for 12 months.

70. The only evidence in favour of that assumption was Mr. Pun's hearsay evidence that senior management of the Augusta Mill, who were Abitibi employees, had confirmed the reasonableness of the assumptions. Given that the only customer of the Augusta Mill is Abitibi, which is bound to it by a long-term contract to buy 100% of the output, it is clear that the employees of Augusta Mill have no experience in finding customers for their product.

71. Moreover, this evidence was clearly contradicted by the evidence of Rougeau, who was then the Executive Vice President, Operations and Sales of AbitibiBowater Inc., whom the Claims Officer characterized as the only witness with experience in the day-to-day operation of newsprint mills (para. 51). He described the difficulties that a standalone Augusta Mill would have in finding customers, including overcapacity in the industry and declining demand, as well as issues with the quality of the Augusta Mill's product, which would not be suitable for all customers or all markets.

72. Moreover, he testified as to the difficulties encountered by Boise in its De Ridder mill when it terminated the sales arrangement with Abitibi. Rougeau testified that after 18 months of selling at reduced prices, De Ridder only had enough customers to run one of its two paper machines and that the other sat idle.

73. It is also significant to note that RBC's conclusion was that the Augusta Mill was worth US$145 million to US$180 million (the upper end of the range was ever higher if the sale was earlier) on a forced sale under the Call Agreement, but that 100% of the Partnership without the Call Agreement was worth only US$135 million to US$180 million (see Tab E-3). In other words, the Mill was worth more if the Call Agreement was triggered and the Sales Agreement with Abitibi terminated than if the Call Agreement was terminated and the relationship with Abitibi forcing Abitibi

to purchase all of the Mill's output remained in place. This cannot make sense even with a difference in valuation dates.

74. The Claims Officer was clearly correct in rejecting the RBC Value Assessment Report in favour of the Monitor's analysis.

(c) Abitibi's Interest

75. Finally, the Claims Officer added US$10 million to the Monitor's valuation in order to take into account Abitibi's interest in purchasing the Augusta Mill and Woodbridge's interest in ensuring that the Mill not be sold at a too low a price.

76. Even though Abitibi was ultimately the purchaser of the Woodbridge Interest in January 2011 and Rougeau testified that Abitibi would have been interested had the Call mechanism been triggered, it is far from clear that, looking at the situation in April 2009, Abitibi would be a viable purchaser. At that time, Abitibi had essentially no access to financing and faced creditor opposition over relatively minor DIP financing.

77. Moreover, even if we accept that Abitibi would be willing to pay a premium for the mill, there is no reason to conclude that it would overpay dramatically for it. The Claims Officer's assessment of US$10 million for the value of that premium was generous to Woodbridge in the circumstances.

C. Valuation of the Woodbridge Interest

1. Position of the Parties

78. The positions of the parties with respect to the valuation of the Woodbridge Interest are not that far apart.

79. RBC performed discounted cash flow analyses and concluded that the value for 100% of the Partnership was in the range of US$135 million to US$180 million. The Monitor, on the other hand, started with the Blackstone valuation of US$170 million. This is towards the higher end of the range determined by RBC.

80. As the next step, both RBC and the Monitor take 47.5% of the value, which gives RBC a range of US$64 million to US$86 million. Applying the same 47.5%, the Monitor concludes that the Woodbridge Interest is worth US$81 million.

81. Where the parties diverge is that RBC applied a valuation adjustment of 30% because:

(i) Woodbridge has a minority interest in the Partnership;

(ii) the Call Agreement is not operative; and

(iii) the significant uncertainty regarding the financial condition and prospects of Abitibi at the time of Assessment Date (page 27 of the RBC Report).

82. The Monitor did not provide for any such adjustment and therefore concluded the value was US$81 million.

83. The Claims Officer for the most part accepted the Monitor's analysis that the discount was not required, principally because the value had been calculated on a discounted cash flow basis and the cash flow is not affected by the rejection of the Call Agreement or the minority position. The Claims Officer did conclude that the Call Agreement had some value for Woodbridge and therefore granted a discount of US$5 million.

2. <u>Analysis</u>

84. Abitibi agrees with the Claims Officer that reasons put forward by RBC to justify a 30% discount are not sufficient. Although the Woodbridge interest is a 47.5% interest, the Partnership Agreement gives Woodbridge equal rights with Abitibi in terms of, in particular, authorizing the distribution of cash profits. The Partnership Agreement was not amended when Abitibi acquired the additional 2.5% interest, so Woodbridge has the rights of a 50% partner.

85. Moreover, it seems inconsistent for RBC to apply a 30% discount at least in part on the basis of Abitibi's significant financial difficulty in April 2009, while at the same time increasing the value of the Call Agreement on the basis of Abitibi being a potential purchaser of the Mill in January 2010.

86. In the circumstances, the discount of US$5 million would appear to be more than sufficient.

V. EVIDENCE OF SUBSEQUENT SALE

87. Woodbridge filed a supplementary affidavit of Gregory J. Dart dated February 10, 2011 in which he produced the Share Purchase Agreement between Abitibi and Woodbridge for the purchase of the Woodbridge Interest.

88. The value of the consideration for this sale totaled approximately US$120 million, including US$17 million which represented Woodbridge's 47.5% share of the Partnership cash and liquid assets which the Partnership had not been distributing.

89. This is a sale in January 2011 which is somewhat difficult to compare to a valuation in April 2009. The economy has improved and Abitibi has emerged from bankruptcy protection. However, the sale price for the Woodbridge Interest is certainly high enough to suggest that the Monitor's valuation was closer than RBC's and that, if anything, the Claims Officer's evaluation, which includes a U.S.$5 million discount, is generous to Woodbridge.

WHEREFORE, MAY THIS COURT:

[1] **DISMISS** the Motion in Appeal and Revision of the Claims Officer's Determination dated December 13, 2010.

WITH COSTS.

Montreal, February 18, 2011

Stikeman Elliott LLP

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