

**SUPREME COURT OF NOVA SCOTIA**

Cite as: NewPage Port Hawkesbury Corporation (Re), 2013 NSSC 124

2011

Hfx No. 355063

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

IN THE MATTER OF: A Plan of Compromise or Arrangement of  
NewPage Port Hawkesbury Corp.

Applicant

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**DECISION OF THE CLAIMS OFFICER IN THE APPEAL OF THE DISALLOWANCE  
OF THE PROOF OF CLAIM OF LIGNI BEL LTD.**

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**Claims Officer:** Richard W. Cregan, Q.C.

**Heard:** January 29, 2013

**Present:** Maurice P. Chiasson, Q.C., Sara Scott, and  
Shannon McEvenue, representing Ligni Bel Inc.

Tim Hill, Maria Konyukhova, Kathryn Esaw, and  
George Kinsman, representing the Monitor,  
Ernst & Young Inc.

**INTRODUCTION**

This is the appeal of the Notice of Disallowance issued on July 12, 2012 by the Monitor in these proceedings of the Proof of Claim of Ligni Bel Ltd. (Ligni) dated April 13, 2012 in which it made a claim for \$33,288,711. A second claim was also made for \$25,324,073 on July 31, 2012. It was admitted that this claim was subsumed within the first claim. It was withdrawn. The appeal is before me by virtue of my appointment as Claims Officer in paragraph 30 of the Claims Process Order, dated March 1, 2012.

## **BACKGROUND**

- [1] NewPage Port Hawkesbury Corp. (NPPH), the corporation subject to these proceedings, in addition to its operation of the paper mill at Port Hawkesbury (Paper Mill), was involved through its Woodlands Unit in the management of extensive woodlands. Some were owned by it and some were Crown Lands. They are referred to collectively as the “Managed Lands”. As well it had access to certain privately owned woodlands. From these woodlands it harvested logs for use in the Paper Mill and for sale to Ligni which operated a sawmill in Scotsburn, Pictou County.
- [2] There are two significant agreements between Ligni and NPPH. The first is the Fibre Supply and Exchange Agreement, dated September 10, 2009, (Fibre Agreement). It provided that NPPH through its Woodlands Unit would supply from the Managed Lands roundwood suitable for use as studwood, that is, logs which could be milled into 2 x 4's, and that Ligni would provide to NPPH wood chips which would be used in the paper making process and hogfuel which would be used to fuel its boilers. As well NPPH would assist Ligni in acquiring logs from privately owned lands. The Fibre Agreement was for a term of ten years with provision for periodic extensions. The other is the Amended and Restated Investment Agreement, dated November 16, 2009, among NPPH, Ligni, 4246501 Canada Inc., which was a corporation related to Ligni, and Bruno Lebel, who is the Chief Executive Officer of Ligni, (Investment Agreement).

[3] Pursuant to the Investment Agreement, NPPH lent \$2,570,000 on a secured loan and received approximately 421,000 preferred shares in Ligni. This entitled NPPH to receive monthly financial performance statements from Ligni. The two agreements resulted in NPPH being a supplier, customer, secured creditor and shareholder of Ligni and thus highly invested in Ligni's continued operations.

[4] The operational relations between the two companies proceeded pursuant to these agreements, but not without difficulties. However, they came to an end on September 9, 2011, when NPPH filed for and received creditor protection in these proceedings.

[5] Ligni's claim consists of the following seven components:

- |    |  |             |
|----|--|-------------|
| 1. | Log cost increase in 2010 and 2011   | \$790,469   |
| 2. | Contribution lost from shift reductions from February 20, 2011 to November 5, 2011 caused by NPPH's failure to supply sufficient wood                  | \$2,878,962 |
| 3. | Chip price difference from NPPH's failure to purchase sufficient chips from the end of August to November 2011   | \$524,002   |
| 4. | Contribution lost from sawmill shut down from November 5, 2011 to March, 2012 as a result of NPPH's failure to provide adequate supplies of roundwood. | \$4,100,947 |

5.	Purchase of hogfuel for boiler	\$36,652
6.	Contribution lost for NPPH's failure to supply wood in 2012-2013	\$12,605,343
7.	Contribution lost for NPPH's failure to supply wood in 2013-2014	\$12,352,336
	<b>Total Claim</b>	<b>\$33,288,711</b>

## **EVIDENCE**

[6] The evidence before me is in the affidavits of Bruno Lebel, Chief Executive Officer of Ligni, and of William Stewart, who had been Director of Woodlands and Strategic Initiatives at NPPH from August 2009 to September 2012 and now has similar responsibilities with the present operators of the Paper Mill.

