SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **AUGUST 23, 2011**

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
And
ERNST & YOUNG INC.
Monitor
And
THE WOODBRIDGE COMPANY LIMITED
And
WOODBRIDGE INTERNATIONAL HOLDINGS, S.A.
And
WOODBRIDGE INTERNATIONAL HOLDINGS LIMITED
Petitioners

JUDGMENT ON MOTION IN APPEAL OF A CLAIMS OFFICER'S DETERMINATION (#876)

JG1793

INTRODUCTION

[1] The Woodbridge Company Limited, Woodbridge International Holdings S.A. and Woodbridge International Holdings Limited (collectively, "**Woodridge**") present a Motion[1] to vary the determination[2] of a Claims Officer[3] (the "**Determination**").

[2] The Claims Officer's Determination concerned the value of Woodbridge's claim (the "**Claim**") arising from the repudiation of a call agreement[4] (the "**Call Agreement**") between Woodbridge and Abitibi-Consolidated Sales Corporation ("**ACSC**"), a former subsidiary of Abitibi-Consolidated Inc. ("**Abitibi**").

[3] The Claims Officer's Determination was made pursuant to a Claims Procedure Order[5] (the "**CPO**") issued by the Court in the context of Abitibi's *CCAA*[6] restructuring[7]. Woodridge filed the Claim against Abitibi on the basis of its guarantee of ACSC's obligations under the Call Agreement.

[4] The Call Agreement repudiated by ACSC established the terms, arrangements and mechanisms between the latter and Woodridge with regard to the sale and buy-back of their respective interest in a partnership (the "**Augusta Partnership**"). Until recently, ACSC had a 52.5% interest in this partnership, with Woodbridge holding the balance of 47.5%. The partnership's principal asset was a 416,000 metric ton capacity mill (the "**Augusta Mill**").

[5] While the Claims Officer's Determination valued it at US$24 million, Woodbridge contends that, when properly assessed, its Claim rather has a value of US$110 million.

[6] It submits that the Claims Officer improperly disregarded the independent opinion of its financial experts[8]. It adds that, unknown to the Claims Officer, at the time of the hearing in front of him, Abitibi and Woodridge had entered into negotiations regarding the purchase of Woodridge's interest in the Augusta Partnership. Throughout these negotiations, the parties allegedly valued this interest at an amount equal or greater than the Claims Officer ascribed to the entire partnership.

[7] According to Woodridge, to rule upon the Motion, the Court owes no deference to the Claims Officer's Determination. It pleads that the Court should reassess the evidence taking into consideration this new development and thus make its own determination of the correct value of the Claim.

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1 Notice of Motion and Motion in Appeal and Revision of the Claims Officer's Determination dated December 23, 2010 (#876) (the "**Motion**").
2 Determination of the Claims Officer dated December 13, 2010, Exhibit B-6.
3 The Honorable Joseph R. Nuss, Q.C.
4 Amended and Restated Call Agreement, as amended, Exhibits A-8, A-9 and A-10.
5 Claims Procedure Order (Review and Determination of Claims) dated January 18, 2010.
6 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("***CCAA***").
7 On December 9, 2010, Abitibi emerged from the *CCAA* process it had initiated on April 16, 2009.
8 Affidavit of Stephen Mitchell and RBC Capital Markets Value Assessment Report, with revisions, Exhibits C-5 and C-6.

[8] Abitibi replies[9] that Woodbridge has failed to establish any error in law or any palpable and overriding error in fact in the Claims Officer's Determination.

[9] It argues that, at this stage, the role of the Court is not to conduct a trial *de novo*. On questions of fact such as the ones raised by Woodridge, the appropriate standard of review rather commands that the Claims Officer's findings not be reversed unless one can point to a palpable and overriding error. In Abitibi's view, this is not the case here.

[10] Abitibi adds that the new evidence submitted by Woodbridge on the sale of Woodridge's 47.5% interest in the Augusta Partnership subsequent to the Claims Officer's Determination is inadmissible, and, in any event, of no convincing probative weight.

[11] The Monitor agrees with Abitibi and suggests that the Determination should not be varied.

THE QUESTIONS AT ISSUE

[12] Three questions are at issue in this matter:

1. What is the standard of review of the Claims Officer's Determination? Should the Court proceed on the basis of a true appeal or *de novo*? What are the applicable criteria for the Court's intervention?

2. Is the evidence submitted by Woodbridge on the sale of its interest in the Augusta Partnership subsequent to the Claims Officer's Determination admissible? If so, what is the relevance or probative weight of this evidence?

3. Should the Court review the Claims Officer's Determination and, if so, on what grounds?

[13] For the reasons that follow, the Court concludes that Woodridge's Motion should be dismissed.

[14] The standard of review applicable to the Motion is that of a true appeal. Therefore, the Court should only intervene in case of an error of law or a palpable and overriding error in fact. Woodridge has not established any such errors. In addition, the additional evidence it sought to adduce is inadmissible. In any event, the Court considers that it would not have influenced the Claims Officer's findings in this matter.

[15] Before expanding upon these reasons, a summary of the Augusta Partnership, the Call Agreement, the Claim's process, the Claims Officer's Determination, and the subsequent sale of Woodridge's Augusta Partnership's interest is necessary.

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9 Debtors' Contestation of the Motion in Appeal and Revision of the Claims Officer's Determination dated February 18, 2011 (#886).

BACKGROUND

a) The Augusta Partnership

[16] The Augusta Partnership between ACSC and Woodridge originated in 2001 when Woodbridge acquired the partnership interest previously held by Thomson Newsprint Inc ("**Thomson**")[10].

[17] Woodbridge acquired Thomson's interest to facilitate the latter's desire to dispose of it (having sold virtually all of its newspaper operations in Canada and the United States), and Abitibi's long stated goal of acquiring full ownership of the Augusta Mill. The Augusta Mill was one of Abitibi's most cost effective mills in North America, strategically located to access the Southeastern U.S. marketplace.

[18] At the time, Abitibi, Woodbridge and Thomson thus reached a deal by which:

a. Thomson sold its 50% interest in the Augusta Partnership to Woodbridge with Abitibi's consent;

b. the Call Agreement among Woodbridge, ACSC and Abitibi was executed; and

c. the partnership agreement was amended to reflect the new Augusta Partnership with Woodbridge rather than Thomson.

[19] In 2004, at Abitibi's request, and to ensure that it could account for the Augusta Partnership on a consolidated basis, Woodbridge agreed to sell a 2.5% interest in the partnership to ACSC[11]. The consideration provided to Woodbridge for the sale of this 2.5% interest amounted to US$10.5 million. It was calculated based on the purchase price formula provided by the Call Agreement, with no minority discount.

