SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **SEPTEMBER 8, 2010**

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

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

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Debtors / Petitioners

And
ERNST & YOUNG INC.
Monitor

And
THE ROYAL TRUST COMPANY
Mise en cause

JUDGMENT ON RE-AMENDED MOTION FOR DIRECTIONS ON THE IDENTITY OF THE PERSONS WHOSE BENEFITS UNDER THE BOWATER SUPPLEMENTAL EXECUTIVE RETIREMENT PLANS WERE SECURED BY A LETTER OF CREDIT (#677)

JG1793

INTRODUCTION

[1] On April 17, 2009, the Court issued an order (as subsequently amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "***CCAA***") in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries thereof (collectively, the "**Abitibi Petitioners**"), (ii) Bowater Canadian Holdings Inc. and affiliates and subsidiaries thereof (collectively, the "**Bowater Petitioners**") and (iii) certain partnerships.

[2] At that time, one of the Bowater Petitioners, Bowater Canadian Forest Products Inc. ("**BCFPI**"), was the sponsor of three Supplemental Executive Retirement Plans (the "**SERPs**"). The SERPs' purpose was to give supplemental retirement benefits to a limited number of executives in addition to the benefits payable from any registered pension plan of BCFPI. The SERPs provided these post-retirement benefits to various members, be they eligible employees or beneficiaries of deceased participants.

[3] Pursuant to a trust agreement (the "**Trust Agreement**"), the benefits payable under the SERPs were partially secured by a letter of credit held by The Royal Trust Company ("**RTC**"), in trust for the eligible members.

[4] On May 1, 2009, as a result of their insolvent status and the issuance of the Initial Order, the Petitioners advised RTC that they had suspended the payments of all SERPs benefits and would not renew the letter of credit securing those[1].

[5] On May 26, 2009, RTC replied that it would call for payment on the letter of credit that it held[2]. It did so on that day and thus received an amount of some $23,065,000[3].

[6] When this letter of credit was called for payment, there were, from a practical standpoint, five different categories of SERPs members:

a) 48 Canadian resident members who had retired before December 31, 2003;

b) 6 Canadian resident members who had retired after December 31, 2003 but before May 26, 2009;

c) 3 U.S. resident members who had retired before December 31, 2003;

d) 11 members who were still active employees of BCFPI; and

e) 6 members who were deferred vested members, that is, terminated employees who had not yet begun to receive their pension benefits under the SERPs.

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1 Exhibit R-17.
2 Exhibit R-18.
3 Exhibit R-7.

[7] Of these five categories, only the first three were being paid pension benefits under the SERPs when BCFPI advised RTC that it was suspending all SERPs payments.

[8] There is a dispute as to which members are entitled to share in the proceeds of this letter of credit and as to how the proceeds are to be distributed. By their Motion[4], the Petitioners seek a declaration that:

a) the only persons entitled to continue to receive monthly SERPs payments from the proceeds of the letter of credit held by RTC are:

    i) The Canadian resident members of the SERPs who retired before December 31, 2003 (listed in Schedule A to the Motion);

    ii) The Canadian resident members of the SERPs who retired after December 31, 2003 but before May 26, 2009, including Mr. Donald Campbell (listed in Schedule B to the Motion), but only on the value of their SERPs benefits accrued up to December 31, 2003; and

    iii) The U.S. resident members of the SERPs, including Mr. Jerry Soderberg (listed in Schedule C to the Motion);

b) RTC should pay the full monthly SERPs payments to the persons entitled to receive such from the proceeds of the letter of credit until they are exhausted in accordance with Schedule F to the Motion or until further order of the Court.

[9] In short, the Petitioners consider that the members who had not yet begun to receive pension benefits under the SERPs on May 26, 2009, namely the active employees (listed in Schedule D to the Motion) and the deferred vested members (listed in Schedule E to the Motion), should not be entitled to share in the proceeds of the letter of credit.

[10] The Petitioners so conclude based upon the wording of the relevant sections of the SERPs, their interpretation and application of their terms, and the letters and notices they sent over the years to the SERPs members in relation to the meaning and intent of the protection afforded by this letter of credit.

[11] Of course, the members listed in Schedules A, B and C to the Motion support the conclusions sought. Without surprise, the members listed in Schedules D and E, that the Petitioners consider must be excluded from any sharing, contest the Petitioners' position. They dispute the interpretation of the relevant sections of the SERPs proposed by the Petitioners and insist that no resolution of BCFPI Board of

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4 Re-Amended Motion for Directions on the Identity of the Persons Whose Benefits Under the Bowater Supplemental Executive Retirement Plans Were Secured by a Letter of Credit dated July 2, 2010 (the "**Motion**").

Directors ever approved the purported changes made to the protection given to them by the letter of credit.

[12] Through their Motion, the Petitioners also ask the Court to authorize BCFPI to amend the Trust Agreement in accordance with Amendment No 1 (the "**Amended Trust Agreement**")[5]. Amongst others, the Petitioners want to dissociate BCFPI from all of its obligations under the Trust Agreement and to create a committee of beneficiaries who would take over from BCFPI the power to give directions to RTC and to make all decisions regarding the funds still to be managed.

[13] RTC disagrees with most of the amendments proposed to the Trust Agreement. It does not want to dissociate BCFPI from the Trust Agreement and to be forced to deal from now on with a committee of beneficiaries, on terms and conditions that it finds unacceptable.

THE ISSUES

[14] Two questions are at issue here: 1) Are the future SERPs benefits of the active employees and the deferred vested employees covered by the letter of credit? 2) Should the Court incorporate the changes to the Trust Agreement proposed by the Petitioners?

[15] To analyse the two questions, a review of the applicable SERPs, the letter of credit, the relevant changes made over the years to the SERPs and the most current actuarial valuations of the SERPs is necessary at the outset.