[7] Mr. Lebel's evidence is that early in the Spring of 2011 the volume of studwood provided to Ligni by NPPH was being reduced without notice. On July 14, 2011 he met with Mr. Stewart who he says expressed dissatisfaction with the terms of the Fibre Agreement and advised that NPPH could not meet the 40% studwood supply condition in that agreement. He also says that he learned from Mr. Stewart that more than 2000 tons of studwood which should have been delivered to Ligni were

being held at the Paper Mill. Mr. Stewart denies these allegations. The supply of studwood and the purchase of wood chips by NPPH ceased on August 21, 2011. This left Ligni to source studwood elsewhere without the help of NPPH.

- [8] With sources for studwood limited Ligni had, prior to that date, reduced its daily operations from two shifts to one. As well it had to find a new source for hogfuel and to sell its chips elsewhere. The new arrangements were all to the financial disadvantage of Ligni.
- [9] As to the supply of studwood, Mr. Stewart's account is somewhat different. He says that Ligni's financial difficulties caused it to manage its supply of studwood in a way which created inventory shortages and that the very wet and mild winter of 2011 created sub-par harvesting conditions which decreased NPPH's supply of studwood from the Managed Land. This was a problem shared by the other major participants in the industry in Nova Scotia.
- [10] Furthermore Mr. Stewart says that by November 2010, Ligni had fallen significantly behind in payments under the Fibre Agreement. By February 2011, it owed NPPH approximately \$1,400,000. Mr. Lebel had advised him in January 2011 that economic difficulties were causing cash flow issues for Ligni and that as of late 2010 it was in breach of its financial covenants with its lenders.
- [11] In February 2011 Mr. Lebel asked NPPH to temporarily stop supplying

studwood so it could catch up on its arrears and reduce its inventory. NPPH was requested to manage deliveries so that there would only be 1.5 days' worth of studwood inventory at the Sawmill.

- [12] By September 2011, these efforts notwithstanding, Ligni was in arrears to NPPH of approximately \$400,000.
- [13] Mr. Stewart asserts that NPPH took “extraordinary” steps to deliver studwood to Ligni by directing contractors to increase studwood harvesting at the expense of pulpwood for the Paper Mill and to work overtime, the extra expense for which was assumed by NPPH. It made extra efforts to accommodate just in time delivery and to minimize transportation expenses, obtained studwood from New Brunswick and Prince Edward Island for Ligni's benefit and advised Ligni on optimal approaches for procuring studwood from third party suppliers.
- [14] Ligni's audited financial statements as of March 28, 2010 and March 27, 2011 show that the losses from operations were \$1,882,291 and \$1,839,539 respectively, and that Shareholder Equity Deficits for those years were \$10,368,720 and \$10,572,971, respectively.
- [15] On August 2, 2012 BDO Canada Limited was appointed receiver over certain Ligni assets. The notice given by the receiver dated August 8, 2012 records that Ligni owed NPPH unsecured debts of \$425,702 and secured debts of \$3,000,000.

[16] Attached as exhibits to Mr. Stewart's affidavit are a number of internal, contemporaneous emails found in the records of NPPH . One is from Derek Geldart, Region Manager Woodland of NPPH, dated May 11, 2011 to Gilbert Carre at Ligni, and copied to Mr. Lebel and Mr. Stewart, from which I quote:

We have had our buyers focused on this related to both our needs the last several weeks. From our supply area, roads are now open in eastern NS and PE, and scheduled to reopen in NB in May 16 - so this added production should soon increase deliveries. This year, the weather has been more of a factor than the government road closures. Although locally the spring thaw has not been as significant - the wet weather has. I track precipitation and drying days to stay aware of environmental and production risks, and compared to last year, we have had more than double the precipitation for the period April 1 to May 1-. Also, worsening efforts to find relief for production and hauling is that the rains have been steady with precipitation being received in eastern/central Nova Scotia greater than 75% of the days. The longest break between precipitation has been 3 days providing very little drying opportunity. We have offered incentives to suppliers to get there wood forwarded to roadside; and hauled if roadside (most of the stranded production is in the woods) and the response has been they cannot move wood until things dry. There are no surplus inventories we know of. The option is to throw huge money at it - but we/our buyers believe that will not get us the volumes we need.