[20] At the same time, the partnership agreement was amended to provide that distributions to the partners would require the unanimous agreement of the partners' committee. At the May 2009 partners' committee meeting, it was decided that there would be no distributions until further notice. The last distribution by the partnership occurred in February 2009, namely, prior to Abitibi's filing for *CCAA* protection.

b) The Call Agreement

[21] Amongst others, the Call Agreement established the terms of the fundamental economic arrangements between the parties and set out the mechanisms for Woodbridge to sell its interest in the Augusta Partnership to Abitibi, or failing an acquisition by Abitibi, to sell the partnership as Woodbridge saw fit.

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[10] Exhibit A-6.
[11] Exhibit A-8.

[22] Accordingly, pursuant to the Call Agreement, ACSC first had the right to purchase all of the issued and outstanding shares of Augusta Newsprint Inc. ("**ANI**") (the company through which Woodbridge held its interest). The price to exercise the option was initially set at US$190 million, subject to adjustments. That right, as amended, expired on December 31, 2009, at which point the adjusted call price would have been approximately US$208 to 215 million.

[23] Second, if ACSC did not exercise its call right, it then had the option, for a full year, to sell the entire Augusta Partnership, including the portion owned by Woodbridge, on certain conditions.

[24] Third, if ACSC did not sell the Augusta Partnership within the time period specified in the Call Agreement, that is, in 2010, Woodbridge finally had the option, for the whole year 2011, to force the sale of the entire Augusta Partnership.

[25] Upon a sale of the Augusta Partnership by either ACSC or Woodbridge under these forced sale mechanisms, the terms of the Call Agreement provided that Woodbridge would be entitled to approximately the first US$215 million of the sale proceeds (subject to adjustments) prior to any recovery by ACSC.

[26] In other words, under the Call Agreement:

a. ACSC had a call right, until December 31, 2009, to purchase Woodbridge's interest in the Augusta Partnership at a specified price that would have been around US$208 million;

b. If ACSC did not exercise its call right by December 31, 2009, ACSC had the option, until December 31, 2010, to sell the entire Augusta Partnership, including the portion owned by Woodbridge, with Woodbridge being entitled to approximately the first US$215 million in proceeds; and

c. If ACSC did not exercise its option by December 31, 2010, Woodbridge had the option, until December 31, 2011, to sell the entire Augusta Partnership, including the portion owned by ACSC, again with Woodbridge being entitled to approximately the first US$215 million in proceeds.

[27] Over and above that, the Call Agreement provided for a guarantee by Abitibi of ACSC's obligations to Woodbridge in that regard[12].

[28] When Abitibi filed for *CCAA* protection in April 2009, the value of the Augusta Mill was lower than the amount of the call right or the amount of the sale proceeds Woodbridge would be entitled to under any forced sale mechanisms.

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[12] Exhibit A-7.

[29] On June 15, 2009, ACSC thus filed a motion in the concurrent Chapter 11 US proceedings pertaining to Abitibi, seeking authority to reject the Call Agreement. On October 27, 2009, the US Bankruptcy Court issued an order confirming the rejection by ACSC of the Call Agreement[13].

c) The Claims Process

[30] As a result, on November 25, 2009, Woodbridge filed a proof of claim in the Chapter 11 US proceedings against ACSC due to this rejection of the Call Agreement. On the same date, Woodbridge also filed its Claim against Abitibi in the *CCAA* proceedings on the basis of Abitibi's guarantee of ACSC's obligations under the Call Agreement[14].

[31] Woodridge initially valued its Claim at US$213 million less the value of the ongoing Augusta Partnership[15]. As it became clear that Abitibi would likely not go into liquidation, the Claim was eventually adjusted to US$110 million in 2010[16].

[32] By Notice of Revision or Disallowance dated June 30, 2010[17], the Monitor revised the Claim to US$9 million. In response, Woodbridge filed a Notice of Dispute of the Monitor's Notice of Revision[18], contesting the revision by the Monitor.

[33] Pursuant to the CPO, the Monitor referred the matter to the Claims Officer and a Dispute Package was delivered to him on August 18, 2010.

[34] The hearing of Woodbridge's Claim took place on September 17, 2010. The Claims Officer had before him a written record, including affidavits and the other material that has been reproduced in the Court file on this Motion. In addition, the Claims Officer heard oral evidence from Mr. Morrison on behalf of the Monitor, Mr. Rougeau on behalf of Abitibi, and Mr. Pun and Mr. Dart on behalf of Woodbridge.

[35] By his Determination of December 13, 2010[19], the Claims Officer revised the Woodbridge Claim from US$9 million (as allowed by the Monitor) to US$24 million.

d) The Claims Officer's Determination

[36] In front of the Claims Officer, the parties agreed that the proper measure of Woodbridge's Claim against Abitibi was the value of the Call Agreement repudiated by ACSC during the *CCAA* proceedings.

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13 Exhibit B-1.
14 Exhibit B-3.
15 Exhibit C-1.
16 Exhibit C-3.
17 Exhibit B-4.
18 Exhibit B-5.
19 Exhibit B-6.

[37] As well, since the Call Agreement provided that Woodbridge would be entitled to approximately the first US$215 million of the sale proceeds under any forced sale mechanism, and since the value of the Augusta Mill at the relevant time was lower than that, the method for calculating the value of the Call Agreement and the date for valuation purposes were not in dispute either.

[38] Consequently, everyone accepted[20] that the value of the Call Agreement was to be determined as of April 16, 2009, on the basis of the difference between:

(1) the sale proceeds resulting from a forced sale of the Augusta Partnership pursuant to the Call Agreement (that is, the value of an hypothetical sale of the Augusta Mill without the Call Agreement); and

(2) the value of Woodbridge's 47.5% interest in the Augusta Partnership as a going concern, without the Call Agreement.

[39] The disagreement between the parties arose from different assumptions used in the valuation exercise. For illustrative purposes, the values attributed to each side of the equation by Woodridge, the Monitor and the Claims Officer were as follows:

	(1) Value of Forced Sale of the Augusta Partnership	**(2) Going Concern Value of Woodbridge's 47.5% interest**
Woodbridge's Claim	US$145–180 million	US$45-60 million (Includes a 30% minority discount as per their experts)
Monitor's Notice of Revision	US$90 million	US$81 million
Claims Officer's Determination	US$100 million	US$76 million

[40] As this chart shows, any increase in the forced sale value or decrease in the going concern valuation of Woodbridge's minority interest would result in an increase in Woodbridge's Claim.

i) the Value of the Forced Sale of the Augusta Partnership

[41] On the one hand, on the value of the forced sale of the Augusta Partnership, the Claims Officer reviewed the assumptions submitted by the parties.

[42] He determined that those of the Monitor were more practical and based on the actual situation "on the ground, as it were, relying on the experience in the newspaper industry". In its revision of Woodbridge's Claim, the Monitor had in fact considered the

20 Paragraphs 36 and 37 of the Determination.

state of the North American newsprint market in April 2009, the customer base of the Augusta Mill, as well as the cost competitiveness of the mill.