THE SERPs

[16] Bowater Pulp and Paper Canada Inc. ("**BPPC**"), formerly Avenor Inc., implemented the first of the SERPs effective July 16, 1993 (the "**1993 SERP**")[6]. On July 1, 1995, this 1993 SERP was restated into three SERPs (collectively, the "**1995 SERPs**")[7]:

a) The Supplemental Retirement Benefit Plan for Grade 11 and under Employees of Bowater Pulp and Paper Canada Inc.;

b) The Supplemental Retirement Benefit Plan for Grade 12 and under Employees of Bowater Pulp and Paper Canada Inc.; and

c) The Senior Executive Retirement Plan.

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5 Exhibit R-29.
6 Exhibit R-1.
7 Exhibit R-2.

[17] The rules of the 1995 SERPs were afterwards restated in 1997 (collectively, the "**1997 SERPs**")[8].

[18] Finally, effective January 1, 2002, BPPC and BCFPI merged and continued their operations under the name of BCFPI. On the merger date, BCFPI became the sponsor of the 1997 SERPs which were renamed as follows (collectively, the "**2003 SERPs**")[9]:

a) The Supplemental Retirement Benefit Plan for Grade 27 and under Employees of Bowater Canadian Forest Products Inc.;

b) The Supplemental Retirement Benefit Plan for Grade 28 and under Employees of Bowater Canadian Forest Products Inc.; and

c) The Senior Executive Retirement Plan of Bowater Canadian Forest Products Inc.

[19] Throughout the years, each of the 1995 SERPs, the 1997 SERPs and the 2003 SERPs have included the following provisions dealing with BPPC or BCFPI contributions and the letter of credit, the SERPs' interpretation and administration, and BPPC or BCFPI authority to amend the SERPs:

> **SECTION 4- CONTRIBUTIONS**
>
> 4.01 No contribution shall be required from a Participant in respect of benefits payable under this Supplemental Plan.
>
> 4.02 The benefits payable under this Supplemental Plan shall, unless decided otherwise by Avenor Inc. at its entire discretion, be payable by the Corporation out of its operating funds as they become due and the Corporation shall be under no obligation whatsoever to pay contributions in advance to fund such benefits.
>
> 4.03 Notwithstanding Subsection 4.02, the Corporation will arrange for the payment of benefits provided under the Supplemental Plan to be secured through a letter of credit from a financial institution.
>
> **13.08 INTERPRETATION**
>
> a) This provision of this Supplemental Plan shall be interpreted in accordance with the laws of the Province of Quebec and shall be binding upon and enure to the benefit of the Corporation and its successors and assigns.
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> b) Headings wherever used herein are for reference purposes only, and do not limit or extend the meaning of any of the provisions of this Supplemental Plan.

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8 Exhibit R-3.
9 Exhibit R-4.

SECTION 14- ADMINISTRATION

14.01 The Corporation shall decide on all matters relating to the interpretation, administration and application of this Supplemental Plan, consistently with the text of the Supplemental Plan.

14.02 To facilitate any action required to be taken by the Corporation under the Supplemental Plan, the Board of Directors of the Corporation may, at its discretion, delegate the responsibility for administration of the Supplemental Plan to any person(s) appointed specifically for this purpose to act on behalf of the Corporation.

SECTION 15- FUTURE OF THE PLAN

15.01 Notwithstanding anything to the contrary herein, the Corporation reserves the right to make amendments to this Supplemental Plan. Any such amendment shall be communicated in writing by the Corporation to the Participants indicating the effective date of such amendment which, subject to Subsection 15.02 below, shall not precede the date that such communication is deemed to have been received by the Participants pursuant to Subsection 13.07 hereunder. Furthermore, the Corporation will not have the right to make such amendment only in respect of one or more Participants but such amendment shall have to be made in respect of all Participants, excluding those Participants who have already commenced to receive benefits hereunder.

15.02 When an amendment is made to this Supplemental Plan pursuant to Subsection 15.01 above as a result of a corresponding amendment to the Registered Plan, such amendment shall take effect as of the same effective date as applicable in respect of the corresponding amendment to the Registered Plan.

15.03 No amendment made to this Supplemental Plan by the Corporation pursuant to this Section 15 can have the effect of reducing the amount or value of the benefits accrued by the Participants under this Supplemental Plan prior to the effective date of such amendment.

(Emphasis added)

THE LETTER OF CREDIT

[20] As appears from this section 4.02, BPPC or BCFPI had the obligation to pay the benefits under the SERPs out of their operating funds, as the benefits became due. There were no contributions by the participants (section 4.01) and BPPC or BCFPI were under no obligation to pay contributions in advance to fund the benefits (section 4.02).

[21] Pursuant to section 4.03, BPPC or BCFPI were required, however, to establish a trust to hold documentary credits or letters of guarantee or investments to secure the payment of the benefits under the SERPs to the members.

[22] On August 14, 1996, BPPC entered into the Trust Agreement with Montreal Trust Company ("MTC") so that MTC would hold a letter of credit (initially in the amount of $30,000,000) to secure the payment of the benefits under the SERPs[10].

[23] The Board of Directors' resolution approving the Trust Agreement referred to "an amount sufficient to cover the current level of liabilities of the Corporation under the SERPs" and to the fact that the letter of guarantee would be drawable "in the event the Corporation does not meet payment obligations to participants under the SERPs"[11].

[24] The Trust Agreement provided that MTC was to hold the letter of credit until such time as the Corporation defaulted on the payment of the benefits under the SERPs. MTC was then to call the letter of credit, hold the proceeds in trust for all eligible members of the SERPs, and distribute the proceeds to them to the extent that they were sufficient for that purpose.

[25] MTC was bound by the terms of the SERPs and required to perform such duties imposed upon it pursuant to the Trust Agreement and each related SERPs. MTC was entitled to act on the instructions or written directions of the Corporation.

[26] Effective January 1, 2003, RTC replaced MTC as trustee of the Trust Agreement holding the letter of credit[12].