[17] Another is from Mr. Geldart to Mr. Stewart dated June 29, 2011, from which I quote:

Note: most mills are having difficulty meeting consumption needs and prices have risen significantly. We are having some success on the mainland region increasing supply from the "single shift" supply level (with recent increase) and will continue to target loggers to increase volumes. Additionally, we have been able to maintain relatively low studwood wood cost, but the current market has prices higher than recent past and you need to consider the supply needs and any urgency with getting increased volumes in a short period. We

continue to be met with higher prices as we increase volumes from “common” supply areas. Presently, our buyers are indicating an increase of a few to several dollars (\$60 to \$64 roadside) depending upon areas is required - with a total delivered cost impacted by haul distance. Simply, overall we need to draw supply away from others who are in a similar situation. Please advise related to your ability to further increase prices to prices indicated.

- [18] This was in immediate answer to an email Mr. Stewart had sent to Mr. Geldart, portions of which I quote:

I had a call from Bruno Lebel today, concerned about sawmill finances and log supply. I told him that logs were likely available, but at much higher price, and at risk of starting a price war, but that we would not make that decision for him - and properly so, it's Bruno's call whether he wants to pay much more or run one shift.

...so I volunteered that you would assess the market and provide guidance early next week on what price you thought would be necessary to achieve enough log supply for continuous 2-shift operation. I told Bruno that we would have to beat an \$80/tonne delivered price in the Halifax-Truro corridor - likely an increase of 10% or more from where we are now. We also discussed weather delays on Crown, and our own paper mill shortage of pulpwood.

Can you have your team look at what might be possible? Geldart is away so we should deal directly with Bruno.

- [19] There are a number of material matters concerning which Mr. Lebel and Mr. Stewart give conflicting accounts. Mr. Lebel's account is very general and is not much more than simple assertions that NPPH was not compliant with the terms of the Fibre Agreement.
- [20] In contrast, Mr. Stewart gives significant detail of the efforts NPPH made to accommodate Ligni within the terms of the Fibre Agreement. He describes in some detail the efforts to supply studwood, the difficulties caused by the



weather, the market for logs from private sources and Ligni's admitted financial difficulties. He attaches relevant emails. These particulars have not been countered by any reply from Ligni. Accordingly, I accept Mr. Stewart's account in preference to Mr. Lebel's where there is conflict.

## **LAW AND ANALYSIS**

[21] There are certain key clauses in the Fibre Agreement, particularly Paragraphs H., I. and J. which may here be conveniently quoted:

### **H. Volume Adjustments:**

1. If NPPH is unable to meet its volume commitments to Ligni Bel as a result of a Force Majeure Event (defined below) affecting NPPH, Ligni Bel shall have the right, once its wood yard inventory has been substantially depleted, to temporarily secure its Studwood requirement elsewhere, but only for the period of time until NPPH is again able to meet its Studwood supply commitments. However prior to exercising this right, Ligni Bel shall meet with NPPH to discuss alternate methods to meet its Studwood needs, and NPPH shall have the right of first refusal, at its option, to meet Ligni Bel's Studwood needs by implementing such alternate methods.
2. If a Force Majeure Event prevents either party from performing under this Agreement, the obligation of each party toward the other shall be reduced proportionately, provided that in such event both parties will take all reasonable steps to restore the balance of their commitment as soon as possible.
3. A *Force Majeure Event* means any event or circumstance that prevents either party from performing some or all of its obligations under this Agreement and that is beyond the reasonable control of the affected party, including strikes, lockouts, or other legal or illegal labor disruptions however arising, Acts of God or the Queen's enemies, wars, civil insurrections, riots, laws, orders or regulations or any governmental authority, body or agency, fires, unavoidable accidents, delays in transportation, delays caused by common carriers, inability to obtain necessary materials or

equipment, insect infestation, falling off in market conditions or mechanical breakdown, or any other cause similar to the above (excepting lack of finances and/or financing) that is beyond the reasonable control of the party affected, and also includes a temporary or permanent closure or reduced operation of all or a portion of the Sawmill or the Paper Mill for operational, economic or other reasons, whether or not within the control of the party affected.