[43] Conversely, the Claims Officer found that the assumptions underlying the Woodbridge's assessment of damages were "very speculative and overly optimistic, ... more theoretical, having the inherent weaknesses of forecasting future events in the economics fear in a troubled industry".

[44] In making this assessment, the Claims Officer reviewed written submissions and affidavits filed by the parties. He also heard oral testimony. He accepted that the following factors should be considered in determining the forced sale value of the Augusta Partnership:

a. there had been a dramatic decrease in the demand for newsprint in North America;

b. excess capacity existed in the North American marketplace in 2009;

c. newsprint prices were trending downward long term, having only been stabilized by capacity withdrawals;

d. pursuant to the terms of the partnership agreement, Abitibi was required to operate the Augusta Mill at an operating rate of at least 90% despite the excess capacity in Abitibi's mill system. There would be no such requirement post-sale;

e. ACSC was contractually obligated to purchase all of the production of the Augusta Mill, which was required to operate at a minimum 90% capacity. The Augusta Mill had no third party customer order book. In the event of a forced sale to a third party, this obligation would be automatically terminated. Abitibi would reallocate the volumes produced by the Augusta Mill to other mills in its mill network to the extent of its excess capacity in the network. Therefore, the Augusta Mill would be sold as an idle plant;

f. establishment of a post-closing order book would be challenging for a third party purchaser because (a) 30% of the production of the Augusta Mill was sold to 4 large domestic customers who had contracts in place with Abitibi, and (b) a stand-alone independent mill would not be able to guarantee production to its customers as it would have no ability to divert production to another mill in the event of a production stoppage;

g. as there was an overcapacity in the newsprint market, a purchaser would not be able to "buy" an order book as other producers would match newsprint price reductions and/or the profitability of the Augusta Mill would decline as a result of declining gross margins;

h. the Augusta Mill appeared to be a relatively efficient mill and could be attractive to a buyer who had an inefficient or higher cost mill in its network. However, a purchaser would only be prepared to pay an amount for the Augusta Mill based on the cost savings achieved by moving production from an existing inefficient mill to the Augusta Mill;

i. there were a limited number of prospective buyers with an interest in expanding North American newsprint capacity or with the financial capacity to complete a transaction;

j. severance and termination costs had to be taken into consideration;

k. the newsprint produced by the Augusta Mill may not meet all standards for the export market which would limit the demand and pricing for the newsprint; and

l. as a stand-alone independent mill, the cost competitiveness of the Augusta Mill would be adversely affected for the following reasons: (a) selling costs would increase in the short term as brokers would be required to move volume until a sales force could be retained, (b) the Augusta Mill would no longer benefit from the bulk purchasing power of Abitibi (c) the sales footprint of the Augusta Mill would need to expand which would cause freight costs to increase as the number of customers and shipping distances would correspondingly increase, (d) a stand-alone independent mill would require a significant upfront investment of working capital, and (e) the key management of the Augusta Mill would be re-deployed within Abitibi which would create uncertainty for any purchaser of the Augusta Mill.

[45] This notwithstanding, the Claims Officer determined that the Monitor did not however give sufficient weight to the particular and special interest of Abitibi and Woodbridge in acquiring full ownership of the Augusta Mill. In this respect, he agreed with Woodbridge that on any sale of the Augusta Partnership, Abitibi and Woodbridge would both be serious bidders.

[46] He held that Abitibi was a very important producer in North America with vast expertise and concluded that if the Augusta Mill was put up for sale, it would very probably be a serious bidder. Woodbridge would also be a bidder in order to protect its investment and prevent the Augusta Mill from being sold for too low a price. It was accepted that any amount received from the sale of the Augusta Mill up to approximately US$215 million would go entirely to Woodbridge.

[47] In the Claims Officer's view, the Monitor's evaluation of the Augusta Mill on a standalone basis in the context of a third party purchaser did not give sufficient weight to Abitibi's benefits and synergies (that would not be available to others) in acquiring full ownership.

[48] He noted that in such circumstances, Abitibi would probably bid an amount higher than US$90 million to acquire the full Augusta Partnership. He therefore found that the Monitor's valuation of US$90 million, while acceptable for third party purchasers, did not sufficiently take into account the particular and special interest of Abitibi to acquire the mill or the protective interest of Woodbridge.

[49] As a result, the Claims Officer added US$10 million to the Monitor's US$90 million valuation of the forced sale of the Augusta Partnership.

ii) the Going Concern Value of Woodbridge's 47.5% interest

[50] On the other hand, the Claims Officer largely accepted the Monitor's submissions in respect of the going concern value of Woodbridge's 47.5% interest in the Augusta Partnership.

[51] Abitibi's financial advisors had determined that the going concern value of the Augusta Mill, at the date of the *CCAA* filing and based on a discounted cash flow analysis, was US$170 million. This was an arm's length valuation prepared for Abitibi's creditors in the *CCAA* proceedings. This valuation was not materially different from Woodbridge's going concern valuation of US$145-US$180 million.

[52] As Woodbridge owned 47.5% of the Augusta Mill, the Monitor valued its interest at US$81 million ($170 million x .475).

[53] Woodbridge submitted that a minority discount of thirty percent (30%) should be applied to the Monitor's valuation of the 47.5% interest. In valuing Woodbridge's interest in the Augusta Mill, the Monitor did not consider it appropriate to do so as the valuation analysis prepared by Abitibi's financial advisors was based on a discounted cash flow analysis of the mill as a whole.

[54] In its view, it was not appropriate to attribute a minority discount to the determination of going concern value as the proper assessment was the value of Woodbridge's retained interest in the Augusta Mill as a going concern, not the value of an independent sale of Woodbridge's minority interest. The process was to value the Augusta Mill as a whole, not to determine what a purchaser would pay for a minority interest therein.

[55] The Claims Officer generally accepted the Monitor's reasoning in respect of the minority discount issue and ruled that a discounted cash flow method was the appropriate basis for establishing value.

[56] Still, the Claims Officer again adjusted the Monitor's assessment of going concern value by reducing it of US$5 million on the basis that the Call Agreement had value to Woodbridge in providing the possibility of forcing a sale of the Augusta Mill for a one-year period starting on January 1, 2011. The Determination thus assessed the going concern value of Woodbridge's interest to be US$76 million (US$81 million – US$5 million).

[57] In the end, the Claims Officer consequently valued the Claim at US$24 million, that is, the difference between (1) the forced sale value of the Augusta Partnership of US$100 million and (2) the going concern value of Woodridge's 47.5% interest of US$76 million.

e) The Subsequent Sale of Woodridge's Augusta Partnership's Interest

[58] The Claims Officer issued his Determination in respect of the Woodbridge Claim on December 13, 2010.