[27] The letter of credit was renewed annually at various face amounts determined by BCFPI until it was called for payment in May 2009, triggering the receipt by RTC of the amount of approximately $23,065,000[13].

[28] The rules of the Income Tax Act (Canada) (the "**ITA**"), applicable to "Retirement Compensation Arrangements", required RTC to then pay a refundable tax to the Canada Revenue Agency ("**CRA**") of 50% of the amount it received upon calling the letter of credit. In addition, the ITA requires that 50% of any income (interest, dividend or capital gain) realized by RTC on the assets held under the Trust Agreement be paid to the CRA as a refundable tax. These amounts will be refunded by the CRA after the end of each calendar year during which RTC pays SERPs benefits to the eligible SERPs members.

[29] The balance of the proceeds is presently held by RTC in 30-day Government of Canada Treasury Bills.

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[10] Exhibit R-5.
[11] Exhibit R-5.
[12] Exhibit R-6.
[13] Exhibit R-7.

THE CHANGES TO THE 2003 SERPS

[30] Since 2003, BCFPI issued three letters and notices to the members to advise them of purported changes to the SERPs that affected which members' benefits were secured by the letter of credit.

[31] On November 24, 2003, BCFPI first sent a letter to the then 38 active (i.e. not retired) SERPs members[14]. The last paragraph of the letter stated that only the benefits of retired SERPs members and only SERPs benefits accrued up to December 31, 2003 would be secured by a letter of credit from then on:

> "Please be advised that SERP benefits for service from January 1st, 2004 for all Canadian operations will not be secured by way of a letter of credit. DB SERP benefits for service up to December 31st, 2003 will continue to be secured that way for former BPPC employees working in Canada. For employees who have elected the DC plan, the DC SERP applicable to service from January 1st, 2003 is not secured by a letter of credit. This limitation of the use of a letter of credit does not affect the calculation of your total pension benefits."
>
> (Emphasis added)

[32] Even though some active members, including, for instance, Mr. Cayouette who testified at hearing, apparently disagreed with BCFPI position, none of them formally raised any kind of opposition to this letter.

[33] On May 27, 2005, BCFPI sent another notice to the then 33 active SERPs members to further clarify what had been said in the 2003 letter, namely that only the benefits of retired SERPs members and only SERPs benefits accrued up to December 31, 2003 would be secured by a letter of credit[15]:

> "**Notice to former BPPC employees eligible for Supplementary Pension benefits**
>
> The purpose of this notice is to clarify the status of the letter of credit that pertains to the members of the Bowater Canadian Forest Products Inc. Supplemental Retirement Benefit Plan for Grade 27 and Under, the Supplemental Retirement Benefit Plan for Grade 28 and Over and the Senior Executive Retirement Plan, which provide benefits to former employees of Bowater Pulp and Paper Canada Inc.
>
> (...)
>
> During this year's annual renewal process for the letter of credit, the Company reviewed the methodology applied to the calculation of the letter of credit in light of the language quoted above. The Company determined that the letter of credit will be calculated based on the following methodology:

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[14] Exhibit R-8.
[15] Exhibit R-9.

- The letter of credit will secure the payment of benefits to retirees and survivors who have started to receive their pension under the plans; it will not secure in advance the payment of benefits that may become payable sometime in the future to active employees or to terminated employees who are not yet in pay status (terminated vested participants).

- As you have been previously notified in the letter describing the pension re-design, the letter of credit will only secure benefits attributable to service accrued through December 31, 2003, or through December 31, 2002 for members who have elected to participate in the DC plan effective January 1, 2003.

- Further, the letter of credit will only secure the payment of benefits attributable to service that is accrued through December 31, 2003 or through December 31, 2002 for members who have elected to participate in the DC plan effective January 1, 2003, based upon the earnings determined as of December 31, 2003 and based on the early retirement provisions that would have applied if termination of employment or retirement had occurred on December 31, 2003 taking into account the maximum pension payable from the registered plan at pension commencement.

- The benefits to be secured by the letter of credit are to be calculated as though the plans were wound up and benefits settled on the valuation date for members in receipt of a pension on that date.

The Company is currently updating the letter of credit in accordance with the principles described above. The amount of the letter of credit will be recalculated on a periodic basis.

The calculations applicable to the letter of credit do not affect the calculation of your individual pension benefits. Your future retirement benefits will continue to be computed in accordance with the plan provisions, regardless of the amount of, or method of calculation applicable to, the letter of credit. If you should have any questions, please contact Georges Cabana at (514) 954-2101."

(Emphasis added)

[34] On May 30, 2005, a similar letter[16] was sent to seven SERPs members who were deferred vested members on that date. It stated:

"Notice to former BPPC employees eligible for Supplementary Pension benefits

The purpose of this notice is to clarify the status of the letter of credit that pertains to the members of the Bowater Canadian Forest Products Inc. Supplemental Retirement Benefit Plan for Grade 27 and Under, the Supplemental Retirement Benefit Plan for Grade 28 and Over and the Senior

16 Exhibit R-10.

Executive Retirement Plan, which provide benefits to former employees of Bowater Pulp and Paper Canada Inc. (BPPC).

(...)

During this year's annual renewal process for the letter of credit, the Company reviewed the methodology applied to the calculation of the letter of credit in light of the language quoted above. <u>The Company has determined that the letter of credit will secure the payment of benefits to retirees and survivors who have started to receive their pension under the plans. It will not secure in advance the payment of benefits that may become payable sometime in the future to active employees or to terminated employees who are not yet in pay status (terminated vested participants).</u> The benefits to be secured by the letter of credit are to be calculated as though the plans were wound up and benefits settled on the valuation date for members in receipt of a pension on that date.

The Company is currently updating the letter of credit in accordance with the principles described above. The amount of the letter of credit will be recalculated on a periodic basis.