(underlining added)

**I. Limitation of Liability:**

1. Both parties to this Agreement undertake to use commercially reasonable efforts to supply and purchase the volume and quality of Studwood, Hogfuel and Chips as indicated in this Agreement. However, provided it has made such efforts, neither party will be liable to the other for any production reductions, interruptions or cost impacts due to failure, for any reason, to deliver or take delivery of the volume or quality of Studwood, Hogfuel or Chips, as the case may be, as indicated in this Agreement.

**J. Arbitration:**

4. For greater clarity, no award, either in damages or in the nature of specific performance, shall be made in the event and to the extent that a party is entitled to, and does in fact, rely on the Force Majeure Event provisions set out in Section H above.

**J. General Provisions:**

2. In addition to recovering damages and other remedies available at law or in equity, either party may suspend performance under this Agreement during any period in which the other party fails to comply with its obligations under this Agreement. No failure by either party to enforce a right or remedy on a particular occasion shall preclude that party from asserting the same right or remedy on a different occasion or from asserting any other right or remedy.

[22] The Fibre Agreement in many places acknowledges that Ligni and NPPH each understood that flexibility would be required in its administration. This was necessary because this industry is subject to many contingencies - the market, the weather, etc. They had to work together. Furthermore, the

Paragraphs quoted above show that the parties were mindful that the industry is vulnerable to failures, closures, etc. The Force Majeure and the Limitation of Liability Clauses address these issues. Where one or both face failure or closure, the liability into the future is strictly limited.

[23] The essence of Ligni's claim is that it has suffered damages as a result of the failure of NPPH to deliver studwood and to take delivery of chips and hogfuel in accordance with the terms of the Fibre Agreement. The response of the Monitor is that, for any failure on NPPH's part, it has an answer or defense based on the terms of the agreement interpreted in light of the events during the relevant times.

[24] Specifically, NPPH says that Ligni, by its management practices brought on by financial difficulties, created studwood shortages. These shortages as well were exacerbated by the sub-par harvesting conditions which affected the studwood harvesting from the Managed Lands. NPPH on the other hand, as stated in the email quoted above and statements made in Mr. Stewart's affidavit, acted reasonably and responsibly in addressing Ligni's needs.

[25] Let me comment on the clauses quoted in Paragraph [21].

### **FORCE MAJEURE**

[26] Clause H. 1. and H.2. make it clear that the parties understood that accommodations and adjustments would from time to time be needed.

There would be times when there would be temporary Force Majeure Events. The parties agreed to consult and help each other and “take all reasonable steps to restore the balances of their commitment as soon as possible”. The picture given by Mr. Stewart and the content of the emails attached to his affidavit strongly indicate that NPPH was in compliance with this clause.

- [27] Key to this claim is the Force Majeure Clause H. 3.. It includes several specific things, e.g., war, mechanical breakdown, all of which are “beyond the reasonable control of the affected party”, and also includes “a temporary or permanent closure or reduced operation of all or a portion of the Sawmill or the Paper Mill for operational, economic or other reasons whether or not within the control of the party affected”.
- [28] The quoted words describe exactly what has happened. With the initial application in these proceedings NPPH was out of the business covered by the Fibre Agreement. This event has prevented NPPH from performing under the agreement. The obligation of NPPH under the agreement is reduced proportionally . Here “proportionally” means “totally”. There are no steps it could have reasonably taken to restore the balance. This was the end of the agreement.
- [29] Ligni submits that the basis for a Force Majeure Event have not been proven. A careful look at the case law and the facts is needed.

[30] Ligni submits that the ruling in *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Co.*, [1976] 1 S.C.R. 580 is relevant. The general principle is well stated by Dickson J. as follows:

4 An act of God clause or *force majeure* clause, and it is within such a clause that the words “non-availability of markets” are found, generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.

[31] In this case the Defendant was asserting that the unavailability of markets was the Force Majeure Event whereby it could escape liability. However, the court examined what had happened and concluded that the Defendant had “priced itself out” of the market. This was something within its control. One cannot rely on Force Majeure where one has discretion and creates the event. It must be unexpected.