[59] Barely a few weeks later, on January 14, 2011, Woodbridge completed the sale of its 47.5% interest in ANI to ACSC resulting in ACSC owning 100% of the Augusta Partnership as of that date[21].

[60] The value of the consideration for the sale was approximately US$125 million and consisted of the following:

a. US$15 million in cash;

b. a US$90 million secured, interest bearing, first priority promissory note issued by the partnership to Woodbridge[22];

c. US$17 million representing a 47.5% share of the partnership's cash and liquid assets to be distributed to Woodbridge immediately prior to the closing of the transaction; and

d. approximately US$2 million in subsequent payments.

[61] The sale was the product of discussions that were initiated in June 2010. The discussions took place over a number of months and involved numerous meetings, calls and draft term sheets.

[62] Despite this, the parties' initial positions did not differ significantly in relation to the value of Woodbridge's 47.5% interest in the Augusta Partnership. Woodbridge began negotiations ascribing a value of close to US$135 million (US$120 million plus approximately US$15 million for its expected share of the partnership's cash) to its

21 Affidavit of Mr. Dart, Exhibit F.
22 Exhibit F-4.

interest, whereas ACSC began roughly at US$105 million (US$90 million plus approximately US$15 million for the partnership's cash).

[63] On September 23, 2010, shortly after the hearing before the Claims Officer, the parties had in fact agreed on a deal that included a value of US$105 million (plus what was ultimately almost a US$20 million share of the Augusta Partnership cash).

[64] The share purchase agreement itself was executed as of December 23, 2010[23].

[65] Afterwards, the sale was the subject of an approval hearing in the US Bankruptcy Proceedings, which granted it on January 7, 2011. The US Bankruptcy Court noted that the sale allowing ACSC to obtain 100% ownership of the Augusta Partnership was negotiated at arms' length and entered into in good faith[24].

ANALYSIS

1) THE STANDARD OF REVIEW

[66] In this case, the parties have had the benefit of a thorough adversarial proceeding before the Claims Officer. Both sides presented affidavit evidence with documents production, including expert reports. Viva voce testimonies with cross-examinations were allowed at the hearing. Counsel made oral and written submissions.

[67] In such a context, it is the Court's opinion that the standard of review on an appeal of the Claims Officer's Determination is that of an appellate court[25]. The role of the Court is not to conduct a trial *de novo* and plainly set aside the findings of the Claims Officer, reassess the matter and substitute its own discretion.

[68] Both the case law and the wording of the CPO at issue justify this conclusion.

i) the applicable case law

[69] Woodbridge asserts that there is limited jurisprudence on the deference, if any, to be accorded by a court to a decision of a claims officer in a *CCAA* restructuring context. This is incorrect.

[70] To the contrary, there is a strong line of Canadian cases (from the Ontario Appeal and Superior Courts, the Saskatchewan Court of Queen's Bench and the British Columbia Supreme Court) that directly address the "standard of review" issue in such a

[23] Exhibit F-1.
[24] Exhibit F-3.
[25] See *Housen* v. *Nikolaisen*, [2002] 2 S.C.R. 235.

situation[26]. These cases emphasize that the role of the Court is not to proceed on a *de novo* basis; its role is rather to decide the Motion applying the criteria of a true appeal.

[71] In the leading case of *Tiercon Industries*[27], Morawetz J. summarized as follows the applicable criteria in that regard:

> [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) <u>With respect to pure questions of law, the standard of review is correctness.</u>
> >
> > (b) <u>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 <u>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.
> >
> > […]
>
> [69] <u>The role of the court</u> on […] appeal is to review the decision of the Claims Officer. It <u>is not to conduct a trial de novo</u>.[…]
>
> [Our emphasis]

[72] The Ontario Court of Appeal affirmed this decision.

[73] In *Triton Tubular*[28], the Ontario Superior Court refused to conduct a *de novo* hearing when, like here, the proceeding before the claims officer was a "full-blown trial like proceeding" and not a summary one[29]. It rightfully noted that:

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26 See *General Motors Corporation* v. *Tiercon Industries Inc.*, 2009 CanLII 72341 (Ont. S.C.), paras. 11, 12 and 69, confirmed at 2010 ONCA 666 (CanLII); *1587930 Ontario Inc., Re*, 2006 CanLII 34422 (Ont S.C.), paras. 4 to 7; *Triton Tubular Components Corp. v. Steelcase Inc.*, 2005 CanLII 33299 (Ont. S.C.), paras. 13 to 16; *Big Sky Farms Inc., Re*, 2010 SKQB 255 (CanLII), paras. 8 to 10; *Pine Valley Mining Corporation (Re)*, 2008 BCSC 356 (CanLII), paras. 8 to 13.

27 *General Motors Corporation* v. *Tiercon Industries Inc.*, 2009 CanLII 72341 (Ont. S.C.), paras. 11, 12 and 69, confirmed at 2010 ONCA 666 (Ont. C.A.).

28 *Triton Tubular Components Corp. v. Steelcase Inc.*, 2005 CanLII 33299 (Ont. S.C.), paras. 13 to 16.

> [14] [...] 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.

[74] The Court agrees with these findings.

[75] In that regard, the *Canadian Airlines*[30] decision heavily relied upon by Woodbridge is of no assistance. In that case, the Alberta Court of Queen's Bench held that on an appeal from a claims officer's decision, while the latter's ruling deserved respect, the court was still free to substitute its own discretion.

[76] However, in *Canadian Airlines,* the appeal at issue was solely concerned with matters of law. In addition, this case was decided prior to *Tiercon Industries*, *Triton Tubular* and the other judgments referred to before that have constantly favour a stricter standard of review.

[77] The standard of review established by this trend of cases is palpable and overriding error for findings of fact and correctness for findings of law. In fact, the standard of review applied in the end to the decision of the claims officer in *Canadian Airlines* would have been the same under the criteria identified in these cases. From that standpoint, the *Canadian Airlines* case is consistent with the standard of review of these more recent *CCAA* cases.

[78] That said, the analogy drawn by Woodridge between the standard of review of a decision made by a claims officer and the standard of review of a decision made by a clerk under Article 42 *C.C.P.* is misguided and inappropriate. Contrary to the relevant wording of the CPO at issue here, Article 42 *C.C.P.* specifically refers to a review process, not an appeal process.

[79] A better analogy indeed exists with the standard of review on appeal of a trustee's notice of disallowance under Section 135(4) *BIA*. Similarly to the CPO, this provision refers to an appeal. In addition, the rationale underlying that standard of review, as it relates to the need to preserve the efficiency of a claims adjudication process set up pursuant to bankruptcy and insolvency laws, is equally present in a *CCAA* claims process.