The calculations applicable to the letter of credit do not affect the calculation of your individual pension benefits. Your future retirement benefits will continue to be computed in accordance with the plan provisions, regardless of the amount of, or method of calculation applicable to, the letter of credit. If you should have any questions, please contact Georges Cabana at (514) 954-2101."

(Emphasis added)

[35] None of the active or deferred vested members apparently reacted to the letters or notices sent in 2005. Even if Mr. Cayouette testified that he did not remember reading the e-mail that was then allegedly sent to him as active employee, no one seriously disputes that these letters and notices were in fact duly sent by BCFPI. The Contestation filed by the members listed in Schedules D and E indeed appeared to accept the existence of these letters and notices. On the balance of probabilities, the Court finds that they were remitted to the members concerned by BCFPI.

[36] Subsequently, around September 2005, BCFPI requested that restatements of the SERPs be prepared effective as of January 1, 2003, including amendments that would reflect the content of the 2003 letters and the 2005 letters (the **"2003 Draft Restatement"**).

[37] The 2003 Draft Restatement thus amended sections 1.02 and 4.03 of the BCFPI SERPs as follows[17]:

"1.02 The restated text of this Supplemental Plan is effective as of January 1, 2003 and as of such date replaces and cancels the application of any prior plan or agreement, whether oral or written, between a participant therein and the Corporation and providing for supplemental retirement benefits to be paid to such

[17] Exhibit R-11.

participant in addition to those payable from any registered pension plan of the Corporation. However, this Supplemental Plan shall not apply to or otherwise modify benefits payable or the terms and conditions for payment of such benefits to any former employee who has retired from or otherwise terminated his employment with Bowater Canadian Forest Products Inc. or its predecessors or their affiliates prior to the effective date of this Supplemental Plan.

4.03 Notwithstanding Subsection 4.02, the Corporation will arrange for the payment of benefits provided under the Supplemental Plan to be secured through a letter of credit from a financial institution. <u>For greater certainty, such letter of credit shall not apply during active employment with the Corporation and shall only apply from pension commencement</u>. Furthermore, the letter of credit shall <u>only apply in respect of benefits provided under this Supplemental Plan for Credited Service prior to January 1, 2004</u>, based on Final Average Earnings and Average Incentive Target up to December 31, 2003 and taking into account the early retirement reduction that would have applied if employment had terminated or retirement had occurred on December 31, 2003 but taking into account the maximum pension applicable under the Registered Plan at pension commencement. The letter of credit shall not apply either in respect of Participants subject to US tax as a result of being a US citizen, a US resident or being employed by Bowater Inc. or any affiliated company in the US, unless they have elected in writing to be covered by the letter of credit."

(Emphasis added)

[38] However, Petitioners have not been able to locate a resolution of BCFPI Board of Directors amending sections 1.02 and 4.03 of the 2003 SERPs as they read in this 2003 Draft Restatement, nor one resolution adopting the 2003 Draft Restatement.

[39] Later on, in July 2009, an officer of BCFPI executed a further restatement of the SERPs, this time "effective January 1, 2003, including amendments up to January 1, 2009 inclusive" (the "**2009 Restatement**")[18]. In that document, the wording of section 4.03 was similar to that of the 2003 Draft Restatement. Yet, the BCFPI Board of Directors did not adopt either a resolution to give effect to this 2009 Restatement.

THE ACTUARIAL VALUATIONS

[40] That said, at various times during the relevant years, BCFPI obtained from Mercer actuarial valuations of its liabilities pursuant to the SERPs for the purpose of establishing the face amount of the letter of credit held by RTC.

[41] Actuarial valuations as of June 2005 and March 2008 were so performed, in compliance with the 2003 Draft Restatement and the letters sent in 2003 and 2005 to the SERPs members[19].

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[18] Exhibit R-13.
[19] Exhibits R-15 and R-16.

[42] Both the June 2005 and the March 2008 actuarial valuations of Mercer disclosed the following information:

> "To Bowater Canadian Forest Products Inc.
>
> At your request, we have conducted an actuarial valuation of the liabilities as at (...) in respect of certain Supplemental Retirement Plans of Bowater Canadian Forest Products Inc. The purpose of this valuation is to determine the face amount of the letter of credit as of such date. We are pleased to present the results of the valuation.
>
> (...)
>
> Based on the terms of the Supplemental Retirement Plans and on notices provided to active and vested terminated members, <u>the letter of credit covers pensions in payment relative to benefits for service up to December 31, 2003</u> (December 31, 2002 for any member who elected to participate in the DC plan effective January 1, 2003), based on earnings up to December 31, 2003 taking into account the early retirement reductions that would have applied if termination or retirement had occurred on December 31, 2003 and also taking into account the maximum pension applicable at pension commencement.
>
> In accordance with the RCA Trust Agreement between Avenor Inc. and Montreal Trust Company, the amount of the letter of credit shall be equivalent to Bowater Canadian Forest Products Inc.'s determination of its liabilities to beneficiaries. Such determination shall be based on actuarial valuations which the Trustee shall be under no obligation to review or assess."
>
> (Emphasis added)

[43] In both valuations, Mercer also indicated that "liabilities correspond only to liabilities for pensions in payment, consistent with the notices provided (by BCFPI) to affected members".

ANALYSIS

[44] In the end, this Judgment deals with yet another unfortunate consequence of the insolvency of the Petitioners and their filing for Court protection under the *CCAA*. Simply put, BCFPI does not have the financial resources to continue funding the payment of the SERPs benefits to eligible members. Only the letter of credit remains for those entitled to its proceeds.

[45] And still, even if the entitlement is limited to those members identified by the Petitioners in the Motion, according to Schedule F and Mercer's projections[20], there will not be enough to cover everyone for everything they are entitled to under the SERPs. The available funds are expected to run out sometime in January 2026.

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[20] Exhibit R-31.

[46] Be that as it may, the Court must decide the pending issues based upon the interpretation of the relevant sections of the SERPs and the behaviour of the parties in relation thereto.