[32] It is also well stated in paragraph 15 of *Wal-Mart Canada Corp. v Gerard Developments Ltd.*, 2010 ABCA 149 which I quote:

With respect to *force majeure*, the *force majeure* clause applies where circumstances occur which were unforeseen or beyond a party’s control and does not apply to normal business risks or to reallocate bargained for contractual risks.

[33] There is nothing to suggest that NPPH created the situation it found itself in on August 29, 2011 for the purpose of avoiding responsibility to Ligni or any of its many other creditors. The evidence and the general knowledge in the community has been that NPPH was caught up in a financial crisis

which was beyond the control of its officers. It was not dealing with normal business risks. It had little choice but to submit to protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C-36 (CCAA).

[34] One need only read the following paragraphs in the affidavit, dated September 5, 2011, of NPPH's Mill Manager, Tor E. Suther, filed in the application for relief under the CCAA:

6. NPPH is in dire financial straits, NPPH has been suffering significant operating losses, which currently approximate \$4,000,000 per month on average. NPPH's operating losses have, to date, been funded by its US parent company, NewPage Corporation ("NPC"), and these totaled approximately US \$50,000,000 over the past twelve months alone. NPC is however currently experiencing its own financial difficulties and is unable to continue to fund the operating losses of NPPH.
7. Due the current market and economic conditions facing NPPH (discussed below), on August 22, 2011 NPC announced its intention to initiate downtime of the Port Hawkesbury Mill's operations commencing in mid September 2011.
8. NPPH seeks protection under the CCAA to stabilize its current situation in order to seek a "going concern" solution for the business of NPPH to attempt to preserve the greatest benefit and value for its creditors, employees and other stakeholders and for the local community as a whole.

[35] It is understandable that NPPH could not continue operations when the Force Majeure letter of August 29, 2011 was sent. It no longer had the financial resources to be an operating entity capable of performing the terms

of the Fibre Agreement. The Force Majeure clause accordingly relieved it of liability to supply further wood, etc. to Ligni, something it had become totally incapable of doing.

### **LIMITATION OF LIABILITY**

[36] Clause I. 1. “Limitation of Liability” imposes upon the parties the requirements “to use commercially reasonable efforts to supply and purchase the volume and quality of Studwood, Hogfuel and Chips as indicated in this Agreement”. So long as such efforts are made, neither party shall have a claim against the other for failure to deliver. Mr. Stewart’s evidence is that throughout 2011 NPPH was using “commercially reasonable efforts”. It was doing the best that, in the conditions of the time, could be expected and sometimes was going the extra mile.

### **RIGHT TO SUSPEND PERFORMANCE**

[37] Clause J. 2. allows one party to suspend performance under the Fibre Agreement when “the other party fails to comply with its obligations under this Agreement”. The evidence is that throughout the relevant period Ligni was behind in its payments to NPPH.

[38] The point of this clause is that one party is not required to continue deliveries when the other is behind in paying for past deliveries. If Ligni

wanted logs it had to pay for those which had already been delivered.

[39] It was submitted by Ligni's counsel that NPPH should have given notice that it intended to rely on Clause J. 2.. There is no evidence that NPPH ever specifically communicated to Ligni that, if it did not satisfactorily bring its account up to date, NPPH would cease deliveries. However, the parties were no doubt conscious of this provision. NPPH is entitled to rely on this provision.

### **GOOD FAITH**

[40] Ligni's counsel in his brief raised the issue of good faith. He notes that a duty of good faith is implied in certain contractual relations. He quotes Fridman: *The Law of Contract in Canada*, 6<sup>th</sup> edition (Toronto: Carswell, 2011 at p. 530 as follows:

Contracts that require a party to exercise discretion in performance or to expend their "best efforts" to achieve a stipulated conclusion, as previously noted, involve the obligation on such parties to act in good faith. Should they act in bad faith, they will be in breach of contract. It has also been accepted that parties to a contract are under an obligation to do all that is reasonably necessary to ensure its performance. This means they may not act in relation to the contract so as to nullify the bargain, objective or benefit owing to the other party. Each party has a duty to act towards the other in accordance with the reasonable expectations of each party under the contract.