[80] Recently, the Ontario Court of Appeal explained that rationale in the following terms[31]:

> 24 At the very least, the practice seems to be that an appeal court, when considering a Notice of Disallowance, will first decide the issue of whether the

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[29] See also to the same effect, *1587930 Ontario Inc., Re*, 2006 CanLII 34422 (Ont. S.C.), paras. 4 to 7 and 19 to 22.

[30] *Canadian Airlines Corp. (Re)*, 2001 ABQB 146 (CanLII).

[31] *Credifinance Securities Limited* v. *DSLC Capital Corp.,* 2011 ONCA 160 (CanLII).

> matter proceeds as a true appeal or as a hearing *de novo*. The test that has evolved seems to be that a hearing *de novo* will occur if the court decides that to proceed otherwise would result in an injustice to the creditor: Charlestown Residential School (Re) (2010), 70 C.B.R. (5th) 13 (Ont. S.C.) at paras. 1 and 18.
>
> 25 I note that this practice is not used uniformly across the country. For example, in British Columbia an appeal under s. 81 of the BIA is not intended to be a trial de novo but rather a true appeal: Galaxy Sports Inc. (Re) (2004), 1 C.B.R. (5th) 20 (B.C.C.A.) at para. 40. The policy rationale is that trustees in bankruptcy should be regarded as having experience and expertise in the area of business financing, restructurings and insolvency.
>
> 26 <u>This BC approach makes sense because, if evidence that was not before a Trustee were to be presented on an appeal as a matter of course, much of the efficiency in the operation of the bankruptcy scheme would be lost</u>. Creditors who neglected to file a proof of claim in compliance with the requirements of the scheme would be at an advantage because they could expect to enhance their proof on appeal. <u>This, it seems to me, would impact on the objective implicit in the BIA, which is to enable parties to have their rights and claims determined in an expeditious fashion, and add unwanted expense, delay and formality</u>: Galaxy Sports at para. 41.
>
> [Our emphasis]

[81] A similar analogy can also be drawn with the appeal process of a registrar decision under Section 192(4) *BIA*, which proceeds as a true appeal and not *de novo*[32].

[82] Bearing this in mind, with respect to questions of fact, which are the sole basis for its Motion, Woodbridge is therefore required to establish that the Claims Officer made palpable and overriding errors.

[83] As well, since this is not a *de novo* hearing, the oral evidence offered by Woodbridge on the Motion is inadmissible. Normally, a court does not admit such evidence in appeal. The Court cannot simply accept it as a substitute for the lack of transcripts of the September 17, 2010 hearing before the Claims Officer.

[84] The relevant record in this case consists only of the Claims Officer's Determination, which includes a summary of facts, reasons and conclusions, as well as the affidavits and exhibits filed before him. No official recording was made of the hearing in front of the Claims Officer. Neither a tape recording of the proceedings, nor a transcript of the hearing is thus part of the current record.

[85] Woodbridge was aware that there was no stenographic record of the proceedings before the Claims Officer. It apparently made no effort to request that one be kept. There is no evidence either that such records are generally made or kept in the ordinary course of *CCAA* claims hearings.

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[32] See *Cockfield Brown Inc. (In re): Giroux* v. *Réseau de télévision T.V.A. Inc.*, [1988] R.J.Q. 1807 (C.A.).

[86] Following the hearing of September 17, 2010, and in connection with this Motion, Woodbridge asked the Claims Officer for a copy of the transcript of the recording he had made. This request was denied. The Claims Officer advised that the recording had been made for his "personal use" and that there was no transcript[33].

[87] No reasonable person, particularly a sophisticated party duly represented such as Woodbridge, could have inferred from the presence of a dictating machine on the Claims Officer's desk that the hearing was officially recorded. The hearing was held in a conference room of a law firm where neither an official stenographer nor a clerk was present.

[88] As a result, Woodbridge cannot put in front of the Court the oral evidence made during the hearing before the Claims Officer on September 17, 2010, namely the stenographic notes of the four witnesses then examined (Mr. Dart from Woodbridge, Mr. Pun from RBC, Mr. Morrison for the Monitor, and Mr. Rougeau from Abitibi).

[89] Having sat silent, Woodbridge cannot now try to use the fact that there is no stenographic record to transform this appeal into a *de novo* hearing.

[90] By choosing not to request to have the hearing before the Claims Officer recorded by an official stenographer, Woodbridge took the chance that the factual determinations and conclusions of the Claims Officer could not meet the standard of "palpable and overriding errors" in case the decision was not favourable to it.

[91] In the context of this Motion, Woodbridge must abide by the consequences of its choice.

[92] In similar circumstances, the Quebec Court of Appeal has ruled that when an appellant fails to put in front of the appellate court all the evidentiary record before the first judge, the factual determinations and conclusions of the latter cannot be reviewed. The appellate court must take for granted the facts as reported by the first judge in his decision[34].

[93] While the parties agreed to make available to this Court the same witnesses who testified before the Claims Officer for the purposes of the Motion, this agreement was expressly made without prejudice to Abitibi's right to argue on the appropriate standard of review and on the admissibility of any or all of such evidence[35].

[94] Hearing on the current Motion the same witnesses who testified in front of the Claims Officer illustrated the differences that exist between a *de novo* process and an appeal based on the record as it stands. It indeed showed the awkward consequences of trying to consider the matter as an appeal and a *de novo* hearing at the same time.

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[33] Exhibits R-11 and R-12.

[34] See *Québec (Sous-ministre du Revenu)* v. *9087-3118 Québec inc.*, 2010 QCCA 1470, para. 14; *3979229 Canada inc.* v. *Commission des normes du travail*, 2010 QCCA 1412, para. 12, and *Centre commercial Innovation inc.* v. *Lafleur*, 2009 QCCA 845, para. 8.

[35] See Procès-verbal dated January 31, 2011, and Procès-verbal dated May 2, 2011.

Simply put, it is impossible for this Court to properly recreate what took place at the hearing before the Claims Officer. From that perspective, it must rely on the Claims Officer's comments on this oral evidence, and nothing else.

[95] Of course, it is well settled that even in the absence of a transcript, or where there is no statutory duty to record hearings, a court sitting in appeal will still proceed to the appeal unless, exceptionally, the record put before it does not allow for a proper disposal of the application for appeal[36].

[96] Here, the record as it stands is adequate for this Court to rule upon the Claims Officer's Determination. It limits however the review in terms of the oral evidence. The findings of the Claims Officer in that regard must be taken as they are and his assessment thereof must be accepted as correct. It would be dangerous and unjust, if not wrongful, for this Court to reassess the probative value of evidence it has not heard and which is not before it[37].

ii) the wording of the CPO

[97] The wording of the CPO at issue leads to a similar result on the applicable standard of review.