[47] With due respect to the arguments raised by the members listed in Schedules D and E, the Court considers that the Petitioners' position is correct under the circumstances. Only the members listed on Schedules A, B and C are entitled to share in the proceeds of the letter of credit.

[48] For what it is worth, this does not negate to the members listed in Schedules D and E their entitlement to the SERPs benefits and their claims in that regard in the context of the restructuring. This Judgment is only concerned with the proceeds of the letter of credit securing, in part, the benefits payable under the SERPs.

[49] With respect to the amendments sought by the Petitioners to the Trust Agreement, however, the Court is of the view that it does not have the authority to impose such upon the interested parties in the absence of any consensus on the nature, extent and wording of the provisions at issue.

[50] The Court's explanations follow.

1) THE MEMBERS ENTITLED TO SHARE IN THE LETTER OF CREDIT

A) The Canadian Members Who Retired Before December 31, 2003

[51] 48 members of the SERPs are Canadian who retired before December 31, 2003. They include the 44 retirees and four beneficiaries listed in Schedule A to the Motion.

[52] No one disputes that the benefits of these members are covered by the letter of credit. The Court agrees.

[53] The language of the 2003 SERPs provides that the payment of their benefits is to be secured by the letter of credit. They were never advised that their benefits, in whole or in part, were not covered by the letter of credit. The amendments to the 2003 SERPs reflected in the 2003 Draft Restatement and the 2009 Restatement provide that their benefits are covered by the letter of credit. The actuarial valuations prepared by Mercer in 2005 and 2008 included their benefits in the calculation of the amount of the letter of credit.

B) The Canadian Members Who Retired After December 31, 2003

[54] Six members of the SERPs are Canadian who retired after December 31, 2003 and before May 26, 2009. They are listed in Schedule B to the Motion.

[55] Similarly to the Canadian members who retired before December 31, 2003, no one disputes that the benefits of these members are covered by the letter of credit, as long as they are limited to the benefits accrued up to December 31, 2003. Again, the Court agrees with that assertion.

[56] Although the language of the 2003 SERPs provides that the payment of benefits is to be secured by a letter of credit, BCFPI's intention was clearly that only SERPs benefits accrued up to December 31, 2003, would be secured by the letter of credit.

[57] Letters were sent on November 24, 2003 to the SERPs members who were active as of that date in order to advise them that only the benefits of retired SERPs members and only SERPs benefits accrued up to December 31, 2003, would be secured by the letter of credit. This change was also reflected in the 2003 Draft Restatement and the 2009 Restatement.

[58] In addition, the actuarial valuations prepared by Mercer in 2005 and 2008 limited the liabilities of the SERPs towards the members who retired after December 31, 2003 to the value of the benefits that accrued up to December 31, 2003, such that the face value of the letter of credit was based on the pre-December 31, 2003 earnings and service.

[59] The Court also agrees with Petitioners that Mr. Donald Campbell should be included in that group. He was on salary continuance on April 17, 2009 when the Initial Order was issued. As a result of the Initial Order, his salary continuance was discontinued and his active employment was terminated as of April 15, 2009. Thereafter, Mr. Campbell elected to retire on May 1, 2009.

[60] It is appropriate to treat him as a Canadian resident member who retired after December 31, 2003 but before May 26, 2009, as opposed to an active employee.

C) The U.S. Members

[61] There were, at the date of the Motion, three members of the SERPs who were U.S. citizens: one retiree who is a Canadian resident (Mr. Warren Woodworth), one beneficiary who is a U.S. resident (Mrs. Alyce Flenniken), and Mr. Jerry Soderberg. All three members of this group retired prior to December 31, 2003. They are listed in Schedule C to the Motion.

[62] The SERPs liabilities to Mrs. Flenniken and Mr. Woodworth are covered by the letter of credit. The language of the 2003 SERPs provides that the benefits of all members, including the U.S. members, are covered by the letter of credit and these members have not received any notice or letter from BCFPI whereby they were advised that their benefits, in whole or in part, were not covered by the letter of credit.

[63] True, there were, however, negative tax consequences in the United States if the benefits of a U.S. member were secured by a letter of credit. The tax rules of the Internal Revenue Code (the "**IRC**") provided that securing SERPs benefits of SERPs members who were taxpayers of the United States resulted in the obligation for such SERPs members to include in the income for the year during which such security was granted the value of the benefits so secured.

[64] For that reason, in the 2003 Draft Restatement and in the 2009 Restatement, it was indicated that the liabilities of the SERPs to the members of this group were not secured by the letter of credit unless they elected in writing to be covered by the letter of credit.

[65] Accordingly, the value of the SERPs liabilities to Mrs. Flenniken and Mr. Woodworth were not included in the calculation of the face value of the letter of credit held by RTC in 2005 or 2008. The 2008 actuarial valuation indeed stated:

> "For tax reasons U.S. taxpayers are not covered by the letter of credit unless they elect to be covered. We understand that U.S. taxpayers have been notified by Bowater Canadian Forest Products Inc. to this effect."

[66] Nevertheless, the Petitioners do not have any indication in their files that these U.S. members were at any time invited to make such an election. Therefore, their liabilities should have been included in the valuations.

[67] As for Mr. Soderberg, also a citizen and resident of the United States, on August 4, 1995, he was given confirmation, through two letters, of changes to his compensation package which included participation in the 1993 SERP[21]. On January 6, 1997, he was advised that his SERPs benefits were secured by a letter of credit held by MTC[22]. On February 25, 1997, he was further advised that although he was and would continue to be a participant of the Avenor America Inc. pension plan (a U.S. pension plan), he would remain entitled to the pension benefits set forth in the letter of August 4, 1995 describing his pension entitlements[23].