He also quotes Justice Kelly from *Gateway Realty Ltd v. Arton Holding Ltd.* 106 N.S.R. (2d) 180, at paragraph 39, as follows:

The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This



standard is breached when a party acts in bad faith manner in the performance of its rights and obligations under the contract. “Good faith” conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in “bad faith” - a conduct that is contrary to community standards of honesty, reasonableness or fairness. The insistence on a good faith requirement in discretionary conduct in contractual formation, performance, and enforcement is only the fulfillment of the obligation of the courts to do justice in the resolution of disputes between contending parties.

And he quotes from *Nareerux Import Co. v. Canadian Imperial Bank of Commerce*, 2009 ONCA 764 at paragraph 69 as follows:

Although Canadian law has not yet recognized a stand-alone “duty of good faith” in the performance of a contract that is independent from the terms of the contract, as the United States has done, the jurisprudence establishes that there is an implied contractual duty of good faith not to act in a way that defeats or eviscerates the very purpose and objective of the agreement for an implied duty of good faith.

[41] Relevant to this discussion is the statement quoted by counsel for the Monitor from *Transamerican Inc. et al. v. ING Canada Inc.* (2003) 68 O.R.(3rd) 457 (C.A.), at para 53:

[53] I agree with Transamerica that Canadian courts have not recognized a stand-a-lone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained-for rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into...

In *Black's Law Dictionary* 6<sup>th</sup> edition “good faith” is defined as:

Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage...

- [42] I think that one can take these quotations as authority that one need not be concerned with a separate duty of good faith in contractual relations, but it is very clear that parties to a contract have a duty to act in a manner consistent with the “purpose and objective of the agreement”.
- [43] Elsewhere in this decision I have noted the efforts of NPPH in the evidence given in Mr. Stewart’s affidavit and the exhibits attached to it, that on the whole NPPH, through the difficult times of 2011, was doing what it could to support the objectives of the Fibre Agreement. This is consistent with the discussion of “good faith” noted above. No foundation is made by Ligni to contend that NPPH was not acting in good faith with respect to its obligations.
- [44] NPPH was acting as well as it could and thus in good faith in answering Ligni’s needs, but this all came to an end on September 9, 2011 when it received protection under the CCAA and sent the Force Majeure Letter to Ligni.

## DAMAGES

[45] The following quotations make it very clear that the onus to prove damages lies on the claimant:

From Cassels, Jamie; Adjin-Tettey, Elisabeth, *Remedies: The Law of Damages*, 2d ed.(Toronto: Irwin Law, 2008) at 33, I quote:

The onus of proof of damages in on the plaintiff. The plaintiff must show, on the balance of probabilities, that the defendant's wrong was the cause of the harm suffered, and must also prove, with a reasonable degree of certainty, the amount of the damages. **The court will not burden the defendant with uncertain claims or speculative amounts of damages.**

[Emphasis added]

In *Bonham-Carter v. Hyde Park Hotel* (1948), 64 T.L.R. 177, Lord Goddard is quoted as follows:

Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: "This is what I have lost, I ask you give me these damages." They have to prove it.

[46] What has been submitted to me by way of particulars of damages are:

- Proof of Claim which lists the seven specific components of loss,

- Notice of Revision of Disallowance, which indicates that each component is rejected either for failure to provide supporting documentation and explanation or because of the Force Majeure Event, and
- a few spread sheets for which little explanation is given, and are thus of little probative value to me.

[47] Prior to the hearing I understand there were discussions between Mr. Kinsman, a senior officer with the Monitor, and Ligni's representatives. Mr. Kinsman prepared questions for each component. Answers were given. I was presented toward the end of the hearing with a five page memorandum which gives a background statement, the Monitor's questions, and Ligni's response for six of the seven components, but no comprehensive commentary.

[48] All that is before me are simply pleadings asserting losses. More is needed. Large sums are being claimed. They must be proved with a proper accounting presentation, and appropriate supporting material and substantiated with evidence from competent and knowledgeable witnesses. Such has not been presented to me. Lord Goddard's comment completely describes the situation now before me.

[49] I invited from my first discussion with counsel and again until the end of the hearing suggestions as to how this problem might be addressed. Little response was forthcoming. Ultimately it was simply left in my hands.

[50] I do not accept that any damages have been properly proved before me. Each component in the claim can be dismissed on this ground, however, I shall now review each to show that, even if damages were proved, for legal reasons they cannot stand.