[98] At paragraph 13, it precisely indicates that Woodridge "*may appeal a Claims Officer's determination to this Court*". The paragraph further states that "*if an appeal is not filed*", the Claims Officer's determination is "*final and binding*".

[99] This wording may be compared to the one applicable on an appeal of a Grievance Claims Officer, which is dealt with at paragraph 23 of the CPO. In that case, it is specifically indicated that "*for the purpose of such an appeal, the Court shall apply the criteria applicable to judicial reviews*".

[100] As a general rule, the true meaning of the word "*appeal*" is not that of a *de novo* hearing. In the context of the CPO at issue, this is reinforced by the specific distinction made between an appeal of a Claims Officer's determination and an appeal of a Grievance Claims Officer's determination, with the latter being subject to the criteria applicable to judicial reviews.

[101] To conclude that the review process of the Claims Officer's Determination is a *de novo* hearing would ignore this CPO wording. This cannot be the expected result.

[102] Moreover, the CPO issued in this case is, for all intents and purposes, similar if not identical to the CPO considered by the Ontario courts in the cases referred to before. Its purpose is to provide for efficient and rapid means of resolution so that the creditors may vote on a plan as soon as possible.

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36 *Canadian Union of Public Employees, Local 301* v. *Montreal (City)*, [1997] 1 S.C.R. 793.

37 *Syndicat des employés de soutien de l'Université de Sherbrooke v. Frumkin*, 2010 QCCS 1641, leave to appeal denied, 2010 QCCA 1572.

[103] To consider this appeal as a *de novo* hearing would defeat such purpose and render rather useless the recourse to a claims officer process. This is even truer when one considers the credentials of the Claims Officers designated by the Court in the Abitibi *CCAA* claims process, including the one designated in the current Claim.

[104] That said, contrary to another assertion put forward by Woodridge in argument, to make the Claims Officer's Determination subject only to an appeal process is perfectly acceptable. In such a situation, the final say remains with the Court, and not with the Claims Officer. It is only the criteria for intervention that vary.

[105] In short, Woodridge would like to have a second full trial of its Claim, after having had the benefit of a complete and due trial process in front of the Claims Officer. This is wrong and inappropriate.

[106] Put to its utmost limit, it would impose a much too onerous burden on restructuring judges in any *CCAA* process of relative importance. This would defeat the whole purpose that justifies the issuance of CPOs. The CPOs are aimed at providing summary mechanisms for creditors to file and value their claims against a debtor company. They help to bring finality to the process and facilitate the timely vote on a proposed plan. They are geared towards an orderly and efficient completion of the *CCAA* proceedings. From that perspective, they are in accordance with the wording of the applicable sections of the *CCAA*.

[107] No one disputes that a *CCAA* court has the authority to issue a CPO and impose a claims process for the benefit of an entity that has filed for *CCAA* protection. It is now accepted that one of the *CCAA* distinguishing features is to grant a broad and flexible authority to the supervising court to make orders necessary to facilitate the reorganisation of a debtor and achieve the *CCAA's* objectives[38].

[108] In closing on this first issue of the standard of review, the Court cannot avoid mentioning that in its own Motion, despite its argument that the matter should proceed as a *de novo* hearing, Woodridge pleaded that the Claims Officer allegedly erred and that his errors were "*reversible errors of law and where applicable palpable and overriding errors of facts as well*"[39].

[109] Interestingly, this refers to the exact wording of the criteria summarized in *Tiercon Industries*, namely the ones applicable for the standard of review of a true appeal as opposed to a *de novo* hearing.

2) THE ADDITIONAL EVIDENCE ON THE MOTION

[110] Turning to the palpable and overriding errors on the part of the Claims Officer, Woodbridge submits that the latter's Determination was wrong primarily because of the value given by the parties to its 47.5% minority interest in a sale finalized in early 2011.

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38 *Century Services Inc.* c. *Canada (Attorney General)*, [2010] 3 S.C.R. 379, at paras. 15, 19 and 65.
39 Paragraph 29 of the Motion.

[111] In that regard, Woodridge describes *"the fundamental problem with the Claims Officer's Determination, and the position advanced by Abitibi,"* as being the failure *"to have regard to the proper values of the Augusta Partnership as evidenced by the discussions which were taking place between Woodbridge and Abitibi and which ultimately resulted in the sale of Woodbridge's 47.5% interest in the Augusta Partnership"*[40].

[112] Accordingly, Woodbridge describes the fundamental problem with the Determination as arising out of evidence that was not put before the Claims Officer. With respect, there can be no criticism of the Determination based on evidence that Woodbridge did not put before the Claims Officer.

[113] In this regard, the real issue is whether the evidence of these negotiations is admissible and probative. The test for the introduction of new evidence on appeal was articulated by the Supreme Court[41] along the following lines; to introduce it, a party must convince the court that:

a. The evidence was not available at the time of trial;

b. The evidence is relevant in the sense that it bears on a potentially decisive issue;

c. The evidence is credible; and

d. The evidence is expected to have affected the result.

[114] Based on these criteria, the additional evidence sought to be adduced by Woodbridge is neither admissible nor probative. Four reasons warrant such a conclusion.

[115] First and foremost, this evidence was available to Woodbridge before the Claims Officer released his Determination. Had Woodbridge acted diligently, it would have raised the issue in front of him. It did not.

[116] In fact, not only did Woodbridge not seek to put it before the Claims Officer. Worse, it offered no convincing explanation for not presenting it then.

[117] The negotiations of the eventual sale of Woodridge's 47.5% interest to ACSC began in June 2010. An agreement on the US$105 million value was reached on September 23, 2010. A motion to approve this settlement was prepared and signed on December 1, 2010.

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40 Woodridge's Outline of Argument dated April 15, 2011, para. 40.

41 *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

[118] Even if the share purchase agreement was executed on December 23, 2010 and the closing finalized in January 2011, all of these occurred before the issuance of the Claims Officer's Determination of December 13, 2010.

[119] The mere fact that the transaction only closed in late December 2010 and early January 2011 is insufficient to justify Woodridge's assertion that this evidence was not available at the time of the hearing in front of the Claims Officer.

[120] Woodridge and ACSC were not only very close on their respective positions on value as early as June 2010; they had indeed reached a deal on that aspect barely a week after the hearing in front of the Claims Officer, that is, on September 23, 2010.

[121] The motion for approval of the transaction in front of the US Bankruptcy Court was even prepared, signed and served prior to the issuance of the Claims Officer Determination.

[122] At best, Woodbridge knew enough to raise the issue in front of the Claims Officer. It willingly chose not to do so.

[123] Similarly, the fact that nothing was officially finalized at the date of the hearing in front of the Claims Officer is without basis. The issue is not whether the new evidence was available at the time of the hearing, but whether it was available at trial level. This includes the trial process up to the issuance of the Claims Officer's Determination.