[68] Still on January 6, 1997, he was granted a Change of Control Agreement by Avenor. During August 1998, there was a change of control, such that the agreement was therefore triggered. On September 3, 1998, Mr. Soderberg was informed of the computation of his benefits pursuant to this Change of Control Agreement and, as a result, fully released and discharged Avenor Inc. and BPPC from all further obligations. He retired on October 1, 1998 and on October 2, 1998[24], he was advised that he would start to receive a pension from the U.S. pension plan and that his SERPs benefits would be assumed by Bowater Inc. and paid from the U.S.

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21 Exhibit R-24.
22 Exhibit R-25.
23 Exhibit R-26.
24 Exhibit R-28.

[69] Yet, the value of the SERPs liabilities to Mr. Soderberg was not included in the calculation of the face value of the letter of credit held by RTC in 2005 or 2008 because he did not and does not participate in a Canadian registered pension plan.

[70] Despite this, based on the above-mentioned letters sent to Mr. Soderberg, the Court agrees with Petitioners that he should also be entitled to continue to receive, from May 1, 2009, his monthly SERPs payments from the proceeds of the letter of credit.

D) The Active Employees and The Deferred Vested Members

[71] On May 26, 2009, eleven members of the SERPs were still active employees and six were deferred vested members. They are listed in Schedules D and E to the Motion.

[72] Petitioners submit that the benefits of the active employees and the deferred vested members should not be covered by the letter of credit for four main reasons:

- On a proper interpretation, the relevant sections of the SERPs do not allow for it;
- The active employees and the deferred vested members received letters dated November 24, 2003, May 27, 2005, and May 30, 2005 which specified that the letter of credit did not secure the payment of benefits that may become payable some time in the future to active employees or deferred employees;
- The 2003 Draft Restatement and the 2009 Restatement both provided that the letter of credit did not secure benefits during active employment with the corporation or to deferred vested members and shall only apply from pension commencement;
- The actuarial valuations prepared by Mercer in 2005 and 2008 did not include the benefits of the active members and of the deferred vested members.

[73] The Court agrees that the active employees listed on Schedule D and the deferred vested members listed on Schedule E are not entitled to receive monthly SERPs payments from the proceeds of the letter of credit.

[74] First, it is a reasonable interpretation of the relevant provisions of the SERPs to suggest that the letter of credit covers benefits in payment to the retirees and their beneficiaries, and not the potential future payments to active employees and deferred vested employees.

[75] The SERPs are contracts of successive performance. Subsection 4.02 provides that BCFPI shall pay the benefits payable thereunder as they become due.

[76] Benefits payable under the SERPs are benefits payable on a monthly basis pursuant to Sections 5 to 11, i.e. on Normal Retirement Date (age 65), Early Retirement

Date (age 55), postponed retirement date (after age 65), disability date, death or the date of termination of employment. No benefits are due nor become due before the earliest of such dates.

[77] BCFPI's undertaking pursuant to Subsection 4.03 can be interpreted as securing the payment of the benefits provided by the SERPs, not the benefits payable in se or per se. Accordingly, only benefits that are in payment are secured by the letter of credit.

[78] The SERPs provide in Subsection 13.08 that their provisions shall be interpreted in accordance with the laws of the Province of Quebec. The relationship between a SERP Participant and BCFPI is contractual and the relevant rules on interpretation are set out in Articles 1425 to 1434 *CCQ*.

[79] Pursuant to these rules of interpretation, Subsections 4.02 and 4.03 of the SERPs should not be construed in a vacuum but in relation to each other and other provisions of the SERPs (Article 1427 *CCQ*).

[80] Second, under the SERPs, it was for BCFPI to decide on all matters relating to the (i) interpretation, (ii) administration, and (iii) application of the plans.

[81] In the exercise of these powers, BCFPI issued the letters dated November 24, 2003 (Exhibit R-8), May 27, 2005 (Exhibit R-9) and May 30, 2005 (Exhibit R-10).

[82] The Court agrees that BCFPI's decision to only secure benefits in payment and not benefits under accrual was a reasonable decision reached pursuant to Subsection 14.01.

[83] When such decisions are reasonable and reached without consideration of reasons or motives that are outside of the scope of the discretion granted to the "decision-making person", the Courts will not lightly intervene in the "decision-making" process[25].

[84] As can be seen from the language of the 2003 and 2005 letters, there were reasonable reasons for BCFPI to reach such decisions. In *James Robert Marchant* v. *The Royal Trust Company* and *Bowater Pulp and Paper Canada Inc.*[26], the Court upheld the administrator's decision to deny an enhanced benefit since the decision was reasonable and not taken in bad faith.

[85] Third, even if the letters and notices sent in 2003 and 2005 were viewed as amendments to the SERPs rather than interpretation, administration or application of the SERPs, they were nevertheless valid amendments pursuant to Subsection 15.01.

[86] This provision imposes three conditions to the validity of an amendment:

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25 See *Neville* v. *Wynne*, 2005 BCSC 483, confirmed 2006 BCCA 460, and *Patrick Communications Inc.* v. *Telus*, 2006 BCSC 854, confirmed 2007 BCCA 200.

26 (1999), 26 C.C.P.B. 126, (S.C., 1999-09-30), SOQUIJ AZ-99026555.

(1) The amendment must be communicated in writing by BCFPI to the Participants;

(2) The communication must indicate the effective date of the amendment which must not precede the date that the communication is deemed to have been received by the Participants; and

(3) The amendment must be made in respect of all Participants, excluding those who have already commenced to receive benefits under the SERPs.

[87] These conditions were met here. The letters were communicated in writing by BCFPI to the Participants in accordance with the first condition. The first letter was dated November 24, 2003 and came into effect on January 1, 2004. The second letters were dated May 27 and 30, 2005 and came into effect immediately. Therefore, the three letters met the second condition. Finally, the amendment affected all active employees and deferred vested members, as required by the third condition.

[88] That is not all.