[51] **1. Log cost increase in 2010 and 2011** **\$790,469**

This component appears to be based on the increase in price paid for logs in 2011 until September 10, 2011 over that paid in 2010. Ligni's submission is that it had to pay \$790,469 more for the studwood logs than it would have had to pay had NPPH performed its obligations as Ligni interprets the Fibre Agreement.

[52] All that is before me are the statements which were provided to the Monitor. No one gave evidence, apart from brief reference in Mr. Lebel's affidavit, to competently prove the loss.

[53] Mr. Lebel says that this loss resulted from NPPH's decision to cease supplying from the Crown lands and simply supplying the logs from privately owned lands. This resulted in Ligni reducing its operations from two to one shift per day which made the operation unprofitable. Because of the several difficulties experienced, sufficient logs from the Managed Lands could not be harvested. They had to rely on logs from private lands and were thus at the mercy of the market. I would also note that the financial statements indicate that Ligni's operations had long been unprofitable. To this Mr. Stewart states that "Ligni's action and events out of control of both

NPPH and Ligni in late 2010 and 2011 account for any shortages complained of by Ligni”.

[54] I should also note that the anticipation expressed in Clause A. 4. of the Fibre Agreement was that only approximately 40% of Ligni’s requirement for studwood would come from the Managed Lands. The balance would come from the private wood market over which neither Ligni nor NPPH had any control.

[55] The Limitation of Liability Clause I. 1. addresses this. All that was required of NPPH was to take “commercially reasonable efforts”. I am satisfied that it did.

[56] This component is therefore dismissed.

[57] **2. Contribution lost from shift reductions from February 20, 2011 to November 5, 2011 caused by NPPH’s failure to supply sufficient wood. \$2,878,962**

[58] Ligni claims that NPPH purposely failed to meet Ligni’s requirement for studwood. Mr. Stewart’s response is that Ligni’s financial difficulties required it to manage its supply. This created mounting shortages. As well the sub-par harvesting conditions decreased the supply available from NPPH’s Managed Land.

[59] Particulars of Ligni's financial difficulties are stated in Mr. Stewart's affidavit. Briefly they are:

- By late 2010 Ligni was in breach of financial covenants with its lenders.
- By February 2011, Ligni owed NPPH approximately \$1.4 million in overdue accounts.
- In early January Mr. Lebel advised Mr. Stewart that Ligni was experiencing cash flow issues.

[60] Mr. Stewart also states that NPPH, being an investor and creditor of Ligni, took the initiative to prepare a plan to help with the cash flow problem. He also notes a telephone call with Mr. Lebel on February 23, 2011 in which Mr. Lebel asked for a temporary stop in supply so that Ligni could catch up in arrears and reduce its studwood inventory to more manageable levels. It asked for delivery to be managed so that the inventories would not exceed 1.5 days' needs.

[61] The harvesting conditions of the winter 2010 - 2011 were difficult. The weather was unusually mild and wet resulting in soft ground conditions. This affected not just NPPH, but the other major pulp and paper producers in Nova Scotia. Two of them ran out of inventory due to the weather.

[62] Mr. Stewart insists that NPPH did not use studwood for paper making. He says that studwood logs are not used because they jam the debarking equipment. Studwood is more expensive than pulpwood. Also, its use in

paper making would prejudice NPPH's Forest Stewardship Council certification.

[63] He also states that NPPH did a number of things to deliver studwood to Ligni including:

- directed harvesting contractors to increase studwood harvesting at the expense of pulpwood,
- instructed contractors to work overtime at NPPH's expense,
- instituted just in time delivery,
- made arrangements to minimize transportation costs,
- made use of its contacts elsewhere in Eastern Canada, and
- advised Ligni on optimal approaches to obtain logs from private owners.

[64] Again, until NPPH ceased operations it used commercially reasonable efforts to meet Ligni's needs as required by Clause I. 1., Limitation of Liability. This answers the claim until that time. The Force Majeure Clause H. 3. also applies after the letter was sent. This answers the balance of the claim. This component is accordingly dismissed.

[65] **3. Chip price differences from NPPH's failure to purchase sufficient chips from the end of August to November 2011 \$524,002**

[66] The obligation of NPPH to purchase chips is governed by Clause A. 7.:

Ligni Bel will supply to NPPH, and NPPH will purchase from Ligni Bel, the total wood chip volume produced by the Sawmill (Chips) so long as and to the extent that NPPH needs Chips in its Paper Mill operation.