[124] Certainly, Woodridge could have at least asked for a reopening of the evidence based on what it knew. Again, it chose to stay quiet, no doubt with a full understanding of the potential consequences.

[125] Second, the parties agreed that the valuation exercise was to be conducted on the basis of the facts known to the parties as at April 2009. The many challenges facing Abitibi and the pulp and paper producers generally at that time are described in the Determination. The industry was in crisis. Demand and prices were falling. Many competitors were restructuring and pulp mill prices were depressed.

[126] A potential purchase of Woodbridge's 47.5% minority interest for some US$120 million in January 2011 was not a fact known by the parties in April 2009.

[127] Third, it is wrong to suggest that the purchase of Woodbridge's 47.5% interest in 2011 at around US$120 million can be extrapolated as evidence that the Augusta Mill was worth over US$200 million in 2009.

[128] On the one hand, the purchase price is not all in cash. It includes a US$90 million note "secured" by the assets of the Augusta Mill. This cannot be treated as equivalent to cash.

[129] On the other hand, there is no suggestion in the evidence that the US$120 million agreed to be paid by Abitibi to Woodbridge for its minority interest was anything

more than the price that Abitibi was willing to pay to acquire it, and relieve itself from the burden of the support agreements to the Augusta Partnership. No evidence suggests that this price was based on any assessment of the value of the mill as a whole.

[130] In other words, the value in 2011 of 47.5% of a partnership with the significant support obligations of Abitibi is not probative of the value in 2009 of 100% of the partnership's assets excluding the support arrangements.

[131] In short, this additional evidence is not probative of the values to be used on the formula agreed for determining the amount of Woodbridge's Claim for the repudiation of the Call Agreement as of April 2009. Most probably, this evidence would not have affected the result of the valuation exercise.

[132] Fourth and final, the Court cannot conclude that this alleged new evidence was indispensable. In all likelihood, it could have only affected the second part of the applicable equation for the determination of Woodridge's Claim. As such, this new evidence could have merely influenced the going concern value of Woodridge 47.5% interest, and nothing more.

[133] From that standpoint, there appears to have been good reasons for Woodridge not to raise this issue in front of the Claims Officer. The transaction eventually finalized between Woodridge and ACSC gave an higher value (namely over US$120 million) to the going concern value of its minority interest than the ones put forward by either the Monitor's Notice of Revision[42] or Woodridge's own Claim[43]. This alleged new evidence of Woodridge would have consequently rendered more difficult the acceptance of its own financial experts' opinion in that regard.

[134] Therefore, if the Claims Officer had taken such a fact into consideration, it may have diminished the value of Woodridge's Claim rather than increase it. As stated earlier, it is a decrease in the going concern valuation of Woodridge's minority interest that could result in an increase in Woodridge's Claim, not the reverse. This may well explain why Woodridge chose to remain silent when it had all the elements to speak up in front of the Claims Officer on this point.

[135] This evidence cannot and should not affect this Court's review or assessment of the Claims Officer's Determination.

3) THE CLAIMS OFFICER'S DETERMINATION

[136] Once the Court concludes that this is not a *de novo* hearing and that the evidence of the January 2011 sale of Woodridge's minority interest is inadmissible, there remains not much left convincing, if anything, in Woodridge's assertions against the Claims Officer's Determination.

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42 Exhibit B-4.
43 Exhibit C-3.

[137] In the Court's opinion, Woodridge does not establish a palpable and overriding error on the questions of fact analyzed by the Claims Officer. His findings on the value of the Woodbridge Claim were open to him on the basis of the evidence presented and to which he extensively referred in his decision.

[138] Woodridge's representations in that regard are factual in nature. They amount to mere disagreements on this analysis of the evidence. This falls short of a palpable and overriding error that would justify the Court's intervention.

[139] Again, the gist of Woodridge's arguments on the Claims Officer's palpable and overriding error revolves around the inference one could allegedly draw from the sale of its minority interest finalized in late 2010 and early 2011.

[140] Woodridge's reasoning in this respect is summarized at paragraph 43 of its Outline of Argument:

> 43. The Call Agreement gave Woodbridge the right to force a sale of 100% of the Augusta Partnership and to retain the first approximately US $215 million in proceeds. The sale confirms the value of Woodbridge's 47.5% in 2010 at US $120 million — that issue is no longer a matter of competing valuations, it is settled. As a matter of common sense, given that Abitibi valued a 47.5% interest in the Augusta Partnership at US $120 million then ownership of the entire partnership must be worth substantially more than that (certainly over US $200 million). The Determination, however, reaches the opposite conclusion; namely, that on a sale of the entire Augusta Partnership, Abitibi would have bid just US $100 million or, US $20 million *less* than it paid to acquire Woodbridge's 47.5% interest. Clearly, the Determination is wrong.

[141] Aside from the fact that this evidence is inadmissible for the reasons stated before, the inference so drawn by Woodridge has no support in the proof offered on the Motion.

[142] True, this sale may provide an indication of value for Woodridge's 47.5% minority interest, namely the second element of the formula agreed upon by everyone to determine the damages incurred as a result of the rejection of the Call Agreement. However, to suggest that this automatically entails that the entire Augusta Partnership is therefore worth more than US$200 million is a leap that none of the evidence presented allows one to make.

[143] The evidentiary support for the two elements of the general formula that everyone adopted was very different. The determination of one value did not necessarily allow the corollary determination of the value of the other. It was by no means limited to a simple matter of "common sense" as Woodridge argued.

[144] Over and above its insistence on the inference to be drawn from this evidence that the Court concludes is inadmissible, Woodridge's arguments are centered around three other points: 1) the Claims Officer's improper analysis of the Woodridge's experts

valuations of the forced sale value of the Augusta Partnership; 2) his failure to take into account the cash built up in the Augusta Partnership between the evaluation date chosen and the date on which a likely forced sale would have taken place; and 3) his failure to apply a 30% minority discount to the going concern value of Woodridge's 47.5% interest.

[145] None of these additional complaints amount to a palpable and overriding error on the part of the Claims Officer.

[146] First, on the value of the Augusta Mill, the Claims Officer concluded in the end that the Monitor's assumptions were more realistic and less speculative than those of Woodridge's experts.

[147] He agreed that the Augusta Mill would be sold as a standalone operation and he accepted several of the Monitor's and Abitibi's arguments as to the challenges the mill would face. This conclusion that the Augusta Mill would be sold on a standalone basis was not inconsistent with the fact that one of the most likely bidder for the Augusta Partnership would be Abitibi.

[148] The challenges identified by the Claims Officer that the Augusta Mill would likely face were realistic and supported by the evidence presented in front of him. They were premised on an assertion that the sale would be to a purchaser with no built-in ability to address factors such as no sales force, order system, or buying power.