[89] The validity of the letters was never challenged by any active employee or deferred vested employee before the current proceedings. This is quite telling. In matters of contractual interpretation, Article 1426 *CCQ* states that the interpretation given by the parties and their behaviour in that regard are factors to be taken into account.

[90] In comparison, the subsequent behaviour of both BCFPI and Mercer was in strict compliance with such changes.

[91] The mentions appearing in the 2003 Draft Restatement and 2009 Restatement cited before show clearly that it was either BCFPI's interpretation, administration or application of the SERPs that the letter of credit guaranteed only the benefits then in payment to the retirees or their beneficiaries or, at the very least, its definite intention to amend the SERPs along those lines.

[92] It is true that BCFPI has not been able to locate a resolution of its Board of Directors amending Subsections 1.02 and 4.03 of the SERPs as they read in the 2003 Draft Restatement, nor adopting the 2003 Draft Restatement. It is also true that the Board of Directors did not adopt a resolution to give effect to the 2009 Restatement.

[93] Nevertheless, this is not fatal to the validity of BCFPI's decision respecting the interpretation, administration and application of the plans or the amendments brought about by the 2003 and 2005 letters.

[94] The active employees and the deferred vested employees who have contested the Motion allege that a resolution of the Board of Directors was required to modify the SERPs or to authorize officers to modify the SERPs.

[95] However, they have not pointed to any provision of BCFPI's articles or by-laws that would require such a resolution for such an amendment. Moreover, nothing in the *Canada Business Corporations Act* ("***CBCA***") requires a board resolution in such a case.

[96] At worst, the active employees and deferred vested employees can argue that the delegation to Mr. Cabana, the V.P. Human Resources & Public Affairs, Canadian Operations of BCFPI who signed the letters at issue, was not in accordance with Subsection 14.02 of the SERPs.

[97] If that is the argument, there has been subsequent ratification by BCFPI, whether through the employer certifications referred to in the Mercer valuations and executed by another officer, or through the provision of a letter of credit that was calculated without taking into account the benefits that would have eventually become due to the active employees and the deferred vested employees.

[98] In addition, Section 16(3) of the *CBCA* provides a safe harbour as follows:

> "(3) Rights preserved – No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act."

[99] Lastly, on that point, Maurice and Paul Martel are of the opinion that the co-contracting party ("*le tiers*") cannot attack the contract by invoking internal corporate irregularities such as the lack of appropriate authorization[27]:

> "*Donc, lorsqu'une irrégularité de régie interne entache une transaction, elle ne peut être invoquée par le tiers pour faire annuler cette transaction. Seule la compagnie ou un de ses actionnaires pourrait l'invoquer. Quant à la compagnie, une telle démarche est vouée à l'échec dès le départ si elle veut l'entreprendre pour faire annuler la transaction, car le tiers est protégé par la règle de l'indoor management. Reste l'actionnaire: il ne pourrait pas faire annuler la transaction, car la règle de l'indoor management joue ici encore en faveur du tiers. D'ailleurs, il n'est même pas sûr que l'actionnaire jouisse d'un tel recours, surtout si l'irrégularité a été ratifiée par la majorité des actionnaires.*"

[100] In closing, from a mere practical standpoint, one could add that pursuant to the Mercer actuarial valuations, the amount of the letter of credit was based on the assumption that only retirees and their beneficiaries were covered by the letter of credit, with the result that funds have not been put aside for the active employees and the deferred vested employees. Any deficit that already exists in terms of the coverage of the benefits payable to retirees would therefore be increased if they were included.

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27 Maurice MARTEL et Paul MARTEL, *La Compagnie au Québec: les aspects juridiques*, v. 1, Montreal: Wilson & Lafleur / Martel ltée, 2010, paragraph 26-20.

[101] Moreover, neither the calculation of the SERPs benefits of the active employees and the deferred vested employees, nor the way in which the active employees and the deferred vested employees would benefit from the letter of credit, is clear. In fact, both would create problems because of the number of unknown assumptions that would likely influence the calculations of any benefits.

[102] The Court will therefore limit the SERPs members' entitlement to the proceeds of the letter of credit to the members listed in Schedules A, B and C to the Motion. As requested by the Petitioners, this conclusion will be binding upon all SERPs members. The Court is satisfied that the Motion, be it in its original or amended forms, has been duly communicated to the Service List and to the attorneys who have appeared on behalf of many of the members, while being at the same time always sent by registered mail to all SERPs members and posted on the Monitor's website.

[103] That said, there are, in principle, three ways in which the proceeds of the letter of credit can be distributed to the members entitled to share in those:

a) RTC can continue to make monthly payments to the members entitled to share in the proceeds of the letter of credit until the funds are exhausted. By Judgment rendered July 2, 2010, the Court, with the consent of everyone, has already ordered RTC to resume the monthly payments to the members listed in Schedules A, B and C to the Motion for all outstanding arrears payable since May 1, 2009;

b) RTC can distribute the balance of the proceeds on a pro rata basis based on the value of each member's benefits as at the date of this Judgment; or

c) RTC can distribute the balance of the proceeds on a pro rata basis based on the value of each member's benefits as at May 26, 2009.

[104] The Court agrees with Petitioners that the first approach is to be preferred for the time being. It is fairer to the members entitled to receive monthly SERPs payments from the proceeds of the letter of credit. It is, in fact, in accordance with the approach already followed by the Court in its Judgment of July 2, 2010.

[105] Conversely, the second and third approaches would likely require an amendment to the SERPs and the Trust Agreement in order to pay lump sums, which creates a problem under the circumstances, as will be discussed below.

[106] Since there is no real debate on the entitlement of the members listed in Schedules A, B and C to receive their monthly SERPs payments from the proceeds of the letter of credit, and in view of the advanced age of many of these members, it is appropriate to order the provisional execution of this Judgment notwithstanding appeal.

2. AMENDMENTS TO THE TRUST AGREEMENT

[107] In the Motion, BCFPI asks the Court to also authorize it to amend the Trust Agreement entered into with RTC, notably to dissociate itself from all of its obligations under the Trust Agreement.