[67] At the end of August NPPH was closing down, going into hot idle so that it had no need for chips. The Force Majeure letter was sent.

[68] However, Ligni would argue that there is an implied covenant that NPPH would continue in operation indefinitely, or at least during the term of the Fibre Agreement and that it was entitled to expect that NPPH would continue to be purchasing chips. NPPH had ceased operations. I see no basis for this argument.

[69] The Limitation of Liability Clause I. 1. also applies. The parties agreed “ to use commercially reasonable efforts to supply and purchase ... Chips ...”. The events make it clear that reason dictated that NPPH had ceased production. It submitted to the CCAA proceedings. This is another answer to any suggestion that NPPH had any obligation to continue purchasing chips after August 29, 2011.

[70] As well the Force Majeure provisions apply. Clause H. 3. defines Force Majeure events. The relevant portion is:

... and also includes a temporary or permanent closure or reduced operation of all or a portion of the Sawmill or the Paper Mill for operational, economic or other reason, whether or not within the control of the party affected.

Such quite well describes what happened.

[71] The component respecting failure to take delivery of chips accordingly is dismissed.

[72] **5. Purchase of Hogfuel for boiler** **\$36,652**

The submission regarding hogfuel is that, as NPPH had not been supplying enough studwood to maintain two shifts, one shift did not produce enough hogfuel to maintain operation of Ligni's two boilers, it had to buy hogfuel elsewhere at great expense to fuel its boilers.

[73] To the extent that the claim relates to hogfuel purchased after August 29, 2011, it is disallowed by the Force Majeure Clause. In any event it is also disallowed for lack of proper proof.

[74] It should be noted that the Fibre Agreement does not talk of Ligni's need for hogfuel and does not impose any responsibility on NPPH to assure any supply of hogfuel for Ligni. The only reference in the Fibre Agreement, except for some pricing and logistical arrangements is found in Clause A. 8. which says:

Ligni Bel will supply to NPPH, and NPPH will purchase from Ligni Bel, all bark, sawdust and shavings (biomass) (Hogfuel) not used internally for heat generation at the Sawmill, so long as and to the extent that NPPH needs Hogfuel in its Paper Mill operations. NPPH may also acquire Hogfuel from other sources.

[75] This reference only speaks of hogfuel being supplied to NPPH. This is not in issue. Nowhere in the agreement is there an express obligation on NPPH to assure that Ligni has sufficient hogfuel for its Saw Mill operations. I see no basis for implying such an obligation. This will answer the entire component whether it arises before or after August 29, 2011. Again also the accounting has not been competently put before me and thus quantum has not been adequately proved. As well, the Force Majeure clause would apply from August 29, 2011. Accordingly this component is dismissed.

[76]	<p><b>4. Contribution lost from mill shutdown from November 5, 2011 to March 24, 2012 due to NPPH's failure to provide adequate supplies of wood</b></p>	<b>\$4,100,947</b>
	<p><b>6. Contribution lost for NPPH's failure to supply wood in 2013-2013</b></p>	<b>\$12,605,343</b>
	<p><b>7. Contribution lost for NPPH's failure to supply wood in 2013 - 2014</b></p>	<b>\$12,352,336</b>

[77] These three components relate to the period from November 5, 2011 when Ligni ceased operation to the end of the current fiscal year March 24, 2012, and then through the following two fiscal years.

[78] I understand that contribution lost is an accounting concept that describes the benefit a business would receive from a given activity. It would be an identifiable amount that it did not receive because of the default of another which was a party to a contract. Essentially, in this situation it is an estimate

of what Ligni would have benefitted from the Fibre Agreement, if the NPPH and Ligni had continued to perform and the activity would have been at the original level before financial difficulties were experienced. It assumes that Ligni would have been a viable and profitable operation throughout this period. The operational and financial history reviewed above alone make it very clear that this assumption is poorly founded.

[79] Furthermore, these components relate to the period after NPPH delivered its Force Majeure letter. NPPH is entitled to rely on the Force Majeure Clause. Accordingly these three components are dismissed.

[80] The appeal accordingly is dismissed. If costs are sought, I ask for written submissions.

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Richard W. Cregan, Q.C.  
Claims Officer

Halifax, Nova Scotia  
April 19, 2013