[149] Mr. Rougeau's affidavit notably explained why the value of the 47.5% partnership interest retained by Woodbridge was, if anything, greater than the value of the Augusta Partnership if sold under the forced sale provisions of the Call Agreement in early 2010.

[150] As to the value obtainable on a forced sale in early 2010, as summarized at paragraphs [42] to [44] of this judgment, the Claims Officer considered many factors highlighted in Mr. Rougeau's affidavit and in the Monitor's submissions. For instance:

a. Even if Abitibi would have been an interested buyer of the Augusta Mill in a forced sale proceeding, there was no reason to assume that Abitibi would pay more than the amount necessary to top the price which it could reasonably assume an arm's length third party purchaser would pay;

b. The value to be compared under the Call Agreement was the "consideration representing fair market value for the Partnership based on market conditions existing at the time". The time of the valuation was April 2009, assuming a sale in early 2010. Abitibi was in bankruptcy proceedings in April 2009, and had no assurance of having a bankruptcy plan done by early 2010, nor indeed any assurance that it would have financing longer than the DIP financing already then approved by the Court and due to expire in November 2009. Newsprint demand had declined by 29% between 2004 and 2008 and Abitibi had substantial excess capacity;

c. The Monitor's submissions provided ample evidence both as to the lack of financial capacity of Abitibi and its affiliates in 2009 and indeed up to the time of emergence, as well as the state of the relevant markets;

d. A third party buyer under a forced sale scenario would not inherit the senior management employees seconded by Abitibi to the Augusta Mill and would not benefit from ACSC buying 100% of the output of the Mill on trade terms more favourable than in the industry, nor from the low commission rates paid for sales, the low prices paid for supplies and freight and the guaranteed operating rates in a marketplace with such overcapacity. Any such third party would purchase a mill with no customers, no order book and no sales force in an oversupplied market.

[151] This evidence led the Claims Officer to make the following crucial factual determinations in his decision:

> [51] Amongst the persons who testified, the only one with experience in the day to day operation of newsprint mills is Mr. Rougeau. His affidavit sets out the <u>important advantages and benefits the Augusta Partnership enjoys which flow from the Sales Agreement, the Partnership Agreement as well as the involvement of ABH, all of which would no longer exist in the Standalone situation of the Augusta Mill after a Forced Sale</u>. He describes the <u>considerable hurdles which a third party purchaser would face in operating the Augusta Mill as a Standalone Operation.</u> When Mr. Rougeau testified at the hearing, he acknowledged that the Augusta Mill was "a good mill" and stated that the AbitibiBowater Group would be a natural for being a full owner and would very probably be amongst those bidding for it.
>
> [52] I have concluded that if one places oneself back to April 16, 2009, having regard to the fact that Woodbridge refuses to consent to the distribution of any of the profits from the operation of the Augusta Mill, the AbitibiBowater Group would, at the earliest opportunity (January 1, 2010) proceed with a Forced Sale of the Augusta Partnership. <u>Even taking into account that the Augusta Mill is one of the more cost-efficient mills in North America, the prevailing situation was one of cut backs in newsprint production and the closing of entire mills.</u> In addition, newsprint producers were seeking protection under the insolvency statutes in both Canada and the United States. It could not be reasonably forecast that the situation would be appreciably better in early 2010.
>
> [53] The four largest customers who account for sales equivalent to 30% of the production of the Augusta Mill have long-term contracts with the AbitibiBowater Group. There are also long-term contracts with other customers. It is not likely that they would change their suppliers of newsprint. It should also be considered that the AbitibiBowater Group and other producers would likely react to counter any discount initiated by Woodbridge.
>
> [54] I have also concluded that it is <u>probable that the AbitibiBowater Group (ACSC) would, being the only purchaser of the entire newsprint production of the Augusta Mill, transfer to its other mills the production of newsprint ordered by its customers. Furthermore, the two key personnel of the Augusta Mill, the Mill</u>

> Manager and Comptroller, were on loan from the AbitibiBowater Group and would no longer be with the Augusta Mill. Thus, as at the date of a Forced Sale, the Augusta Mill would have no customer base, no order book and no sales force.
>
> [...]
>
> [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.
>
> [Our emphasis]

[152] The alleged errors raised by Woodridge are disagreements with factual findings of the Claims Officer in weighing the evidence of Mr. Rougeau as contrasted with the evidence offered by Woodbridge's experts.

[153] Disagreements on assessment of the evidence of witnesses cannot form the foundation of an appeal of the Claims Officer's Determination. Such assessments of fact are the very function the Court has delegated to the Claims Officer.

[154] Second, it is wrong to assert that the Claims Officer failed to take into account the cash built up in the Augusta Partnership between the evaluation date chosen and the date on which a likely forced sale would have taken place.

[155] The parties directly addressed this issue in their submissions. The Monitor's reply explained its position in that regard[44] and the influence, if any, of this situation upon the forced sale value of the partnership. In the end, the Claims Officer weighed the arguments of both sides on the assessment of this value. He preferred the approach of the Monitor over the valuations proposed by Woodridge's financial experts.

[156] The accumulated cash in the partnership was one of the elements factored into account in the calculations made by both sides. There was no error on the part of the Claims Officer in retaining the position put forward by the Monitor in that regard.

[157] Third, as again summarized at paragraphs [51] to [55] of this judgment, the Claims Officer had reasonable grounds to prefer the Monitor's submissions on the minority discount issue over those of Woodridge's experts. On that point, in his Determination, the Claims Officer generally accepted the Monitor's reasoning in respect of the discount; he ruled that a discounted cash flow method was the appropriate basis for establishing value.

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[44] Exhibit D-3, paragraph 14.

[158] In addition, the terms of the Partnership Agreement provided a lot of leverage to Woodridge and gave it the ability to negotiate on an equal footing with Abitibi. The potential rationale that would otherwise justify a minority discount of any importance was most likely not present here. Indeed, as Abitibi pleaded, no such discount was applied when ACSC acquired a 2.5% interest of Woodridge in 2004. None was applied either to the sale of the 47.5% interest finalized in early 2011.

[159] That said, it must be remembered that Abitibi did not determine Woodbridge's Claim. The Monitor appointed by the Court in the *CCAA* proceedings did. At the hearing before the Claims Officer, Abitibi supported the Monitor's determination but still argued that, if anything, it was too high. Yet, the Determination attacked by the Motion substantially increased the Monitor's Notice of Revision of Woodridge's Claim.

[160] Be that as it may, only Woodridge now contests the assessment of the Claims Officer. Despite its many arguments, no matter from which angle one analyzes the Claims Officer's Determination, there are no valid grounds to vary his findings.

FOR THESE REASONS, THE COURT:

[161] **DISMISSES** the Motion;

[162] **WITH COSTS.**

CLÉMENT GASCON, J.S.C. J.S.C.

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Dates of hearing: May 2 and 3, 2011

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