[108] There is no provision in the Trust Agreement dealing with amendments and the interested parties, including BCFPI, RTC or, for that matter, the members listed in Schedules A, B and C to the Motion, do not agree on the nature, extent or wording of the amendments sought.

[109] Under these circumstances, the Court considers that the Trust Agreement entered into between BCFPI and RTC cannot be amended and that BCFPI cannot ask the Court to modify it. This negotiation belongs to the parties themselves. It is not for the Court to substitute itself to this process.

[110] It is inappropriate for a Court to attempt to draw up a contract for the parties when these parties do not agree to modify its contractual terms. Contracts represent a law which private parties have agreed applies to them and they normally cannot be varied by the Courts. This remains true as well in the context of a *CCAA* restructuring[28].

[111] Without RTC's consent, BCFPI cannot have the Trust Agreement amended to remove all of its rights and obligations and give those rights and obligations to a committee of beneficiaries.

[112] For the time being, the Trust Agreement entered into between BCFPI and RTC is still in force and has not been terminated.

[113] Although BCFPI contemplates terminating the SERPs to replace them with new SERPs that are described in section 6.9 of the Plan of Arrangement[29], and argues that the termination of the SERPs entails the termination of the Trust Agreement, this Plan of Arrangement is yet to be voted upon and sanctioned by the Court.

[114] Indeed, based on the representations made at hearing, it appears that the interested parties do not even agree on the impact of the potential termination of the SERPs upon the Trust Agreement.

[115] This issue, if it ever arises, will have to be dealt with in due course. For the purposes of this Judgment, it is not necessary to decide this question and rule upon the potential consequences that may follow from any answer.

[116] For now, it will suffice to state that RTC will continue the monthly payments of SERPs benefits from the proceeds of the letter of credit in conformity with the terms of

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[28] *Allarco Entertainment Inc. (Re)*, 2009 CarswellAlta 1458 (Alta. Q.B.).
[29] Exhibit R-32.

this Judgment up until the earlier of the date on which the Trust Agreement is terminated or a further order of the Court.

[117] That said, in its contestation to the amendments sought by the Petitioners to the Trust Agreement, RTC itself seeks declarations that the RCA Plan Trust Fund were properly invested in 30-day Government of Canada Treasury Bills and that it shall not be liable for any damage or complaint relating to these investments.

[118] These declarations are not necessary. The provisions of the Trust Agreement govern the rights and obligations of the interested parties. Short of any difficulties or disagreements that no one alluded to, it is not for the Court to give advanced rulings on potential future disputes.

[119] RTC also seeks declarations that it shall not be liable for any delays caused by the filing of the Motion, in a context where no one appears to raise any issue in that regard. This declaration is again unnecessary.

[120] Finally, RTC wants a declaration that it cannot be held liable for any consequence of its reliance upon the decision to be rendered by the Court on the Motion. The Court's conclusions are, of course, binding upon those that are subject to their terms. They are quite sufficient as they stand for any concerned parties to conduct themselves accordingly. It is not the role of the Court to go any further than that.

FOR THESE REASONS, THE COURT:

[1] **GRANTS, BUT IN PART ONLY,** the Re-Amended Motion for Directions on the Identity of the Persons Whose Benefits Under the Bowater Supplemental Executive Retirement Plans Were Secured by a Letter of Credit (the "**Motion**");

[2] **EXEMPTS**, if applicable, the Petitioners from any further service of the Motion and from any further notice or delay of presentation;

[3] **DECLARES** that the service of the Motion by registered mail or mail to the SERPs members, who are not represented by attorneys, is valid;

[4] **DECLARES** that this Judgment is binding on all members of the SERPs and their beneficiaries;

[5] **DECLARES** that only the following members of the SERPs benefit from the letter of credit (Exhibit R-7) and are entitled to receive, from May 1, 2009, monthly SERPs payments from the proceeds of the letter of credit (Exhibit R-7) held by The Royal Trust Company ("RTC"):

a) The Canadian resident members of the SERPs who retired before December 31, 2003 (listed in Schedule A to the Motion);

b) The Canadian resident members of the SERPs who retired after December 31, 2003 but before May 26, 2009, including Mr. Donald Campbell (listed in Schedule B to the Motion), but only on the value of their SERPs benefits accrued up to December 31, 2003; and

c) The U.S. members of the SERPs, including Mr. Jerry Soderberg (listed in Schedule C to the Motion);

[6] **DECLARES** that the Active Employees and the Deferred Vested Employees whose names are listed in Schedules D and E to the Motion are not entitled to have the value of their accrued benefits under the SERPs secured by the amount held by RTC and that no person other than the persons referred to in the preceding paragraph is entitled to have the value of his or her accrued benefits under the SERPs secured by the amount held by the RTC, nor to receive any monthly SERPs payment from the proceeds of the letter of credit (Exhibit R-7) held by RTC;

[7] **ORDERS** RTC, up until the earlier of the date on which the Trust Agreement (Exhibit R-5) is terminated or a further order of the Court, to continue the monthly SERPs payments, without interest, from the proceeds of the letter of credit (Exhibit R-7), in conformity with the terms of this Judgment;

[8] **DECLARES** that, for the purpose of the Trust Agreement (Exhibit R-5), RTC acting in accordance with this Judgment shall be construed and have the same effect as if RTC relied and acted upon the written instructions of Bowater Canadian Forest Products Inc;

[9] **ORDERS** the provisional execution of this Judgment notwithstanding any appeal and without the necessity of furnishing any security;

[10] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C. J.S.C.

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Me Raymond Hébert
DE GRANDPRÉ JOLI-COEUR
Attorneys for some of the members listed in Schedules D and E of the Motion

Dates of hearing: August 30 and 31, 2010

SCHEDULE "A"

ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.
20. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"
BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"
18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC